## THE DIGEST

OF

# ENGLISH CASE LAW

CONTAINING THE

### REPORTED DECISIONS

OF THE

SUPERIOR COURTS,

AND

A SELECTION FROM THOSE OF THE IRISH COURTS,

TO THE END OF

1897.

UNDER THE GENERAL EDITORSHIP OF

JOHN MEWS,

BARRISTER-AT-LAW.

VOL. V.

CROWN-ELECTION.

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### TABLE OF ABBREVIATIONS

OF THE NAMES OF THE

### PRINCIPAL REPORTS CITED.

[1891] A. C.         Law Reports, Appeal Cases (1891 onwards).           A. & E.         Adolphus and Ellis. Q. B.           Addams Ecc.         Aldams. Ecclosiastical.           Aleyn.         Aleyn. K. B.           Amb.         Ambler. Oh.           Anderson.         C. P.           Anderson.         Anderson.           Anst.         Austruther. Ex.           App. Cas.         Law Reports, Appeal Cases (1876—1890).           Arn.         Arnold. C. P.           Arn. & H.         Arnold and Hodges.           Asp. M. C.         Aspinall.           Maritime Cases.           Atk.         Atkyns. Ch.
B. & Ad. Barnewall and Adolphus. K. B. B. & Ald. Barnewall and Alderson. K. B. B. & C. Barnewall and Crosswell. K. B. B. & S. Best and Smith. Q. B. B. O. C. Lowndes and Maxwell. Bail Court. B. C. Rep. Saunders and Cole. Bail Court. Ball & B. Ball and Beatty. Ch. (Ireland). Bar. & Ara. Barron and Arnold. Election. Bar. & Aru. Barron and Austin. Election Barnard Ch. Barnardiston. K. B. Batty Batty. K. B. (Ireland). Beat. Beatty. Batty. K. B. (Ireland). Beat. Beatty. Batty. K. B. (Ireland). Beat. Beatty. Batty. Ch. (Ireland). Beav. Beaty. Ch. (Ireland). Beav. Beavan. Rolls Court. Bell, C. O. Bell. Crown Cases. Bing. Bingham. C. P.
Bing (N.c.) Bingham New Cases. C. P. Bligh Bligh H. I. Bos. & P. Bosanquet and Puller. O. P.
Bos. & P. (N.R.) Bosanquot and Puller. New Reports. C. P. Bott P. Lo. Bott P. Lo. Laws. Br. & B. Broderip and Bingham. C. P. Br. & Lush. Browning and Lushington. Adm. Bro. C. C. Brown. Ch. Brown. Cases in Parliament. Buck. Buck. Buck. Buck. Buck. Buck. Bull. N. P. Buller's Law of Nisi Prius. Bulst. Bulst. Bulst. Bulstode. K. B.
Bunb. Bunbury. Ex. Burr. Burrows. K. B. Burr S. C. Burrows. Settlement Cases.

[1891] Ch Law Reports, Chancery (1891 onwards).
C. B Common Bench Reports.
C. L. R
(1891) Ch. Law Reports, Chancery (1891 of waters); C. B. Common Bench Reports, C. L. R. Common Law Reports (1853—1855). C. P. D. Law Reports, Common Pleas Division (1875—1860).
Cab. & E. Cababé and Ellis. Nisi Prius. Cald. S. C. Caldecott. Settlement Cases.
Canal Comphell Nici Prins
Camp Campoett. Ivisi I itus.
Camp. Campbell. Nisi Prius. Car. & K. Carrington and Kirwan. Nisi Prius. Car. & M. Carrington and Marshman. Nisi Prius. Car. & M. Carrington and Marshman. Nisi Prius.
Cor & P Corrington and Payne. Nisi Prius.
Car. & P. Carrington and Payne. Nisi Prius. Carter. C. P.
Carth Carthew, K. B.
Cary Cary Ch. Cas. t, Hardwicke Cases temp. Hardwicke. K. B. Cas. t, Talbot Cases temp. Talbot. Ch.
Cas. t. Hardwicke Cases temp. Hardwicke. K. B.
Cas. t. Talbot Cases temp. Talbot. Ch.
Ch. Cas Cases in Chancery.
Ch. Cas. Ch Choice Cases in Chancery. Ch. D Law Reports, Chancery (1876—1890).
Ch. D Law Reports, Chancery (1876—1890).
Ch. Pre. Precedents in Chancery. Ch. Rep. Reports in Chancery.
Ch. Rep Reports in Chancery.
Chit. Chitty. Bail Court. Cl. & F. Clark and Finnelly. H. L.
Cl. & F
Co. Rep Coke. K. B.
Coll. C. C
Colles Colles' Cases in Parliament.
Comb Combathach V P
Company Company K B
Colt. Coltman. Registration. Comb. Comberbach. K. B. Comyns. Comyns. K. B. Coop. t. Brough. Cooper. Cases temp. Brougham, Coop. t. Cott Cooper. Cases in Chancery temp. Cottenham.
Coop. t. Cott. Cooper. Cases in Chancery temp. Cottenhum
G. CooperCh.
C. P. Cooper C. P. Cooper. Ch.
C. & J Crompton and Jervis. Ex.
C. & M Crompton and Meeson. Ex.
C. & J
Con, & L
Cooper
Ut. of Sess. Cas Court of Session Cases (Scotland).
CowpCowper. K. B.
Cox
On & Db Conin and Db Ullian Cl
Crowford and Dir (Turland)
Curt Curteis. Eccl.
ours, oursels, most
D. P. C Dowling. Practice Cases.
D. (N.S.) Dowling, Practice Cases, New Series,
D. & L Dowling and Lowndes. Practice Cases.
D. & R Dowling and Ryland. K. B.
Daniell Daniell. Ex. Eq.
Dans. & Ll Danson and Lloyd. Mercantile.
Day, & M Davison and Merryale. Q. B.
Deacon, Bky.
Deac. & U Deacon and Chitty. Bky.
Dears, & D Dearsley and Bell. Crown Cases,
De G De Com Dearsley, Crown Cases,
De G. F. & J. De Gov. Fisher and Toron C.
De G. & I. De Gov and Janes, Ch. App.
De G. J. & S. De Gey Jones and Smith C.
De G. M. & G. De Gex Macrachton and Gowles
D. P. C. Dowling. Practice Cases. D. (x.s.) Dowling. Practice Cases, New Series. D. & L. Dowling and Lowndes. Practice Cases. D. & R. Dowling and Ryland. K. B. Daniell Daniell Ex. Eq. Dans. & Ll. Danison and Lloyd. Mercantile, Dav. & M. Davison and Menvale. Q. B. Deac. Deacon. Bky. Deac. C. Deacon and Chitty. Bky. Dears. & B. Dearsley and Bell. Crown Cases. Deacon. Deacon. Bky. Dears. & B. Dearsley and Bell. Crown Cases. Deacon. Deacon. Dearsley. Crown Cases. De G. Dearsley. Crown Cases. De G. De Gex. Bky. De G. F. & J. De Gex. Fisher, and Jones. Ch. App. De G. J. & S. De Gex and Smith. Ch. App. De G. J. & S. De Gex, Jones, and Smith. Ch. App. De G. & Sm. De Gex and Smale. Ch.
OIL,

Den. C. C.         Denison. Crown Cases.           Dick.         Dickens. Ch.           Dod.         Dodson. Adm.           Dougl.         Douglas. K. B.           Dow         Dow. H. L.           Dow & Cl.         Dow and Clark. H. L.           Dr. & Sm.         Drewny and Smale. Ch.           Drew.         Drewry. Ch.           Dr.         Drury. Ch. (Ireland).           Dr. & Wal.         Drury and Walsh. Ch. (Ireland).           Dr. & War.         Drury and Warren. Ch. (Ireland).           Drink.         Drinkwater. C. P.           Dyer         Dyer. K. B.	
East.         East. K. B.           Easts. P. C.         East's Pleas of the Crown.           Eden         B. Eden. Ch.           Edwards         Edwards.         Adm.           El. B. B.         Ellis and Blackburn. Q. B.           El. Bl. & El.         Ellis, Blackburn and Ellis. Q. B.           El. El. & Ellis and Ellis. Q. B.         E. G. Ca. Abr.           Equity Cases Abridged.         Eq. Ca. Abr.         Equity Reports (1833—1855).           Esp.         Espinasse. Nisi Prius.           Ex.         Exchequer Reports (1848—1856).           Ex.         Exchequer Reports (1848—1856).           Ex. D.         Law Reports, Exchequer Division (1875)	—1880).
F. & F. Foster and Finlason. N. P. 11. & K. Flanagan and Kelly. Rolls (Ireland). Falo. & F. Falconer and Fitzherbet. Election. Fitzg. Fitzgiblon. K. B. Fonb. (N.R.) Fonblanque. Bankruptcy. Forrest Forrest. Ex. Fort. Fortescue. K. B. Foster Foster. Crown Cases, Fox. Fox. Registration. Free. C. Freeman. Ch. Free. K. B. Freeman. K. B.	
G. & D.         Gale and Davison.         Q. B.           Gale.         Gale.         Ex.           G. Cooper.         Ch.         Giffard.           Giff.         Giffard.         Ch.           Gib.         Eq.         Gilbert.         Ch.           Glyn & J.         Glyn and Jameson.         Bky.           Godb.         Godbolt.         K. B.           Gow.         Gow.         Nisi Prius.	
H. Bl. H. Blackstone. C. P. H. L. Cas. House of Lords Cases. H. & C. Hurlstone and Coltman. Ex. H. & H. Hurlstone and Coltman. Ex. H. & M. Henming and Miller. Ch. H. & N. Hurlstone and Norman. Ex. H. & R. Harrison and Ratherford. C. P. H. & W. Hurrison and Wollaston. Ball Court. Hag. Adm. Haggard. Adm. Hag. Consistory. Hag. Ecc. Haggard. Eccl. Hall & T. Hall and Twells. Ch. Hardr. Hall and Twells.	

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[1891] Ch. . . . . . Law Reports, Chancery (1891 onwards).
             C. L. R. Common Bench Reports.
C. L. R. Common Law Reports (1853—1855).
            C. P. D. .... Law Reports, Common Pleas Division (1875—
          1880).

        Carth
        Carthew
        K. B.

        Cary
        Cary
        Ch.

        Cas. t. Hardwicke
        Cases temp. Hardwicke.
        K. B.

        Cas. t. Tablo
        Cases temp. Talbot.
        Ch.

        Ch. Cas.
        Cases in Chancery.
        Ch.

        Ch. Cas.
        Choice Cases in Chancery.
        Ch.

        Ch. Pre.
        Precedents in Chancery.
        Chancery.

        Ch. Pre.
        Precedents in Chancery.

          Ch. Rep. . . . . Reports in Chancery.
       Ch. Rep. Reports in Chancory.
Chit. Chity. Bail Court.
Cl. & F. Clark and Finnelly. H. L.
Co. Rep. Coke. K. B.
Coll. C. Collyer. Ch.
Colles Colles Cases in Parliament.
Cott. Coltman. Registration.
Comb. Comberbach. K. B.
Comyns Comprise K. B.
Coop. t. Brough. Cooper. Cases temp. Brougham.
Coop. t. Cott. Cooper. Cases in Chancery temp.
      Cop. t. Drougn. Coper. Cases temp. Brougham.
Cop. t. Cotts. Coper. Cases in Chancery temp. Cottenham.
G. Coper. Ch.
C. P. Coper. Ch.
C. & J. Crompton and Jervis. Ex.
C. & M. Crompton and Meeson. Ex.
C. M. & R. Crompton, Meeson and Roscoe. Ex.
Cop. & J. Copper and Lawson. Ch. (Livibuid)
      Course Coper Ch. Course of Session Cases (Scotland).

Cowp. Cowp. K. B.
     Cox. Cox. Ch. Cox. Crown Cases.
     Cox. & Ph. Craig and Phillips. Ch.
Craw & D. Crawford and Dix (Ireland).
Curt. Ourteis. Eccl.
D. P. C.
Dowling. Practice Cases.
D. (N.S.)
Dowling. Practice Cases, New Series.
D. & L.
Dowling and Lowndes. Practice Cases,
D. & R.
Dowling and Ryland. K. B.
Daniell. Daniell. Exp.
Daniell. Daniell. Exp.
Dans. & Ll.
Danson and Lloyd. Mercantile,
Dav. & M.
Davison and Merivale. C. B.
Deac.
Deac.
Deacon. Bky.
Deac. & C.
Deacon and Chitty. Bky.
Dears. & B.
Dearsley and Bell. Crown Cases.
Dears. C. C.
Dearsley and Bell. Crown Cases.
De G.
De G.
De Gex. Bky.
De G. F. & J.
De Gex. Fisher, and Jones. Ch. App.
De G. J.
De Gex and Jones. Ch. App.
  De G. & J. . . . . De Gex and Jones. Ch. App.
 De G. J. & S. De Gex, Jones, and Smith. Ch. App.
De G. M. & G. De Gex, Macnaghten and Gordon. Ch. App.
 De G. & Sm...... De Gex and Smale. Ch.
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Den. C. C. Denison, Crown Cases. Dick. Dickens. Ch.
Dod. Dodson. Adm. Dougl. Donglas. K. B. Dow Dow. H. L. Dow & Cl. Dow and Clark. H. L.
Dow & Cl. Dow and Clark. H. L. Dr. & Sm. Drewry and Smale. Ch.
Dr Drury. Ch. (Ireland). Dr. & Wal. Drury and Walsh. Ch. (Ireland)
Dr. & Sm. Drewry and Smale. Ch. Drew. Drewry. Ch. Dr. Drury. Ch. (Ireland). Dr. & Wal. Drury and Walsh. Ch. (Ireland). Dr. & War. Drury and Warren. Ch. (Ireland). Drink. Drinkwater. C. P.
Dyer Dyer. R. B.
East
Edwards Edwards Adm
El. Bl. & El Ellis, Blackburn and Ellis, Q. B. El. & El
Eq. Ca. Abr Equity Cases Abridged. Eq. R
El. & Bl.   Ellis and Blackburn. Q. B.
F. & F Foster and Finlason. N. P. +1. & K
Falc. & F. Falconer and Fitzherbert. Election. Fitzg: Pitzgibbon. K. B. Fonb. (N.R.) Fonblanque. Bankruptcy. Forrest Forrest. Ex.
Fort Fortescue. K. B.
Foster Foster Crown Cases. Fox Fox Registration. Free C. Freeman Ch.
Free. K. B Freeman. K. B.
G. & D
G. Cooper. Ch. Giff. Giffard. Ch. Gilb. Eq. Gilbert. Ch.
Glyn & J Glyn and Jameson. Bky. Godb Godbolt. K. B.
GowGow. Nisi Prius.
H. Bl H. Blackstone, C. P. H. L. Cas
II. & C Hurlstone and Coltman. Ex.
H. & H. Horn and Hurlstone. Ex. H. & M. Henning and Miller. Ch. H. & N. Hurlstone and Norman. Ex. H. & R. Harrson and Rutherford. C. P.
II & W Humison and Wollaston Rail Count
Hag. Adm. Haggard. Adm. Hag. Cons. Haggard. Consistory. Hag. Ecc. Haggard. Eccl. Hall & Tw. Hall and Twells. Ch.
Hall & Tw. Hall and Twells. Ch. Hardr. Hardres. Ex.

Hare Hawk. P. C. Hawkins's Pleas of the Crown. Hayk. P. C. Hawkins's Pleas of the Crown. Hayes Ex. (Ireland). Hayes Ex. (Ireland). Hobart. K. B. Hodges Hodges. C. P. Hog. Hogan. Rolls (Ireland). Holt. Holt. K. B. Holt. B. Holt. N. P. Holt. Nisi Prius. Hopw. & C. Hopw. & C. Hopwood and Coltman. Registration. Hopw. & P. Hopwood and Philbrick. Registration. Hurl. & W. Hurlstone and Walmsley. Ex.
Hopw. & P. Hopwood and Coltman. Registration.  Hopw. & P. Hopwood and Philbrick. Registration.  Hurl. & W. Hurlstone and Walmsley. Ex.
Ir. C. L. R.       Irish Com. Law (1850—1866).         Ir. Ch. R.       Ixish Chancery (1850—1866).         Ir. Eq. R.       Irish Equity Reports.         [1894] Ir. R.       Irish Equity Reports (1894 onwards).         Ir. R. C. L.       Irish Com. Law (1866—1878).         Ir. R. Eq.       Irish Equity (1866—1878).
J. & H. Johnson and Hemming. Ch. J. & W. Jacob and Walker. Ch. J. Kelyng Sir J. Kelyng. Crown Cases. J. P. The Justice of the Peace. Jacob Jacob. Ch. Jenkins. Ex. Jo. & Lat. Johns. Johnson. Ch. Jones & Johnson. Ch. Jones & Jones Rx. (Ireland). Jones & Jones and Carey. Ex. (Ireland). Jr. Jones and Carey. Ex. (Ireland).  K & C.
K. & J. Keane and Grant. Registration.  Kay Kay and Johnson. Ch.  Kay Kay. Ch.  Keble. K. B.  Keen. Keelle. K. B.  Keilway. K. B.  Kell. Keilway. K. B.  Kell. Kelyng, Sir John. K. B.  Ken. Kenyon. K. B.  Kenapp. Kenapp. P. C.  Knapp & O.  Knapp and Ombler. Election
L. & C. Leigh and Cave. Crown Cases. L. & M. Lowndes and Maxwell. Bail Court. L. T. Lowndes, Maxwell, and Pollock. Bail Court. L. J. (0.8.) Ch. K. P. Law Times, New Serios.
etc

L. R. H. L. L. R. P. C. L. R. Ch. L. R. Eq. L. R. Q. B. L. R. C. P. L. R. E. S. L. R. P. & M. L. R. A. & E. L. R. C. C. L. R. S. C. L. Crown Cases. L. Leach, C. C. Lewin, Crown Cases. Lit. Rep. Lit. & G. Lioyd and Goold. Ch. (Ireland). Lofft Lofft Lofft Lofft Lofft Lush. Lushington. Adm. Lutw. Lutwyche. Registration.  M. C. C. Moody. Crown Cases. M. & H. Murphy and Hurlstone. M. C. C. Moody and Robinson. Nisi Prius. M. & P. Moore and Payne. C. P. M. & Rob. Moody and Robinson. Nisi Prius. M. & P. M. & Rob. Moody and Robinson. Nisi Prius. M. & S. Maule and Selwyn. K. B. M. & S. Maule and Selwyn. K. B. M. & S. Maule and Robinson. Scotch Appeals. Macl. & R. Maclean and Robinson. Scotch Appeals. Mac. & G. Macnaghten and Gordon. Ch. M'Cle. M'Cle. M'Cle. M'Cleland. M'Cleland. M'Cle. M'Cleland. M'Cleland. M'Cleland. M'Cle. M'Cleland. M'	L. R. H. L. L. R. P. C. L. R. Ch. L. R. Eq. L. R. Q. B. L. R. C. P. L. R. Ex. L. R. P. & M. L. R. A. E. L. R. C. C. L. R. B. C. C. L. R. A. E. L. R. C. C. L. R. D. C. L. R. H. L. Sc.	
L. R. P. C. L. R. Ch. L. R. Eq. L. R. Q. B. L. R. C. P. L. R. Ex. L. R. P. & M. L. R. A. & E. L. R. C. C. L. R. H. L. Sc. L. Letch. K. B. Leach, C. C. Leach. Crown Cases. Ld. Raym. Lord Raymond. K. B. Levin, C. C. Lewin. Crown Cases. Lit. Rep. Lit. & G. Lioyd and Goold. Ch. (Ireland). Lofft. Lofft. K. B. Longf. & T. Longfeld and Townsend. Ex. (Ireland). Lush. Lush. Lushington. Adm. Lutw. Lutwyche. C. P. Lutwyche. Registration.  M. C. C. Moody. Crown Cases. M. & H. Moody and Malkin. Nisi Prius. M. & M. Moody and Malkin. Nisi Prius. M. & P. Moore and Payne. C. P. M. & Rob. Moody and Robinson. Nisi Prius. M. & Sc. Moore and Selwyn. K. B. M. & Sc. Moore and Selwyn. K. B. M. & Sc. Moore and Selwyn. K. B. M. & Sc. Moore and Welsby. Ex. Macl. & R. Malean and Robinson. Scotch Appeals. Mac. & G. Macnaghten and Gordon. Ch. M'Cle. M. Cleland. Ex. M'Cle. M. M'Cleland. Ex. M'Cle. M. M'Cleland. Ex. Macq. H. L. Madd. Maddock. Ch. Mann. & G. Manning and Granger. C. P. Man. & G. Manning and Gyland. K. B. Masson. Masson. Bky. and Winding-up. Marshall. Marshall. C. P. Meg. Megone. Company Cases. Mer. Merivale. Ch. Moot. & D. Montagu. Bky. Mont. & D. Montagu and Ayrton. Bky. Mont. & D. Montagu and Ayrton. Bky. Mont. & D. Montagu and Marshun. Msy. Mont. & D. Moore. D. Moo	L. R. P. C. L. R. Ch. L. R. Eq. L. R. Q. B. L. B. C. P. L. B. Ex. L. R. P. & M. L. R. A. & E. L. R. C. C. L. R. R. U. So	
L. R. Ch. L. R. Eq. L. R. Q. B. L. R. C. P. L. R. Ex. L. R. P. & M. L. R. A. & E. L. R. O. C. L. R. H. L. Sc. L. R. H. L. Sc. L. R. H. L. Sc. L. Leach, C. Crown Cases. Ld. Raym. Lord Raymond. K. B. Lewn, C. C. Liewn, C. C. Lewn, C. C.	L. R. Ch	
L. R. Eq. L. R. Q. B. L. R. C. P. L. R. Ex. L. R. C. P. L. R. Ex. L. R. C. C. L. R. S. M. L. R. A. & E. L. R. C. C. L. R. H. L. Sc. L. Leach, C. C. Leach, C. C	L. R. Eq	
L. R. O. C.  L. R. H. L. Se. L. R. Ir. Latch K. B. Leach, C. C. Leach. Crown Cases. Ld. Raym. Lord Raymond. K. B. Levin, C. C. Lewin, C. C. Lewin. Crown Cases. Lit. Rep. Liteton. C. P. Lit. & G. Littleton. C. P. Lit. & G. Lloyd and Goold. Ch. (Ireland). Lofft Lofft K. B. Longf. & T. Longfeld and Townsend. Ex. (Ireland). Lush. Lush. Lushington. Adm. Lutw. Lutwyche. C. P. Lutw. Reg. Cas. M. & H. Mordy and Malkin. Nisi Prius. M. & M. Mody and Malkin. Nisi Prius. M. & P. Moore and Payne. C. P. M. & Rob. Moody and Robinson. Nisi Prius. M. & S. Maule and Selwyn. K. B. M. & S. Maule and Selwyn. K. B. M. & S. Macl. & R. Maclean and Robinson. Scotch Appeals. Mac. & G. Maccaphen. Micle. Miclen. Micren. Micre	L. R. C. C	
L. R. O. C.  L. R. H. L. Se. L. R. Ir. Latch K. B. Leach, C. C. Leach. Crown Cases. Ld. Raym. Lord Raymond. K. B. Levin, C. C. Lewin, C. C. Lewin. Crown Cases. Lit. Rep. Liteton. C. P. Lit. & G. Littleton. C. P. Lit. & G. Lloyd and Goold. Ch. (Ireland). Lofft Lofft K. B. Longf. & T. Longfeld and Townsend. Ex. (Ireland). Lush. Lush. Lushington. Adm. Lutw. Lutwyche. C. P. Lutw. Reg. Cas. M. & H. Mordy and Malkin. Nisi Prius. M. & M. Mody and Malkin. Nisi Prius. M. & P. Moore and Payne. C. P. M. & Rob. Moody and Robinson. Nisi Prius. M. & S. Maule and Selwyn. K. B. M. & S. Maule and Selwyn. K. B. M. & S. Macl. & R. Maclean and Robinson. Scotch Appeals. Mac. & G. Maccaphen. Micle. Miclen. Micren. Micre	L. R. C. C	
L. R. O. C.  L. R. H. L. Se. L. R. Ir. Latch K. B. Leach, C. C. Leach. Crown Cases. Ld. Raym. Lord Raymond. K. B. Levin, C. C. Lewin, C. C. Lewin. Crown Cases. Lit. Rep. Liteton. C. P. Lit. & G. Littleton. C. P. Lit. & G. Lloyd and Goold. Ch. (Ireland). Lofft Lofft K. B. Longf. & T. Longfeld and Townsend. Ex. (Ireland). Lush. Lush. Lushington. Adm. Lutw. Lutwyche. C. P. Lutw. Reg. Cas. M. & H. Mordy and Malkin. Nisi Prius. M. & M. Mody and Malkin. Nisi Prius. M. & P. Moore and Payne. C. P. M. & Rob. Moody and Robinson. Nisi Prius. M. & S. Maule and Selwyn. K. B. M. & S. Maule and Selwyn. K. B. M. & S. Macl. & R. Maclean and Robinson. Scotch Appeals. Mac. & G. Maccaphen. Micle. Miclen. Micren. Micre	L. R. C. C	
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N. R. New Reports (1862-1865). Nelson Nelson Ch.
New Sess. Cas. New Sessions Cases. O'M. & H. ....O'Malley and Hardcastle. Election. [1891] P. Law Reports, Probate (1891 onwards),
P. D. Law Reports, Probate Division (1876—1890),
P. & D. Perry and Davison K. B.
P. & K. Perry and Knapp. Election. Peake, Add. C. Peake Additional Cases, Nisi Prius.
Peake, N. P. Peake. Nisi Prius.
P. Wms. Peere Williams. Ch. 
 P. Wms.
 Peere Williams.

 Phillimore.
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 Ph.
 Phillips.

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 Popham.

 Price.
 Ex.
 1890). [1891] Q. B. . . . . . Law Réports, Queen's Bench (1891 onwards). Roll ADr. Rolle X Abridgment.
Rolle Rolle K. B.
Rose Rose Bky.
Russ. Russell. Ch.
Russ. &M. Russell and Mylne. Ch.
Ry. & Can. Traff. Cas. Rly. and Canal Cases (1874 onwards). Ry. & M. ...... Ryan and Moody. Nisi Prius. Salk. ...... Salkeld. K. B. Sau. & Sc. ..... Sausse and Scully. Rolls Ct. (Ireland). Scott Scott C. P.
Scott (N.B.) Scott New Reports, C. P.
Scott (N.B.) Select Cases in Chancery.
Selw. N. P. Selwyn. Law of Nisi Prius, Shower Shower K. B.
Shower P. C. Shower Parliamentary.
Sid Siderfin K. B.

Sim. Simons Ch.
Sim. & S. Simons and Stuart. Ch.
Sim. & G. Smale and Giffard. Ch.
Smith Smith K. B.
Smith Registration.

Spinks: Adm. St. Tri. State Trials. Stark. Starkie. Nisi Prius. Str. Strange. K. B. Styles Styles K. B. Swabey Swabey. Adm. Sw. & Tr. Swabey and Tristram. Probate. Swanst. Swanston. Ch.
T. Jones         Sir T. Jones         K. B.           T. & M.         Temple and Mew. Crown Cases.           T. Raym.         Sur T. Raymond.         K. B.           Tam.         Tamlyn.         Rolls Court.           Taunt.         Taunton.         C. P.           Term Rep.         Durnford and East.         K. B.           Tothill.         Tothill.         Ch.           Turn.         & R.         Turner and Russell.         Ch.           Tyrw.         Tyrwhitt.         Ex.           Tyrw. & G.         Tyrwhitt and Granger.         Ex.
Vent.         Ventris. K. B.           Vern.         Vernon. Ch.           Vorn. &S.         Vernon and Scriven. K. B.           Ves. sen.         Vesey, sen. Ch.           Ves.         Vesey, jun. Ch.           V. & B.         Vesey and Beames. Ch.
W. Bl. Sir Wm. Blackstone, K. B. W. Jones Sir W. Jones, K. B. W. Kolynge Sir W. Kelynge, Ch. W. R. Weokly Reporter, W. W. & D. Wilmore, Wollaston and Davison, K. B. West West, H. L. Wighttw, Wightwick, Ex. Willos Willos, C. P. Wilmot Wilmot, Notes, K. B. Wils, Ch. Wilson, Ch. Wils, Ex. Wilson, Ex. Wilson, Wilson, Ex. Wilson, Ch. Wils, Ex. Wilson, Ex. Wilson, K. B.
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# Digest

OF

#### ENGLISH CASE LAW

### CROWN.

[BY J. M. LELY.]

- A. Prerogatives Generally, 2.
- B. WHEN BOUND BY STATUTE, 7.
- C. CROWN PROPERTY.
  - 1. Generally, 10.
  - 2. Royal Forests, 14.
  - 3. Intrusion, 16.
  - 4. Foreshore-See SEA.
- D. CROWN GRANT, 17.
- E. CROWN DEBT.
  - 1. What is, and what not, 28,
  - 2. Priorities of, 30,
- F. EXTENT, EXECUTION BY.
  - 1. Generally, 31.
  - 2. Extent in Chief.
    - a. What may be Taken, 32. b. Priority of, 35.

    - c. Proceedings in, 38.
  - 3. Extent in Aid.
    - a. Who Entitled to, 42.
    - b. What may be Taken Under, 44. Priority of, 45.
    - d. Proceedings in, 46.

  - 4. Amoveas Manus, 48. 5. Diem Clausit Extremum, 48.
- G. ESCHEAT.

#### H. PETITION OF RIGHT.

- 1. Generally, 60.
- 2. Procedure.
  - a. At Common Law, 64.
    b. Under Petition of Right Act, 65.
- 3. Refusal to Present, 66.

#### I. LAW OFFICERS.

- 1. Generally, 67.
- 2. When Attorney-General to be Party, 71.
- 3. Relators, 74.
- 4. Procedure Practice and Pleading, 75.

#### J. Costs.

- 1. Generally, 77,
- 2. Of and against Relators, 80.
- K. CROWN SERVANTS-See Public Officer.
- L. CROWN OFFICE-See CROWN OFFICE.
- M. MINES-See MINES.
- N. PENALTIES-See PENALTY.
- O. TAXES AND DUTIES-See REVENUE.

#### A. PREROGATIVES GENERALLY.

Parting with Prerogatives, ]-Although the Crown may not of its own authority part with ESCHEAT.

1. Inquisition, 49.
2. Truverse of Inquisition, 50.
3. Failure of Hoirs, 50.
4. Mortgages, 50.
5. Other Property, 51.
6. Other Property, 51.
7. Regrant by Grown, 68.
8. Other Matters, 53.
4. Failure of Personal Representatives, 55.
6. Grant of Grown and Representatives, 55.
6. Grant Representatives, 55.
6. Grant Regresentatives, 55.
6. Grant Regresentati

By a local act a corporation was enabled to levy tolls and duties, in respect of specified goods, upon ships entering a harbour, and out of the funds arising from such tolls and duties to repay moneys borrowed for the improvement of the harbour, and to keep it in repair. The act cuntained exemptions in favour of the Crowu. but there was no express cauctment that the Crown should be liable to toll in other respects. Goods not included within the exemption having been imported into the harbour for government purposes:—Held, that the Crown was not liable for duties in respect of them. Ib.

Limitation of Dignities.]—Semble, that the Crown has not an unlimited power of limiting dignities in any way that it pleases, and that it cannot create a mode of succession to a title totally unknown to the law. Cope v. Delaware (Eurl), 42 L. J., Ch. 870; L. R. 8 Ch. 982; 23 L. 7. 555; 22 W. R. 3.

The Crown cannot give to the grant of a dignity or honour a quality of descent unknown to the law. Wiltes' Peerage, L. R. 4 H. L. 126.

Creation of Courts.]—Although the Crown may by its prenegative establish courts to proceed according to common law, it cannot create any new court to administer any other law. Naturi (Bishapp), Le re, 3 Moore, P. C. (N.S.) 115, 11 Jun. (N.S.) 353; 12 L. T. 188; 13 W. R. 549. Under the Bombay charter of justice, the

Under the Bombay charter of justice, the Supreme Court at Bombay is invested with full and absolute power to allow or deny an appeal in criminal cases, and no power is reserved to the Crown by such charter to grant leave to appeal in such cases. The case of *Christian* v. *Chrice* (1.P. W. 329), observed upon. *Rey*. v. *Allow Perno*, 5 Moore, P. C. 296.

The royal court of Jersey has no power to order charges for alterations made in the court house, directed at its instance, to be derived out of the Crown revenues of the island. Judgment of the Corn to Jersey, declaring the attorney-general and receivers of the island liable for such charges, revised on appeal, with costs, Jersey (Jtt. Gen.) v. Capelain, § Moore, P. C. 37.

Prize.]—Privateer sailing and taking prize without letters of marque, the prize belongs to the king as a droit of the Crown, Nichol v. Goodall, 10 Ves. 155.

Title in Extra-parochial Places.]—The king, in right of his crown, has a general right to the tithes of all lands situate in extra-parochial places. Att.-Gen. v. Eardley (Lard), Dan. 271; 8 Price, 39; 22 R. R. 697.

Effect of Judiesture Acts.]—The prerogative of the Crown to intervene in actions affecting the rights or revenue of the sovereign has not been affected by the Judienture Acts; and for the determination of such matters the Exchequer Division of the High Court of Justice had all the powers formerly possessed by the Court of Exchequer. Aft.-Cen. v. Constable, 48 L. J., Ex. 455; 4 Ex. D. 172; 27 W. R. 661.

Liberty of Subject.]—The Court of Chancery is cautious of extending the prerogative of the Crown, so as to restrain the liberty of the subject, or his power over his own person and estate, further than the law will allow. Barnesley, Emparte, 3 Ack. 171.

Coinage.]—The right to regulate the coinage and paper money of a state is part of the sovereign percogative recognised by the law of nations, which is part of the common law of England, and therefore such right will be protected by the courts of this country. Austrian Emperor v. Kosseth, 2 Giff. 628. Affirmed. 30 L. J., Ch. 690; 7 Jur. (N.S.) 483; 4 L. T. 494; 9 W. R. 712.

Treatics—Interference with Private Rights.]—Where the government justified certain acts, in derogation of the private rights of the plantifi in regard to his lobster fishery, as acts and matters of state arising out of political relations between Her Majesty and the French government, contending that they involved the construction of treaties and of a temporary modus vivendi for lobster fishing in Newfoundland and other acts of state, and that they were matters which could not be inquired into by the court:—Held, that this defence disclosed no answer to the action. Walker v. Baird, 61 L. J., P. C. 92; [1892] A. C. 491; 67 L. T. 513—P. C.

Salmon Fishing—Rights of Crown—Staying Proceedings.]—Where in a ponding cause it appears that the Crown has a prima facie claim to salmon fishings in dispute, the court ought to direct intimation to be made to the Crown authorities, and stay the action pending their decision to appear or bring a separate action. Ogston v. Stewarf, [1896] A. C. 120—H. L. (Sc.)

Enemies' Goods.] — Enemies' goods coming into this country may be seized for the use of the Crown. Land v. Lord North and the Bank of England. 4 Dong. 266.

Right to Print.]—The Crown has not a prerogative or a power to grant the printing of almanacs to the Company of Stationers, exclusive of any other. Stationers' Co. v. Carman, 2 W. Bl. 1004.

The king's printers were authorised to print statutes and abrilgments at common law, exclusively of all others who had not prior grants. Basket v. Cambridge University, 2 Burr. 661; 1 W. Bl. 105; 2 Ld. Ken. 307.

Royal Palacos.]—The privilege of exemption from the execution of legal process which attaches to royal residences is based solely on the principle that the personal dignity and comport of the savereign should not be interfered with; and though actual personal residence is not necessary to confer it, the privilege does not extend to the precincts of a palue such as that of Hampton Court, the compation of which as a royal residence has been clearly and unequivocally abandoued, which has been appropriated to uses practically inconsistent with the personal residence of the sovereign, and which the sovereign has shown no intention of using again as a residence. Att.-Gav. v. Dakhia, 19 °L. d., Ex. 113; L. R. 4 H. L. 338; 23 °L. T. 1; 18 W. R. 1111.

Exemption from Tolls.]—Carriage and horses belonging to the Queen, driven by her coachman, and used by a member of her household, or his family, with the Queen's permission, though not upon her service, held exempt from turnpike tolls. Westever v. Perkins, 2 El. & El. 57; 28

582.

The king is exempted, by virtue of his prerogative, from the operation of all statutes imposing duties or taxes upon the subject; and, therefore, the post-horse duty imposed by 25 Geo. 3, c. 51, was not to be paid for horses employed in forwarding public expresses on the service of the government. Reg. v. Cook, 3 Term Rep. 519.

Undertaking as to Damages. |-The court will not, in favour of the Crown, depart from established practice, therefore, in the case of an action by the Crown to restrain the defeudants from proceeding to construct certain tramways, the court refused to grant an interim injunction against the defendants unless the Crown would consent to be bound by the usual undertaking as to damages. Secretary of State for War v. Chubb. 43 L. T. 83.

Where in an action by the attorney-general, suing on behalf of the Crown, the court, on the merits, is of opinion that an interlocutory injunction should be granted, such injunction will be granted, although counsel on behalf of the Grown decline to give the undertaking as to damages required in the case of an ordinary applicant. Att.-Gan. v. Albany Hotel Ch. 65 L. J., Ch. 885; [1896] 2 Ch. 696; 75 L. T. 195-C. A.

If the case for the Crown were a very doubtful one an injunction might be refused unless some undertaking in damages were given. Ib.

No Liability for Predecessor.]-The reigning sovereign is not liable to make compensation for damage to the property of an individual occasioned by the negligence of the servants of the Crown in a preceding reign; nor, semble, even where such damage has been done in his own reign. Canterbury (Viscount) v. Att.-Gen., 1 Ph. :306; 12 L. J., Ch. 231; 7 Jur. 224.

Royal Marriages. |- The Royal Marriage Act, 12 Geo. 8, c. 11, extends to prohibit the coutracting of marriages, or to annul any already contracted, in violation of its provisions, wherever the same may be contracted or solemnised, cither within the realm of England or without. Susseav Peerage, 11 Cl. & F. 35 : 8 Jur. 793.

Prohibition. - Prohibition lies not in an inferior court after the defendant has pleaded there; for by pleading the defendant submits to the jurisdiction. But at the suit of the king prohibition lies, though the defendant pleaded: but if a prohibition has been granted, the court will grant a supersedeas if there is an affidavit that the cause arose within the jurisdiction. Anon., 1 Vern. 301.

India-Exercise of Arbitrary Power in. |-The seizure by government of the property of a deceased independent raigh, under circumstances which imply the exercise of force and arbitrary power, cannot be inquired into by a municipal court of justice. East India Co. v. Kamachee Boye Sahiba, 7 W. R. 722.

Colonies. ]—The prerogative of the Crown runs in the colonies to the same extent as in England. Bateman's Trusts, In re, 42 L. J., Ch. 553; L. R. 15 Eq. 355; 28 L. T. 395; 21 W. R. 435.

-Colonial Assembly. ]-Semble, the Crown, by its prerogative, can create a legislative

L. J., M. C. 227; 5 Jur. (N.S.) 1352; 7 W. R. (assembly in a settled colony, subordinate to parliament, but with sufficient power within the limits of the colony for the government of its inhabitants; but quære whether it can bestow upon it an authority, viz., that of committing for contempt, not incidental to it bylaw. Kielley v. Carson, 4 Moore, P. C. 63; 7 Jur. 137.

> Waiver of Forfeiture - Proof of.] - A forfeiture may be waived by the Crown as well as by private individuals, and such waiver may be proved by similar evidence, e.g. by the contimed acceptance of the Crown rent in respect of a market after conduct which would give the Crown a right to forfeit a grant. Middleton (Lord) v. Power, 19 L. R., Ir. 1.

> Action of Ejectment by the Crown-Equitable Defence—Specific Performance.]—In an action of ejectment by the Crown a defendant may set up any equitable defence which would have availed against a private plaintiff. Judgment held to have been rightly entered for the defendant where a concluded contract with the Crown was proved entitling him to the issue of a grant in respect of the land in suit. Att. Gan. for Trinidad v. Bourne, [1895] A. C. 83-P. C.

Royal Proclamation. - The object of a royal proclamation is only to make known the existing law; it can neither make nor unmake the law. Hence the proclamation of the 13th May, 1861, whereby the provisions of the Foreign Enlistment Act were enforced, and the subjects of the Crown were warned of the risks they incurred by sending contraband of war to either of the belligerent powers in America, had no effect upon the legality of an adventure for transporting munitions of war to the Confederate Porting Industrials War to the Confederate States. Charasse, Ex parte, Grazobrook, In re, 4 De G., J. & S. 655: 34 L. J., Bk. 17; 11 Jur. (N.S.) 406; 12 L. T. 249; 13 W. R. 627.

Interpleader.]—Order of interpleader made against the Crown. Reid v. Stearn, 6 Jur. (N.S.)

Relief under Interpleader Act, 1 & 2 W. 4. c. 58, refused in a case where pending an action an extent in chief issued against the plaintiffs, and on inquisition had, the debt sued for was returned as seised to the use of the Crown. Condy v. Mangham, 6 Man. & G. 710; 7 Scott (N.R.) 401; 13 L. J., C. P. 17.

Right of Crown to Discovery.]-The Crown has the same right of discovery against a subject as one subject has against another, but cannot be compelled to give discovery to a cannot be compensat to give discovery to a subject. Att. Gen. v. Newcoastle-upon-Tyme Corporation, 66 L. J., Q. B. 593; [1897] 2 Q. B. 384; 77 L. T. 203—C. A.

The fact that on an information the defendants' answer has not been excepted to within six weeks does not preclude the Crown from obtaining discovery in the usual way. Ib.

Executive Government—Liability for Negligence—Reasonable Care.]—Where the executive government possessed the control and management of a tidal harbour, with authority to remove obstructions in it, and the public had a right to navigate therein, subject to the harbour regulations and without payment of harbour dues, the staiths and wharves belonging to the executive government which received wharfage and tonnage dues in respect of vessels using them :-Held,

that vessels using the staiths in the ordinary manner may do so without damage to the vessel. Reasonable care is not shewn when, after notice of danger at a particular spot, no inquiry is made as to its existence and extent, and no warning is given. Reg. v. Williams, 53 L. J., P. C. 64; 9 App. Cas. 418; 51 L. T. 546—P. C.

The principle of liability for negligence estab-lished by Parnaby v. Lancaster Canal Co. (11 A. & E. 223), and Mersey Docks Trustees v. Gibbs (L.R. 1 H. L. 93), approved of, and applied to the executive government in the above circumstances, which were distinguishable in respect of

Crown or Executive.]—An action for trespass against committed or intended is not maintainable against officials of the Crown or government against difficults of the Crown of given man, such in their official capacity or as an official body. Raleigh v. Goschen, 67 L. J., Ch. 59; [1898] 1 Ch. 73; 77 L. T. 429; 46 W. R. 90. Such an action will, however, lie against such

officials in respect of acts actually done or directed by them if sued in their individual capacity, even although such acts be done by the authority of the government. Ib.

Civil Servant—Engagement for Term Certain
—Right to Dismiss at Pleasure. |—There is an absolute power in the Crown, in the absence of statutory provision to the contrary, to dismiss at pleasure a person employed in the civil service of the Crown. Dunny. Reg., 65 L. J., Q. B. 279; [1896] 1 Q. B. 116; 73 L. T. 695; 44 W. R. 243; 60 J. P. 117-C. A.

Reduction in Rank.]-A supervisor of Inland Revenue was appointed in 1881 to hold office "during the pleasure of the Commissioners of Inland Revenue." By s. 4, sub-s. 3, of the Inland Revenue Regulation Act, 1890, the commissioners have power to reduce or discharge any such officer as they see eause. The commissioners directed the supervisor to collect statistics for the Board of Agriculture. The supervisor refused to comply with the order as being one which did not concern his duties as an official of Inland Revenue. The commissioners thereupon reduced him in rank. In an action against the commissioners to recover damages :- Held, that no cause of action was shewn, and that, in the exercise of the inherent jurisdiction of the court, the action should be stayed. Worthington v. Robinson, 75

powers of the Crown in the Colony of New South Wales to dismiss civil servants in that colony, and has made an exception to the rule which prevails in New South Wales, as well as in this

#### B. WHEN BOUND BY STATUTE.

unless it is expressly named therein; and this rule doctrine. Addington v. Cann, 3 Atk, 154,

that there was a duty imposed by law upon the extends to cases where the right of the Crown is executive government to take reasonable eare merely nominal. Reg. v. Bayley or Bayley, 1 that vessels using the status in the ordinary Dr. & War, 213: 4 Ir. Eq. R. 142.

Prescription Act.]—Crown not bound by s. 3 of the Prescription Act as to ancient lights. Perry v. Eumes, [1891] 1 Ch. 658. Approved in Wheaton v. Maple, 62 L. J., Ch. 963; [1893] 3 Ch. 48; 69 L. T. 203; 41 W. R. 677—C. A.

Acts transferring Jurisdiction of Courts. ]-Quære, whether, when an act of parliament transfers jurisdiction from one court to another. or grants an extension of the jurisdiction of an existing court, it is necessary, in order to make non-receipt of harbour dues, notwithstanding the Crown Suits Act, 1881, s. 37. Ib. should be named therein. London Corporation Tort by Government Officials—Trespass against 270; 14 L. J., Ch. 305; 9 Jur. 570.

> Bankruptcy Acts before 1883.] — The Crown not being bound by the Statutes of Bankruptcy, the protection of a bankrupt from an extent islimited to actual attendance upon the commissioners upon the common-law privilege of a asoness upon the common-law privilege of a witness or party, not extending through the intervals of adjournment by the statute. Temple, Exparte, 2 Ves. & B. 391; S. P., Russel, Exparte, 19 Ves. 165; Crawford v. Att.-Gra., 7 Price, 2.

Whether the king was bound by the Statutes of whether the King was bound by the Statutes of Bankraptcy was doubted in Att. Gen. v. Stany-forth (Bunb. 98). But in Rev v. Pialey (Bunb. 202), it was held they did not bind the Crown.

Bankruptcy Act, 1883.] - Sect. 150 of the Bankruptcy Act, 1883, enacting that, save as therein provided, the provisions of that act rea debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown, does not by virtue of the Judicature Act, 1875, s. 10, operate as an incorporation in the Companies Act, 1862, of a similar provision so as in a winding-up to bar the Crown of its prerogative of Ing-ip to our the Crown of its prerogative of priority of payment over all creditors. Oriental Bank Corporation, In re. The Crown, Ex parks, 54 L. J.; Ch. 327; 28 Ch. D. 643; 52 L. T. 172.

- Disclaimer binding on Crown. ]-The provisions of s. 55 of the Bankruptcy Act, 1883, as to the disclaimer of onerous property, are "provisions relating to the remedies against the property of a debtor" within the meaning of s. 150 of that the inherent juriscustion of the court, the action within the historian of the should be stayed. Worthington v. Holinson, 75 L. T. 446—C. A.

— Civil Service in New South Wales.]—The Civil Service Act, 1884, defines and limits the 4th Service Act, 1884, defines and limits the

Receiver. The Crown, though not bound by the 3 & 4 Will, 4, c. 55, s. 31, and 3 & 4 Vict. e, 105, s. 20, which give to creditors by judgment country, that in a contract for service under the or recognizance a right to have a receiver Cown there is imported a condition that the appointed on petition, may take advantage of Crown may dismiss at pleasure. Gould v. Swart, the acts, but is not bound by the restrictions of Est. J., P. C. 82; [1896] A. C. 575; 75 L. T. 110

—P. C. And see PUBLIC OFFICER.

—9, C. And see PUBLIC OFFICER.

5, 5, 5, 10, Req. v. Cruine. 2, F. Ch. R. 65. c. 95, s. 10. Reg. v. Cruise, 2 Ir. Ch. R. 65.

Statute of Frauds. ]-The Statute of Frauds does not bind the Crown, but takes place only Limitation Acts.]—The rights of the Crown between party and party, for the king is not are not barred by any Statute of Limitations, named. Lord Hardwicke, however, doubted this Exemption from Poor Rates.]—The Crown, binds the Crown. Moore v. Smith, 28 L. J., not being named in the Poor Relief Act, 1601, M. C. 126; 1 El. & El. 597; 5 Jur. (x.s.) 892; 7 48 Eliz. c. 2, is not bound by its enactments. W. R. 206.

Morsey Docks and Harbour Board v. Concron. 11 H. L. Cas, 443; 20 C. B. (X.s.) 56; 35 L. J., C. CROWN PROPERTY. M. C. 1; 11 Jur. (N.S.) 746; 13 W. R. 1069.

Property, therefore, in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, is not rat-

able to the relief of the poor. Ib.

Crown property, as well as property devoted to or made subservient to the Queen's government, is exempt from poor rates, but property held upon trust to create or to improve docks and harbours in seaport towns, though having a public character, and though devoted to public purposes, is nevertheless subject to be rated to the v. Adamson, 4 Macq. H. L. 931.

The law of England and the law of Scotland

are in these points identical. Ib.

Effect of Saving Clause.]—Semble, that a saving clause in a statute in favour of the Crown refers to rights of property or rights in the as Crown property which belong to the Crown as Crown property. Farmouth Corporation v. Simmons, 47 L. J., Ch. 792; 10 Ch. D. 518; 38 L. T. 881; 26 W. R. 802.

Colonial Statute.]—The Victorian Statute, Crown Liability and Remedies Act, 1865 (28 Vict. No. 241), s. 17, does not affect the prerogative of the Crown when suing in this country. Ib. See Exchange Bank of Canada v. Rey., 55 L. J., P. C. 5; 11 App. Cas. 157. And see COLONY.

Lands Clauses Act-Payment out of Court.]-A railway company, under the powers of its act, gave notice to a lord of the manor to take a piece of land on the seashore which he claimed as part of the waste of his manor. The purchasemoney was assessed by arbitration, but an adverse claim having been made by the Crown, the company paid the purchase-money into court under the 76th section of the Lauds Clauses Act. The Crown filed an information against the lord of the manor claiming the land, together with other land, as part of the fore-shore. The lord of the manor having filed a petition for payment of the purchase-money to him :-Held, that as the Crown could not be brought before the court under the Lands Clauses Act to contest the claim of the pctitioner, the petition ought to stand over till the information had been heard. Lovestoft (Manur of),
Lu re, Reeve, Ex parte, 52 L. J., Ch. 912; 24
Ch. D. 253; 49 L. T. 523; 32 W. R. 309—C. A.

Act giving Right to bring Error-Crown Bound.]-By 11 Geo. 4, and 1 Will. 41, e. 70 (repealed), writs of error upon any judgments given by the Queen's Bench, Common Pleas or Exchequer, were made returnable by the judges and barons, or judges only of the other two courts, in the Exchequer Chamber. The Crown was held bound by that enactment, so that a writ of error lay upon a Julgment for the Crown in a petition of right to the Exchequer Chamber. De Bodle (Baron) v. Reg. (in error), 13 Q. B. 84; 14 Jur. 970—Ex. Ch.

Appeals from Justices. ] -- The Summary Jurisdiction Act, 1857, 20 & 21 Viet, e. 43, which

#### 1. GENERALLY.

The object of the act 21 Jac. 1, c. 14, was to put a defendant litigating with the Crown in the same situation as any other defendant; but the statute does not apply in equity, where, in the matter of discovery, the Crown and a subject normal ogener are precisely on the same footing as ordinary parties. Att. Gen. v. London Corporation, 2 Mac. & G. 247; 2 Hall & Tw. 1; 19 I. J., Ch. 314; 14 Jur. 205. Affirming 12 Bew. 171. litigating together are precisely on the same

Where the Crown has been in possession of lands for more than 160 years, and a corporation who originally claimed under various charters granted by the Crown, and particularly charters of Edward VI., Henry VIII., and Charles II., refrain from asserting their legal rights, having had opportunities of doing so during such period, the court will not interfere in equity, but remit the parties to their legal remedies. Kingston-upon-Hull Corporation v. Att.-Gen., 5 L. T.

420

A voyage of discovery having been executed, and a narrative of it prepared under the orders of the Crown, the narrative is the property of the Crown; but on a bill by a publisher authorised by the secretary to the Board of Admiralty to publish such a narrative, the profits remaining at their disposition, an injunction restraining publication by a stranger was dissolved. Nicol v. Stockdule, 3 Swanst, 687.

When part of the mortgagor's interest is vested in the Crown, the court will not decree foreclosure in respect thereof, but will give the plaintiff liberty to apply in chambers for a sale. Bartlett v. Rees, 40 L. J., Ch. 599; L. R. 12 Eq. 395; 25 L. T. 373; 19 W. R. 1046.

Bank stock was purchased by the government of Maryland before the American war, and vested in trustees for the discharge of certain bills. After the peace, upon a bill under an assignment by the new state of part of the stock as a compensation to mortgagees of lands that were eonfiscated, the fund subjected to that assignment was claimed by the new state, and, there being no claim under the bills, the whole was claimed by the surviving trustee beneficially, also by the proprietary under the old government, and a specific lien was insisted on in respect of losses by confiscation occasioned by the refusal of the trustees to transfer :- Held, that there was no lien; that the new state could take only such rights of the old as were within its jurisdiction; that the claims of the plaintiffs and the state, in respect of the confiscations, were the subject of treaty, not of municipal jurisdiction; and the fund, no object of the trust existing, must be at the disposal of the Crown. The court cannot decree against a title in the Crown apparent on the record, though not insisted on at the hearing. Barclay v. Russell, 3 Ves. 424.

Grant of Land and of Licence to Depasture Cattle, Effect of . A grant of land in fee by the Crown, and also a licence to depasture cattle on Crown lands (which is in substance a lease), carries with it the right to capture and approgives an appeal against an order of justices, priate all wild animals found on such land, that there was a duty imposed by law upon the extends to cases where the right of the Crown is executive government to take reasonable care merely nominal. Reg. v. Bayley or Bayley, 1 that vessels using the staiths in the ordinary Dr. & War. 213; 4 Ir. Eq. R. 142. manner may do so without damage to the vessel Reasonable care is not shewn when, after notice of danger at a particular spot, no inquiry is on danger at a particular spot, no induity is made as to its existence and extent, and no warning is given. Reg. v. Williams, 53 L. J., P. C. 64; 9 App. Cas. 418; 51 L. T. 546—P. C.

The principle of liability for negligence established by Parnaby v. Lancaster Canal Co. (11 A. & E. 223), and Mersey Docks Trustees v. Gibbs (L.R. 1 H. L. 93), approved of, and applied to the executive government in the above circumstances, which were distinguishable in respect of non-receipt of harbour dues, notwithstanding the Crown Suits Act, 1881, s. 37. Ib.

Tort by Government Officials - Trespass against Grown or Executive.]—An action for trespass committed or intended is not maintainable against officials of the Crown or government sued in their official capacity or as an official body. Raleigh v. Goschen, 67 L. J., Ch. 59; [1898] 1 Ch. 73; 77 L. T. 429; 46 W. R. 90.

Such an action will, however, lie against such officials in respect of acts actually done or directed by them if sned in their individual capacity, even although such acts be done by the authority of the government. Ib.

Civil Servant—Engagement for Term Certain—Right to Dismiss at Pleasure.]—There is an absolute power in the Crown, in the absence of statutory provision to the contrary, to dismiss at pleasure a person employed in the civil service pressure a person employed in the civil service of the Crown. *Dunn* v. *Req.*, 65 L. J., Q. B. 279; [1896] I Q. B. 116; 73 L. T. 695; 44 W. R. 243; 60 J. P. 117—C. A.

Reduction in Rank. ]-A supervisor of Inland Revenue was appointed in 1881 to hold office "during the pleasure of the Commissioners of Inland Revenue." By s. 4, sub-s. 3, of the Inland Revenue Regulation Act, 1890, the commissioners have power to reduce or discharge any such officer as they see cause. The commissioners directed the supervisor to collect statistics for the Board of Agriculture. The supervisor refused to comply with the order as being one which did not concern his duties as an official of Inland Revenue. The commissioners thereupon reduced him in rank. In an action against the commissioners to recover damages :- Held, that no cause of action was shewn, and that, in the exercise of the inherent jurisdiction of the court, the action should be stayed. Worthington v. Robinson, 75 L. T. 446-C. A.

- Civil Service in New South Wales. |-The Civil Service Act, 1884, defines and limits the powers of the Crown in the Colony of New South Wales to dismiss civil servants in that colony, and has made an exception to the rule which prevails in New South Wales, as well as in this country, that in a contract for service under the Crown there is imported a condition that the Crown may dismiss at pleasure. Gould v. Stuart, 65 L. J., P. C. 82; [1896] A. C. 575; 75 L.T. 110 —P. C. And see Public Officer.

#### B. WHEN BOUND BY STATUTE.

Limitation Acts. |-The rights of the Crown are not barred by any Statute of Limitations, named. Lord Hardwicke, however, doubte unless it is expressly named therein; and this rule doctrine. Addington v. Cann, 3 Atk. 154.

Prescription Act. ]-Crown not bound by s. 3 of the Prescription Act as to ancient lights. Perry v. Eames, [1891] 1 Ch. 658. Approved in Wheaton v. Maple, 62 L. J., Ch. 963; [1893] 3 Ch. 48; 69 L. T. 203; 41 W. R. 677—C. A.

Acts transferring Jurisdiction of Courts. 1-Quære, whether, when an act of parliament transfers jurisdiction from one court to another, or grants an extension of the jurisdiction of an existing court, it is necessary, in order to make the act binding on the Crown, that the Crown should be named therein. London Corporation v. Att.-Gen., 1 H. L. Cas. 440. Affirming 8 Beav. 270; 14 L. J., Ch. 305; 9 Jur. 570.

Bankruptcy Acts before 1883.] — The Crown not being bound by the Statutes of Bankruptcy, the protection of a bankrupt from an extent is limited to actual attendance upon the commissioners upon the common-law privilege of a witness or party, not extending through the intervals of adjournment by the statute. Truple, Ex parte, 2 Ves. & B. 391; S. P., Russel, Exparte, 19 Ves. 165; Crawford v. Att.-Gen., 7 Price, 2.

Whether the king was bound by the Statutes of Bankruptey was doubted in Att. Gen. v. Stany-forth (Bunb. 98). But in Rew v. Piwley (Bunb. 202), it was held they did not bind the Crown.

Bankruptcy Act, 1883.] — Sect. 150 of the Bankruptcy Act, 1883, enacting that, save as therein provided, the provisions of that act relating to the remedies against the property of a debtor, the priorities of debts, the effect of a composition or scheme of arrangement, and the effect of a discharge, shall bind the Crown, does not by virtue of the Judicature Act, 1875, s. 10, operate as an incorporation in the Companies. Act, 1862, of a similar provision so as in a winding-up to bar the Crown of its prerogative of priority of payment over all creditors. Oriental Bank Corporation, In re. The Crown, Exparte, 54 L. J.; Ch. 327; 28 Ch. D. 643; 52 L. T. 172.

Disclaimer binding on Crown. ]-The provisions of s. 55 of the Bankruptcy Act, 1883, as to the disclaimer of onerous property, are "provisions relating to the remedies against the property of a debtor" within the meaning of s. 150 of that act, and are therefore binding upon the Crown. Commissioners of Woods and Forests, Ex parte, Thomas, In re, or Thomas, Ex parte, Trotter, In re, 57 L. J., Q. B. 574; 21 Q. B. D. 380; 59 L. T. 447; 5 Morrell, 209; 36 W. R. 735.

Receiver. ]—The Crown, though not bound by the 3 & 4 Will, 4, c, 55, s, 31, and 3 & 4 Vict. c, 105, s. 20, which give to creditors by judgment to row, 2.0, wine give to reactions by jungment or recognizance a right to have a receiver appointed on petition, may take advantage of the acts, but is not bound by the restrictions imposed on that right by the 12 & 13 Vict. c. 95, s. 10. Reg. v. Cruise, 2 Ir. Ch. R. 65.

Statute of Frauds. ]-The Statute of Frauds. does not bind the Crown, but takes place only between party and party, for the king is not named, Lord Hardwicke, however, doubted this Exemption from Foor Rates. —The Crown, binds the Crown. Moore v. Smith, 28 L. J., not being named in the Poor Relief Act, 1601, M. C. 126; 1 El. & El. 597; 5 Jur. (N.s.) 892; 7 43 Eliz. c. 2. is not bound by its enactments. W. R. 206. Nervey Docks and Harborr Board v. Cameron. 11 H. L. Cas. 443; 20 C. B. (x.s.) 56; 35 L. J., M. C. 1; 11 Jur. (x.s.) 746; 13 W. R. 1069.

Property, therefore, in the occupation of the Crown, or in that of persons using it exclusively in and for the service of the Crown, is not rat-

able to the relief of the poor. Ib.

Crown property, as well as property devoted to or made subservient to the Queen's government, is exempt from poor rates, but property held upon trust to create or to improve docks and harbours in scaport towns, though having a public character, and though devoted to public purposes, is nevertheless subject to be rated to the relief of the poor. Clyde Navigation Trustees v. Adamson, 4 Macq. H. L. 931. The law of England and the law of Scotland

are in these points identical. Ib.

Effect of Saving Clause.]-Semble, that a saving clause in a statute in favour of the Crown refers to rights of property or rights in the nature of property which belong to the Crown as Crown property. *Yarmouth Corporation* v. Simmons, 47 L. J., Ch. 792; 10 Ch. D. 518; 38 L. T. 881; 26 W. R. 802.

Colonial Statute.]—The Victorian Statute, Crown Liability and Remedies Act, 1865 (28 Vict. No. 241), s. 17, does not affect the prerogative of the Crown when suing in this country. Ib. See Exchange Bank of Canada v. Reg., 55 L. J., P. C. 5; 11 App. Cas. 157. And see Colony.

Lands Clauses Act-Payment out of Court. ]-A railway company, under the powers of its act, gave notice to a lord of the manor to take a piece of land on the seashore which he claimed as part of the waste of his manor. The purchasemoney was assessed by arbitration, but an adverse claim having been made by the Crown, the company paid the purchase-money into court under the 76th section of the Lands Clauses Ac. The Crown filed an information against the lord of the manor claiming the land, together with other land, as part of the fore-shore. The lord of the manor having filed a petition for payment of the purchase-money to him :-Held, that as the Crown could not be brought before the court under, the Lands Clauses Act to contest the claim of the petitioner, the petition ought to stand over till the information had been heard. Lowestoft (Manor of), In re, Reeve, Ex purte, 52 L. J., Ch. 912; 24 Ch. D. 253; 49 L. T. 523; 32 W. R. 309—C. A.

Act giving Right to bring Error-Crown Bound.]-By 11 Geo. 4, and 1 Will. 41, c. 70 (repealed), writs of error upon any judgments given by the Queen's Bench, Common Pleas or Exchequer, were made returnable by the judges and barons or judges only of the other two courts, in the Exchequer Chamber. The Crown was held bound by that enactment, so that a writ of error lay upon a judgment for the Crown in a petition of right to the Exchequer Chamber. De Bode (Haron) v. Reg. (in error), 13 Q. B. 364; 14 Jur. 970—Ex. Ch.

gives an appeal against an order of justices, priate all wild animals found on such land.

#### C. CROWN PROPERTY.

#### 1. GENERALLY.

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of Maryland before the American war, and vested in trustees for the discharge of certain bills. After the peace, upon a bill under an assignment by the new state of part of the stock as a compensation to mortgagees of lands that were confiscated, the fund subjected to that assignment was claimed by the new state, and, there being no claim under the bills, the whole was claimed by the surviving trustee beneficially, also by the proprietary under the old government, and a specific lien was insisted on in respect of losses by confiscation occasioned by the refusal of the trustees to transfer :- Held, that there was no lien; that the new state could take only such rights of the old as were within its jurisdiction; that the claims of the plaintiffs and the state, in respect of the confiscations, were the subject of treaty, not of municipal jurisdiction; and the fund, no object of the trust existing, must be at the disposal of the Crown. The court cannot decree against a title in the Crown apparent on the record, though not insisted on at the hearing. Barclay v. Russell, 3 Ves. 424.

Grant of Land and of Licence to Depasture Cattle, Effect of ]—A grant of land in fee by the Crown, and also a licence to depasture cattle Appeals from Justices.]—The Summary on Crown lands (which is in substance a lease), Jurisdiction Act, 1857, 20 & 21 Vict. c. 43, which carries with it the right to capture and approW. R. 57.

Where cattle had been introduced into an island, and in course of time many escaped and lived in a wild state :- Held, in construing a grant by the Crown of the lands, that these wild cattle were to be treated as animals ferae natura. Ib.

Stay of Action to Eject the Crown.]—The Board of Ordnance put their servant into possession of a house and land adjoining Hurst Castle, which castle has been, from the time of Henry VIII., a possession of the Crown of England. An ejectment having been brought to recover possession of this house and land, and Board of Ordnance, the court, on motion made 8 M. & W. 579; 11 L. J., Ex. 57.

Adverse Possession. ]-B. was empowered by acts of parliament to make and maintain a canal, and to inclose and appropriate such parts of the land adjoining as should be necessary for the purposes of the canal. Provision was made in the canal were the property of the Crown, in right of the Duehy of Lancaster, and such lands cannot be parted with by the Crown except under statutory regulations, imposed by I Anne, c. 7, s. 5. The Canal Acts in question are later. The clauses authorising the user of the lands. and providing for compensation for such user, mentioned the Crown, either expressly or by direct reference; the clauses confined to authorising the purchase and providing for the assess-ment of the price mentioned only bodies politic L. R. 7 Ex. 177; 26 L. T. 34; 20 W. R. 509. and corporate, parties having especial interest as guardians, trustees, executors, and "all and every other person and persons whatsoever." Contracts of purchase were to be inrolled with the clerk of the peace. On payment or tender of the purchase-money, the lands purchased were to vest in B.:—Held, that the Crown had no could be inferred from the exercise by B. of the powers of entry and user given by the act, especially as no evidence of an involment was produced. Dow d. Reg. v. York (Archbishap), 14 Q. B. 81; 19 L. J., Q. B. 242.

for uncertainty after long modern possession, for in such a case a supplementary and confirmatory grant may be presumed. Des Burres v. Shey, 29 L. T. 592; 22 W. B. 273—P. C.

Droits.]—During the Russian war, one of the Queen's ships of war, on her passage to Odessa, fell in with and took possession of a raft of timber having the Russian Imperial mark painted on the several spars composing the same : a droit of the Crown and not a droit of Admir-1109.

Fulkland Islands Co. v. Reg., 2 Moore, P. C. possession there from before 1817, by themselves (x.s.) 266; 10 Jur. (x.s.) 807; 11 L. T. 9; 13 and their predecessors in title, without disturbance or effectual claim by the Crown, such information was dismissed. Att.-Gen. for British Honduras v. Bristowe, 50 L. J., P. C. 15; 6 App. Cas. 143; 44 L. T. 1-P. C.

Although British Honduras was formally declared to be a British colony, and formally annexed to British dominions by a proclamation. of Her Majesty, dated the 12th May, 1862, yet grants of land having been made therein by the Grown as early as 1817:—Held, that the territorial sovereignty of the Crown must be deemed to have been acquired in or before that year. Ib.

Intervening where Rights of Crown Involved. -Encroachment.]-The Queen, as lady of a the declaration served on the servant and on the manor, granted to two licencees, in pursuance of manorial rights, power to enter the lands comon behalf of the Crown, set aside the declaration prised in the manor and search for and carry and stayed the proceedings. Doe d. Legh v. Roe, away minerals, making to the copyholder and terre-tenant respectively a customary compensation for surface damage. The licencees entered without the consent of either copyholder or terretenant and began mining operations; whereupon the terre-tenant commenced an action against them. The attorney-general, on behalf of the Queen and the licencees, then filed an information the act for the purchase and sale of such lands as and bill on the equity side of the Exchequer should be wanted. Certain of the lands adjoining against the copyholder and terre-tenant, praying that the rights of the Crown within the manor should be declared, and that the action should be restrained. On an application for an injunction in accordance with the prayer of the information and bill :-Held, that the rights of the sovereign being involved in the proceedings in the action, the sovereign was entitled jure corone to be actor in any litigation affecting those rights, and that the injunction must there-

Copyhold Surrendered to Trustee for Crown -Encroachments.] -A copyhold was surrendered in 1809 to a trustee for the Crown for military purposes. In 1808 the then lord of the manor had granted to M., the governor of an adjoining fort, a licence to inclose part of the waste adjoinpower to convey lands under these clauses, and ing the copyhold, and to occupy it at a yearly that, supposing such power to exist, no purchase rent during his life if he so long continued governor, which he ceased to be in 1811. Nothing further was shewn as to the title to the land included in the licence, except that at the commencement of this action in 1874 the Crown had been in possession of it as inclosed ground. A grant from the Crown of undefined and nn-ascertained shares in land will not be held void than forty years. Since 1811 there had been for uncertainty after long replacements. repeated admittances of trustees for the Crown to the original copyhold, in which it was described by metes and bounds not including the close L. comprised in the licence. In 1874, the lord of the manor, without the consent of the Crown. granted a licence to get coprolites ont of close L. at a royalty, and received 2227. for royalties. The Crown brought an action for an injunction and damages. Fry, J., held, that close L. had become an accretion to the copyhold tenement, Held, that such timber must be condemned as and was of copyhold tenure, but the decree only granted an injunction and an inquiry as toalty. Raft of Russian Timber, 5 Jur. (N.S.) damages, without any declaration of the rights. of the parties. The chief clerk having certified. that the damages payable to the Crown were — Land in Colony.]—In an information of 2221, and Fry, J., having approved of his finding, intrusion relating to land in British Honduras, the lord appealed on the ground that the the defendants having shewn sixty years' adverse damages were excessive. The tenant who held

close L. under the Crown had separately received Duchy of Lancaster. ]—In 1377 Edward III. by full compensation for surface damage, and the charter granted to his son, John of Gaunt, Duke land had been restored to its original condition : -Held, by the Court of Appeal, that, assuming the doctrine that encroachments made by a lessee inure to the benefit of the landlord to be applicable to encroachments by a copyholder, the application of that doctrine was excluded by the facts that the inclosure of close L. having been made by licence from the lord was not an encroachment, and that the subsequent admittances did not treat close L. as part of the copyhold distinct from her crown :- Held, that the words tenement. Att.-Gen. v. Tomline, 15 Ch. D. 150; 43 L. T. 486—C. A.

Whether that doctrine does apply to copyholds, quære. I b.

Whether, if close L. had been copyhold, a finding which gave to the copyholder by way of damages the whole sum received by the lord for the coprolites could have been sustained, onere.

 Crown Acquiring Freehold under Statute of Limitations.]—Held, that the Crown had under the Statute of Limitations acquired a freehold title to close L., and that as the coprolites, therefore, belonged to the Crown the damages were not excessive. Ib.

Court of King's Bench was the custodian of moneys deposited by the suitors to await the result of actions, and invested a portion of them in exchequer bills. When Lord Ellenborough succeeded to the office in 1811, he found 5,000l. so invested. He received for his own benefit the interest thereupon until the report of the committee of the House of Commons on sinecure offices in 1834, in deference to which he received no further dividends, but caused them to be carried by his bankers to a separate account. After his death, a suit was instituted to administer his estate:—Held, that the funds thus accumulated formed no part of his estate, but must be treated as public moneys, and that the Crown, in right of the public, was entitled to receive them. Colchester v. Law, 43 L. J., Ch. 80.

Non-Tidal Lake - Not Crown Property.] -There is no authority to shew that the Crown is of common right entitled to land covered by water, where the water is not running water water, where the water is not raining water forming a river, but still water forming a lake. Bristow v. Cormican, L. R. 3 App. Cas. 641

If there are acts in pais, which would be admissible as evidence of the title of the Crown,

they must be submitted to a jury. They cannot be taken by the judge and made the basis of a decision by himself alone. Ib.

A general grant by the Crown of a several fishery in a non-tidal lake is not, without more, sufficient to establish the title thereto; and, where there is no evidence of acts of possession by the grantee at the particular part of the lake which is the place in dispute, can have no effect,

Right of Officer to Sell Crown Land. ] -Quære, whether a right can legally exist in an officer of the Crown to sell the soil of the Crown, and not account for the proceeds; but,

of Lancaster, the county of Lancaster, as a county palatine, within his duchy of Lancaster, -et quæcumque alia libertates et jura regalia ad comitem palatinum pertinentia, adeo integrè et liberè, sicut comes Cestriæ, infra eundem comitatum Cestriæ, dignoscitur obtinere. By subsequent charters and acts of parliament the duchy, and such rights as were originally granted with it, became vested in Her Majesty by a title of the charter carried the right to bona vacantia as jura regalia to the county palatine; and that it was not necessary for the Duke of Laucaster to show an enjoyment of such right by the Earl of Chester, as in the absence of evidence to the contrary, the court would presume the enjoyment of the right by the Earl of Chester. Duke v. Walford, 5 Moore, P. C. 434; 12 Jur. 839.

Although the king holds lands as Duke of

Lancaster, he holds them as king also; and all his prerogatives belong to him, with reference to such lands, as they do with reference to lands which belong to him immediately in right of his crown. Alovek v. Cooke, 5 Bing, 340; 2 M. & P. 625; 7 L. J. (o.s.) C. P. 126; 30 R. R. 625.

Duchy of Cornwall-Devise of Lands in. ]-A Suitors' Fee Fund. ]-The chief clerk of the surrender to the use of the will is not necess to support a devise of lands, parcel of the ancient duchy of Cornwall, the tenure whereof was originally a holding from seven years to seven years, but which has in time become a holding to the tenant, his heirs and assigns, subject to a fine at the end of every seven years, and to forfeiture on nonpayment. Usticke v. Peters, 4 Kay & J. 437; 4 Jur. (N.s.) 1271.

Under a devise of all the testator's lands to A. in fee, followed by a devise of his duchy lands to B. for life, the reversion expectant upon B.'s life estate in the ducliy lands passes to A.

#### 2. ROYAL FORESTS.

Of Hainault-Jurisdiction of Commissioner. As to the jurisdiction of the commissioner, under 21 x 22 Vict. c. 37, to find what lands are commonable in the forest of Hainault, see Walford v. Wetherell, 9 C. B. (N.S.) 648; 3 L. T. 738.

Mandamus to Enrol Licence to Kill Game. ]-Mandamus to the verderers of a forest to enrol in the forest court a licence granted by the chief justice in eyre to kill game within the forest. Return, that the licence and the right extended over the lands of private proprietors. The court quashed the writ, first, because it was void in part; and secondly, because the verderers were officers of the court of the chief justice in eyre. who had power to compel them to do what the law required. Reg. v. Conyers, 8 Q. B. 981; 15 L. J., Q. B. 300; 10 Jur. 899.

Action for Trespass by Sporting. - An information by the attorney-general stated, that the Queen was seised in fee of a forest, and that she and all her ancestors enjoyed the forest, and the game of wild beasts and fowls of forest, chase if it can legally exist, such right ought to be asked on the continuous and arising from the forest, established by evidence cogent and invincible, and all rights, without any disturbance, title or claim; that the defendant, without any lawful warrant, right or title erected a fence, and dug a warrant, right or title erected a fence, and dug a ditch in and upon the soil of the forest, and was appendant to the manor, did not pass under eneroached and usurped thereon, and separated the contract, and, consequently, that the purthe Queen could not have and enjoy the forest, manner without the advovson. Att.-Gen or the game, in as full and ample a manner as | Sitteell, 1 Y. & C. 559; 5 L. J. Ex. Eq. 86. she ought, to the injury and disturbance of the Queen in the forest, and to the damage and destruction of the vert and venison of and in the forest: - Held, that the cause of action was ambiguously stated, and that the information must be considered in the nature of an action of trespass on the case for injury to the incorporeal right of forest, by interfering with the game, and that, therefore, the plea was good, the defendant not being bound to make title to the 211; 16 L. J., Ex. 262.

- Injunction Restraining. ] - A receiver having been appointed, in a creditors' suit, of the office of master forester of a royal forest, an injunction was afterwards granted to restrain certain persons who owned lands in the forest, from sporting in it. Blanchard v. Cawthorne, 6 Sim. 155.

Right of Common over. ]-Where a manor was part of a royal forest, and the Crown had the right to turn deer upon the wastes to an unlimited extent, but for upwards of twenty years no deer had been seen there, and the lord of the manor inclosed a portion of the waste :-Held, that in determining whether sufficient common was left, the right of the Crown was not to be taken into consideration. Luke v. Pluston, 10 Ex. 196; 24 L. J., Ex. 52.

A. claimed a right of common over a Crown forest, in respect of an allotment of waste land made to him under an inclosure act in 1810, and relied on an uninterrupted enjoyment for thirty years under the Prescription Act, 1833, 2 & 3 Will. 4, c. 71, s. 1:—Held, that his claim might be defeated by shewing that the enjoyment of the right commenced in 1810, and that the grant of any right over the forest was made absolutely void by a statute passed previously to 1810. Barker v. New Forest Commissioner, 18 C. B. 60; 25 L. J., C. P. 212; 2 Jur. (N.S.) 520.

Right to Cut Wood in.]-Demurrer overruled to a bill by the poor of a parish, claiming a right by grant from the Crown to cut wood on waste lands within a royal forest, for their own use, and for sale to the other inhabitants or the parish. Willingule v. Maitland, 36 L. J., Ch. 6;; attive as matter of right, to change the venue in parish. Willingule v. Maitland, 36 L. J., Ch. 6;; attive as matter of right, to change the venue in the parish will be sufficiently sufficiently and the sufficient of the sufficient via the sufficient value of the su

statute 57 Geo. 3, c. 97, to make sale of any royalties, honours, hundreds, manors, lordships or franchises, "or any rights, members or appur-tenances thereof," belonging to the Crown, within the ordering and survey of the exchequer, is the contracted for the sale of the Crown manor of E., missioners:—Held, that this form of pleading and all courts baron, courts leet, and all fines, reliefs, rents, profits, waifs, strays, deodands, and "all other rights, members, emoluments and appurtenances thereunto belonging": and approximates decreame belonging .— The true of one or own to make of which it has being in effect a contract for been out of possession for twenty years may be sale by the Crown, the advowson of E., which tried in an information of intrusion itself, and

the same from the residue of the forest, whereby chaser was bound to take a conveyance of the

Semble, that if the contract had been between subject and subject, the advowson would have passed; although at the time of the contract, it was not known by either party to be appendant to the manor, and therefore the sale of it was not in their contemplation. Ib.

Under 57 Geo. 3, c. 97, and the Crown Lands Act, 1829, 10 Geo. 4, c. 50, the issuing of a special warrant from the treasury to the Commissioners of Woods and Forests, is not a conland. Att.-Gen. v. Hallett, 5 D. & L. 87; 1 Ex. dition precedent to the making of any contract between the commissioners and the purchasers of Crown lands; it is sufficient if a special warrant be obtained before certificates of sale are granted to the purchaser. 1b.

The Commissioners of Woods and Forests are not, under the 7 Geo. 4, c. 77, entitled to sue, or liable to be sued, for the specific performance of contracts entered into with and by them. The commissioners were authorised, with the consent of the lords of the treasury, to demise, or, previous to any demise, to contract to demise. The bill alleged that the commissioners, having first obtained the consent required, determined to demise, and afterwards contracted to demise to the plaintiff, and prayed a specific performance :- Held, on demurrer, that the bill could not be sustained. Nurse v. Seymour (Lord), 13 Beav. 254.

#### 3. Intrusion.

Trial.]-The Crown cannot by its mere prerogative have the venire facias juratores awarded into any county. Att.-Gen. v. Churchill, 8 M. & W. 171; 10 L. J., Ex. 314.

Pleading in.]-The court has no authority under 4 & 5 Anne, c. 16, s. 4, to allow a defendant to plead several matters in an information of intrusion. Att.-Gen. v. Donaldson, 7 M. & W. 422; 9 D. P. C. 319; 10 L. J., Ex. 139.

Venue.]—In an information of intrusion, the Crown may, as of its prerogative, lay the venue in any county, without regard to the local situation of the premises. Att.-Gen. v. Parsons, 2 M. & W. 23; 2 Gale, 227; 5 D. P. C. 165; 1 Tyr. & G. 980; 5 L. J., Ex. 243.

Commissioners of Woods. ]—The Commissioners | dwelling house being parcel of the royal palace of Woods and Forests having power, under the of Kensington, then in the occupation and in the intruded and made entry upon a messuage or hands and possession of the Queen, as in right of her crown. They pleaded in the form given by 23 Hen. 8, c. 5, s. 11, that they committed the trespasses under the authority of the commiswas not allowable in an information of intrusion at the suit of the Crown. Att. - Gen. v. Donaldson, 10 M. & W. 117; 11 L. J., Ex. 338.

The title of the Crown to lands of which it has

need not be first found by inquisition of office; the onus of proving title in the first instance, in first, where the Crown professes to give a greater such a case on the Crown. Att.-Gen. v. Pursons, estate than it possessed in the subject-matter of such a case, on the Crown. Att.-Gen. v. Parsons, 2 M. & W. 23; 2 Gale, 227; 5 D. P. C. 165; 1 Tyr. & G. 980; 6 L. J., Ex. 9.

Adverse Possession.]—Although the king can never be put out of possession in point of law by the wrongful entry of a subject, yet there may be an adverse possession in fact against the crown. Therefore, after such an adverse possession by a subject for twenty years, the Crown could only recover the land by an information of intrusion; consequently ejectment will not lie at the suit of the grantee of the Crown, notwithstanding the rights of the Crown are not barred by the Statute of Limitations. Doe d. Wall or Watt v. Morris, 2 Scott, 276; 1 Hodges, 215; 4 L. J., C. P. 285; 2 Bing. (N.C.) 189.

Duchy of Cornwall. |-- Prince of Wales may file an English information of intrusion by his attorney-general, for lands, parcel of the duchy of Cornwall. Att.-Gen. v. St. Aubyn, Wightw. 167; 12 R. R. 718, n.

#### D. CROWN GRANT.

Construction, |- Grants by the Crown are construed favourably to the grantor, and in such a case the usual rule as to the construction of grants is inserted. If it be shewn that the king is deceived in his grant, it will not include a subject-matter not expressed. Att.-Gen. v. Ewelme Almshouse Chaplains, 22 L. J., Ch. 846; 17 Beav. 366; 1 W. R. 523.

Words of Reference.]—A grant of a manor to A., with particular words of reference to a previous grant to B., as "with all liberties, &c., which B. had," in as full and ample manner as B. held and enjoyed, &c., is not sufficient to pass rights which had been granted to and enjoyed by B. without express words. Att.-Gen. v. Downshire (Marquis), 5 Price, 269.

Ancient Charter-Long and Continuous User, ] -In construing an old charter dated 1440 as to the limits of a borough, the fact that the usage of the last 150 years has been to rate a certain place to the relief of the poor of the borough is admissible to explain the meaning of the charter. Sattan Harbour Co. v. Plymouth Guardians, 63 L.T. 772; 55 J. P. 282.

Grants to Inhabitants of Parish.]-A grant made by the Crown to the inhabitants of a parish is good, though such grant cannot be made by private individuals. Willingdale v. Maitland, 36 L. J., Ch. 64; L. R. 3 Eq. 103; 12 Jur. (N.S.) 932; 15 W. R. 83.

Conditional Grant. ]-The Crown, by its prerogative, may annex a condition against alienation to a grant in fce. Fowler v. Fowler, 16 Ir. Ch. R. 507.

Crown Deceived.]—Injunction to stay suit because king deceived of fine. Pascall v. Smith, Cary, 77. Brockhurst v. Cotton, and Ward v. Cobone, Id. 85.

Grant made under mistake may be recalled, notwithstanding that derivative titles depend upon it. Cumming v. Forrester, 2 Jac. & W. 334 ; 22 R. R. 157.

- Grounds for Avoiding. ]-Grants from the only effect of 21 Jac. 1, c. 14, being to throw the Crown may be avoided upon three grounds; the grant; secondly, where the same estate, or part of the same estate, has already been granted to another; and thirdly, where the Crown has been deceived in the consideration expressed in the grant. Gledstanes v. Sandwich (Earl), 5 Man, & G. 995; 5 Scott (N.R.) 689; 12 L. J.

If the king makes a grant which cannot take effect according to its terms, it must be concluded that he has been deceived in his grant, and it is void. Alcock v. Cooke, 2 M. & P. 625; 5 Bing.

340 ; 7 L. J. (o.s.) C. P. 126.

Where, therefore, wreck was conveyed by a lease for a term of years which had not expired, if such lease is not recited in a grant conveying an immediate estate in fee to the grantees, such grant is void, because the king having already leased the right of possession, he cannot convey the same right to another, and all leases from the king must be inrolled. Ib.

Grant "in Trust," -The Crown, by royal warrant "granted to the Secretary of State for India in Council for the time being" certain booty taken in war "in trust for the use of certain persons, who had been adjudged entitled to it upon a reference to the Court of Admiralty, to be distributed among them, with a further provision that in case any doubts should arise in the course of the distribution the decision of the Secretary of State should be final, unless the Crown should otherwise order :- Held. (1) That the Secretary of State for India in Council could only sue or be sued as a corporation under 21 & 22 Vict. c. 106, s. 65, in proceedings which might have been taken by or against the late East India Company; (2) That the royal warrant constituted the Secretary of State for India in Council au agent of the Crown for the purpose of the distribution of the fund under the control of the Crown, but did not constitute him a trustee for the persons interested subject nm a truster for the persons interested subject to the control of a court of equity. Measurder v. Wellington (Duke) (2 Russ. & My. 35) dis-cussed. Brown v. Harris (13 Ves. 552; 9 R. R. 221) distinguished. Kinlowk v. Secretary of State for India, 51 L. J., Ch. 885; 7 App. Cas. 619; 47 L. T. 133; 30 W. R. 845—H. L. (E.).

An annuity was granted by the Crown to a trustee on trust to pay it into the hands of B. alone, her executors or administrators, and that she was not to have the power of depriving herself thereof either by sale, mortgage or anticipation:—Held, that a judgment registered as a mortgage under the 12 & 18 Vict. c. 29 (Irish), was an involuntary alienation, and was not a breach of the conditions, Fowler v. Fowler, 15 Ir. Ch. B. 507.

Grant of Undefined Shares.]-A grant from the Crown of undefined and unascertained shares in land will not be held void for uncertainty after long modern possession, for in such a case a supplementary and confirmatory grant may be presumed. Des Barres v. Shey, 29 L. T. 592; 22 W. R. 273.

Reservation of Right implies Means of Enjoyment. - It is a settled principle of law, that not only as between the Crown and a subject, but as between subject and subject, the reservation of a right implies the means of enjoying it. Gould v. Great Western Deep Coal Co., 12 L. T. S42.

A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by the water. Lord v. Sydney Commissioners, 12 Moore, P. C. 473; 33 L. T. 1; 7 W. R. 267.

A grant by the Crown of land bounded by a stream may include by implication the soil of the stream, ad medium filum aque. Ib.

Grant of Mines.]—The prerogative right of the Crown to gold and silver found in unines will not pass under a grant of hand from the Crown unless the intention that it shall so pass is expressed by apit and precise words. Wordley v. Att.-Gra. of lictoria, 46 L. J., P. C. 18; 2 L. R. App. Cas. 163; 30 L. T. 12; 25 W. R. & S2.

— Of Fee Farm Rents.]—Grantee of fee farm rents has the same power of distress as the king had; and so may distrain on other land of the tenant, though not subject to the rent. Att.-Gea. v. Coventry. 1 P. W. 306: 2 Vern. 713.

— In Derogation of Forestal Rights.]—
Grants by the Crown in derogation of forestal rights are good grants, though they would not be good except in derogation of such rights. Willingdate v. Maithand, 36 L. J., Ch., 64; L. R. 3 Eq. 103; 12 Jur. (X.S.) 982; 13 W. R. 83.

A grant by the Crown to the inhabitants of a parish which was a Crown manor and parish within a royal forest, that the labouring or poor people inhabiting the parish, and having families, might, during a certain period of every year, cut or lop the boughs and branches above seven feet from the ground, on the trees growing on the waste lands of the manor and parish, for their own use and consumption, and for sale, for their own relief, to all or any of the inhabitants for their consumption within the parish as fuel, is a valid grant. Ib.

— Of Escheated Land.]—A. and B. join in a petition to the Grown, representing an estate to have escheated, and procure a grant of it to be made to them:—Held, that A. could not afterwards set up a claim to one part under a prior title in himself, while taking the beuefit of the grant as to the rest. Cumming v. Forrester, 2 Jan. & W. SSH, 22 B. R. 157.

Semble, the doctrine of election does not extend to grants from the Crown. Ih.

Grant by the Crown of an estate, &c., for-feited, before, &c., any inquisition finding the forfeiture, is illegal. *Leighton's Cuse*, 2 Vern. 173

Of Land Subject to Provise for Re-entry, I—King Charles II. by letters patent, granted some property in fee, subject to a fee farm rent and to a provise of re-entry, in ease a decree should be made at the suit of the king for repairing the property, and the same should afterwards remain for a year out of repair. The Crown afterwards granted away the rest:—Held, that the provise for re-entry could not be exercised, and that it therefore formed no objection to the title to the property. Flower v. Hartopp, 6 Beav. 476: 12 L. J., Ch. 507; 7 Jur. 613.

Subsequent Grants and Statutes. - In 1830. A. obtained from the Crown a grant in feesimple of lands in the county of Chester. In 1853, the Birkenhead Docks Commissioners obtained from the Commissioners of Woods and Forests a conveyance of the same lauds, upon which, under the sanction of various acts of parliament (to some of which A. was an assenting party), the dock commissioners proceeded to construct docks and other public works. In 1855, all the rights and privileges of the Birkenhead Docks Commissioners were, by act of parliament, transferred to and vested in the corporation of Liverpool, and, by subsequent acts of parliament, from the corporation to the Liverpool Docks Commissioners, and ultimately to the Mersey Docks and Harbour Board :-Held, that the conveyance of 1853 could not divest the estate which had vested in A. under the grant of 1830; and that the subsequent acts of parliament created no statutable title either in the dock commissioners or in the Mersey Docks and Harbour Board, Vynor v. Mersey Docks and Harbour Board, 14 C. B. (N.S.) 753,

Substitution of other Landa, —If a private act confirms a settlement of estates made by a tenuar in tail under a grant from the Crown, and a subsequent act vests pair of those estates in tractees for sale, with directions to purchase often lands with the produce of such sale, to be other lands with the produce of such sale, to be other lands with the produce of such sale, to be other lands with the predecting act, the trustees have no power to convey the estates so granted to a purchaser in fee simple : and the substitution of other lands does not destroy the reversionary interest of the Crown in the estates originally granted. Mitprior v. Editalt, 1 Moore, 434.

An estate granted by the Crown to a subject as tenant in tail, for services, is not barriet so as to destroy the reversion of the Crown; all hough two private acts of parliament may have been passed, continuing a settlement by the tenant in tail, purporting to pass such reversion, the Crown being a party to actither of such acts, and each of them containing a saving clause, by which its rights were expressly reserved. Ib.

Under Letters Patent.]—Where a subject claims a specific portion of land, the property of the Grown, under a grant by letters patent, he must skew a specific description of the particular place as meant to be conveyed by the instrument, for he cannot avail himself of general words. Purmeter v. Gibbs, 10 Pice, 412.

For Benefit of Grown—Conditions.]—Semble, that grants from the Crown for the benefit of the king. by augmenting the revenue formded on inquisition ad quad bornum, must be conformable with the finding—must be acted upon promptly—must be upheld by possession and enjoyment—and the grantees must fulfi all continuing considerations, or the right of possession will not pass thereby from the Crown. Att.-Gen. v. Piermeter, 19 Price, 378. S. C. nom. Purmeter v. Att.-Gen., I Dov. 316, 323. And see Chata v. Nised, 2 Br. & B. 403; 5 Moroe, 185; and Gray v. Bond, 2 Br. & B. 667; 5 Moore, 257.

Held, that the provise for re-entry could not be exercised, and that it therefore formed no objection to the title to the property. Flower V. Hartopp, 6 Beav. 476; 12 L. J., Ch. 507; 7 Jur. 613.

good title could be made under the grant to this daughter, in such manner as titles are thereinparticular spot, the Crown having been in possession for about 150 years from the date of such grant, which must be presumed as against its own grant, there being no sufficient evidence of adverse possession on the part of the claimants.

Of a Town-Toll Traverse. - Where the king before the time of legal memory was entitled to the soil of the town of C., and to toll traverse within it, and afterwards granted to the burgesses of the town "the town of C. with all its appurtenances"; these words are sufficient to pass the toll. Brett v. Beules, M. & M. 426.

Rent-When Unauthorised, ]-Henry VIII. being seised of lands in fee, in right of his crown, granted them by letters patent in tail male to W., reserving rent to himself and his heirs and successors. After the 22 Car, 2, c. 6, and 22 & 23 Car. 2, c. 24, Charles II., by letters patent referring to and professing to pursue the former statute, granted the reut to trustees named in s. 2 of the 22 & 23 Car. 2, c. 24, their heirs and assigns, and the trustees granted the rent to a dean and chapter and their successors for ever : -Held, that the grant to the trustees was not authorised by either statute, the rent being reserved upon an estate whereof the reversion was in the Crown, and therefore being within the exception in 22 Car. 2, c. 6, s. 3. Vigers v. St. Paul's (Dean), 14 Q. B. 909; 19 L. J., Q. B. 84; 14 Jur. 1017-Ex. Ch.

- Of Fee Farm Rents-Loss by Non-claim. -It is no objection to title that two fee farm rents. created by letters patent by James I, are not shown to have been extinguished, it being proved that no claim has been made by the Crown for the rents from the year 1706, and no proof of any previous claim. Simpson v. Gutteridge, 1 Madd. 609: 16 R. R. 276.

Meaning of "Progenitors."]—By statute 10 Hen. 7, all manors, &c., advowsons, &c., whereof the king or any of his progenitors were seised in fee simple or fee tail from the last day of Edw. II.'s reign, were resumed and seised, and all fcoffments, &c., or grants, &c., made thereof, whether by act of parliament or by letters patent, were revoked:—Held, that the word progenitors was synonymous with predecessors, and that a grant of an advowson made by Edw. 4, by letters patent, was avoided by the act, whether or not it had belonged to him jure corona or as Earl of March; and, further, that by the avoidance of such grant, the advowson was re-appended to a manor to which it was before appendant, and which at the time of the resumption was still in the hands of the Crown. Meath (Bishop) v. Winchester (Marquis), 4 Cl. & F. 415; 11 Bh. (N.S.) 330.

In what cases the private property of the sovereign becomes merged in that of the Crown, considered. Ib.

Grant for Maintenance of Dignities. ]-Estates granted by the Crown for the maintenance of dignities, with reversion to the Crown, have the usual incidents, and may be taken in execution. Daris v. Marlborough (Duke), 2 Swanst, 136,

Estates which by 5 Anne, c. 3, are limited to the then Duke of M, for life, remainder to S., statute 17 Edw. 2, c. 15, created a restriction as his duchess, for life, remainder to heirs male of to advowsons of churches only, and did not apply

daugner, in such manner as trues are increm-before limited, in order that they may always "go along and be enjoyed with titles and dignities," with proviso restraining alienation to prejudice of persons in remainder, are not inalienable, and rents and profits may be effectually aliened by person in possession, as against himself. Pension granted by 5 Anue, c. 4, "for the more honourable support of the diguities" of Duke of M. and his posterity, payable out of revenues of post office, to such persons severally and successively to whom same should come by virtue of tha tact, with proviso, that acquittance of every such person should be sufficient discharge, is inalienable, S. C., 1 Swanst, 74.

Right to grant Fishery to Subject—Exclusion of Owner of Soil. ]—The Crown can hold a riverbed throughout a manor and the fishery in the river flowing over the same as parcel of the manor, and may grant the manor with the riverbed and fishery to a subject, and the subject may grant the banks of the river with reservation of the river-bed and fishery. Deconshive (Duke) v. Pattinson, 57 L. J., Q. B. 189; 20 Q. B. D. 263; 58 L, T. 392; 52 J. P. 276-C. A.

Grant of Advowson.]—A grant from the Crown of an advowson (excepted in a former grant under general words) will be presumed after a pos-session evidenced by title-deeds for 133 years, and three presentations. Gibson v. Clark, 1 J. & W. 159; 20 R. R. 266.

In 1437 an almshouse or hospital was founded and endowed by the lord of the manor of Ewelme for thirteen poor men, two priests for praying for souls and the education of youth, and the right of nominating the master was vested in the lord of the manor for the time being. Previous to 1518 the manor and the rights of patronage became, on the attainder of the lord, forfeited to the Crown. In 1618 King James I., by letters patent, granted the right of nomination of the master to the University of Oxford, for the support of the Regius Professor of Medicine, and in 1818 the manor, with all its advantages and endowments, was duly granted by the Crown to J. B. The following points were held :- First, that the rights of nomination and visitation, incidental to the manor, did not, upon the forfeiture by attainder, become merged and extinguished, but vested in the Crown; secondly, that the property, &c., of the hospital was not affected by the statutes for the dissolution of monasteries (27 Hen. 8, c. 28, and 31 Hen. 8, c. 13), but remained vested in the Crown as before; thirdly, that they were not, in any degree, affected by the act respecting chantries (1 Edw. 6, c. 14) so as to vest the property in the Crown, as its quasi "private possessions"; fourthly, that the founder, by annexing the right of nomination to the manor, could not and had not made them inseparable, but that the right of patronage was in the nature of a lay advowson, which the lord might alien without parting with the manor, and the converse; fifthly, that by the grant of King James to the University of Oxford, the jus patronatus had, de facto, been severed from the manor of E.; sixthly, that by the common law the grant of a manor by the king cum pertinentibus would pass an advowson appendant to it, and that the body of duke, remainder to all and every his to the present case of a lay advowson. Att. Gen.

the Crown contained an exception of all churches and vicarages thereto belonging, a perpetual curacy belonging to the rectory passed by the grant, not being included in the exception. Arthington v. Chester (Bishop), 1 H. Bl. 419.

Tithe.]-A grant by Edw. 6 of certain tithes originally appropriated to a dissolved priory by the description of "omnes alias decimas garbarum, granorum, blodorum fæni lanæ et agnellorum ac alias decimas nostras quascunque," &c. :-Held, to pass the rectory and all tithes. Holdsnorth

v. Fairfax, 3 Cl. & F. 115; 8 Bh. (N.S.) 882.
The words "tithes" and "hereditaments," occurring amongst words of general description in a grant, after a particular description of the thing intended to be passed, will not pass tithes in gross. Att.-Gen. v. Eurdley (Lord), Dan.

271; 8 Price, 39.

Where, on the dissolution of monasteries, the possessions of an abbey came to the Crown, and the Crown subsequently granted all the tithes yearly renewing, with all their rights, members. and appurtenances : -Held, that the Crown being the rector, or in loco rectoris, the tithes granted must mean the rectorial tithes, or all the tithes, except such as had been withdrawn by an endowment for the minister. But royal grants being strictly construed, the court would not hold that the grant extended to the rectory, the rectory not being granted in express terms.

Pierrepoint v. Scarlet, 2 Y. & J. 330. Affirmed sub nom. Scarlet v. Lucton School Governors, 4 Cl. & F. 1; 10 Bli. (N.S.) 592,

Fair.]—The grant of a fair "cum omnibus libertatibus et liberis consuctadinibus ad lunjus modi feriam pertinentibus" does not give a right to take tolls. Egremont (Earl) v. Saul, 6 A. & E. 924; 6 L. J., K. B. 205.

A grant of a fair or a market, with an express grant of toll, passes reasonable toll, though no amount be specified. Stanford Corporation v. Pawlett, 1 C. & J. 57; 1 Tyr. 291. In error, 1

C. & J. 400.

Office of Barmaster-Lot and Cope. ]-Where a lease from the Crown of lot and cope also contained a grant to the lessees of the office of barmaster, the grant of the office was void. because the barmaster had duties which could not be impartially executed by the lessee. Ark. wiright v. Cantrell, 7 A. & E. 565; 2 N. & P. 582; W. W. & D. 686; 7 L. J., Q. B. 63; 2 Jur. 11.

But the grant was not void, as giving incompatible offices, the lease not conferring an office.

Office amounting to a Pension. ]-The office of chamberlain and collector of revenues payable to the Crown out of Ettrick Forest was granted by Geo. 4 to Lord D. for his life, with a salary, as well in consideration of the office as out of royal bounty and favour, to be paid out of the moneys of the collection, and, if they should be insufficient, out of the Crown revenues of other lands in Scotland. The salary exceeded the moneys collected, and was paid out of them and the other Crown revenues for several years after the demise of Geo. 4:-Held, that the grant, under grant of a pension to endure beyond the life of 9 Hare, 415; 21 L. J., Ch. 97.

v. Excelme Hospital, 17 Beav. 366; 22 L. J., the royal grantor, and was so far an illegal alienation of the Crown property. Advocate (Lord).—Where the grant of a restaur by (Lord) v. Dunglass (Lord), 9 Cl. & F. 173.

Theatre Patent. ]- No play can lawfully be acted for hire, gain or reward within twenty miles of London, without the authority of letters patent from the king, or of a licence from the lord chamberlain; and no such letters patent, or licence, can be granted so as to authorise the performance of plays at any place except within the city or liberties of Westminster, or where the king may happen to reside. An agreement, therefore, for a partnership in acting plays at a theatre situate within twenty miles of London, but not within the city or liberties of Westminster, or in the place of the king's residence, is one to which the court will not give effect. Ewing v. Osbaldiston, 2 Myl. & C. 53; 6 L. J., Ch. 161; 1 Jur. 50.

The court refused to seal a patent for representing Italian operas, because the provisions for carrying it on were by agreement with the lord chamberlain, his executors and administrators, and the right to the patent was not sufficiently connected with the property in the house. Not sufficient for the party applying merely to answer objections, but he must lay a proper case. Upon such application the court will take care that the king is not deceived, or his object disappointed, and will represent the whole to the king, but will not decide upon the merits of the various claimants. Essential to the complaint of an old market against a new one set up near it, that the old is competent in the accommodation of the public; so here the old proprietors must be able to keep it up properly, the accommodation of the public being the principal thing. O'Reilly, Ex parte, 1 Ves. J. H2; 1 R. R. 89.

By 26 Geo. 8, c. 57, s. 1, the Crown was authorised to grant letters patent for establishing and keeping a theatre in Dublin; and, by s. 2, it was enacted that no person should, for hire, act any play in any theatre in Dublin except in such theatre as should be so established by letters patent, under the penalty of forfeiting 300% for every such offence, to be sued for by the common informer. Under this statute the Crown granted letters patent to H., authorising him, during a certain time, to keep a theatre in Dublin, and his majesty prohibited all persons from keeping during the term open, in any manner, any theatre in Dublin, and therein acting any play, unless they should be thereunto authorised by his majesty—Held, that the patentee could not maintain a bill for an injunction to restrain unauthorised persons acting plays in a theatre in Dublin, for the keeping of which no patent had been granted; and that such a bill could only be maintained upon the ground of interest in the plaintiff. Calcraft v.

Trade Patent.] - The Crown has always exercised a control over the trade of the country, and though restrained by the common law and the Statute of Monopolies (21 Jac. 1, c. 3) within reasonable limits, the Crown might grant the exclusive right to trade with a new invention for a reasonable period. The statute 21 Jac. 1, c. 3, did not create, but controlled, the power of the Crown in granting to the first inventors the disguise of a grant of an office, was in reality a new manufactures. Caldwell v. Vanvilisengen, privilege of the sole working and making of

West, 2 Jo. & Lat. 123; 8 Ir. Eq. R. 74.

The prohibitory words of the patent, which Kingston-npon-Hull Corporation v. Homer, are addressed only to the subjects of this country, are in aid of the grant and not in derogation of

Where a legal right exists, the court cannot refuse to interfere for its protection, upon grounds which depend exclusively on considerations of national policy. Ih.

Before the Patent Act, 1883, a company contracted with the Crown to provide and deliver a quantity of Martini-Henry rifles at a fixed price per rifle, and according to a specification. The stocks and the tubes for the barrels were to be supplied to the company by the Crown, and the rifles, when completed, were to be submitted to officers of the Crown for approval. In order to carry out this contract the company was compelled to make use of an invention for breech action, for which letters patent in the usual form had been granted by the Crown to the plaintiff:—Held, first, that the Crown's right to use the invention was not affected by the grant of letters patent for the use of it to the plaintiff. Dixon v. London Small Arms Co., 46 L. J., Q. B. 617; 1 App. Cas. 632; 85 L. T. 559; 25 W. R. 142.—H. L. (E.)

Held, secondly, that the company were private contractors, and not servants or agents of the Crown, and were therefore liable in an action by the plaintiff to recover damages for the infringement of his patent. Ib.

Letters patent, under which lands sold by private contract were held, contained covenants by the grantee : first, that he would place three free tenants of English or British race, blood, or name, on the premises, each of which should have fifty acres, or one free tenant, who should have one hundred acres for one life; secondly, that he should have on the premises eight cullivers or muskets, and a proper number of arms to arm eight pikemen for his defence against rebels, &c.; thirdly, a provise that if he should demise any part of the premises to the mere Irish for any term exceeding forty-one years, or three lives, or if he should demise the premises limited to be disposed of to any British or English person to any person being mere Irish, the Crown might re-enter. The particulars of sale described the lands as a valuable fee-simple property, and one of the conditions of sale alluded to the letters patent. It appeared from a statute (10 Car. 1, s. 3, c. 3), and certain public documents therein referred to, that the covenants were those inserted in patents at the plantation of Ulster, where the lands were situated :- Held, that the purchaser, having express notice of the letters patent, was bound by constructive notice of the covenants contained in them ; held, also, that the first and third eovenants were no longer in force, every subject of the Crown, since the Union, being a person of British race, name, and blood, and there being no person now answering the description of mere Irish; semble, the second covenant could not now be enforced by the Crown. Stewart v. Conyngham (Marquis), 1 Ir. Ch. R. 534.

Presumption, when Allowed.]-A grant or a charter from the Crown, which ought to be by matter of record, may, under circumstances, be presumed, though within the time of legal memory. In this case the presumption was founded on a possession of 350 years, and

Cowp. 102; Loft, 576.
A right founded upon length of enjoyment originates in a grant which is presumed from the owner, but the presumption of a grant only arises where the person against whom it is to be arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant. Chasenore v. Richards, 7 H. L. C. 349; 29 L. J., Ex. 81; 5 Jur. (R.) 873; 7 W. R. 685—H. L. See also cases sub tit. FISH AND FISHERY.

- Occasional Occupation and Rent.]-Payment of a nominal rent to the Crown, the occasional occupation of the land by sporting occasional occupation of the grass by a sorvant, constitute sufficient evidence of actual possessitute sufficient evidence of actual possessitutes actu constitute summent evidence of media possession. A party in possession under such circumstances has no legal title as against the Crownstances has no legal title as 5 p. 579 - 4 p. 10 p. Harper v. Charlesworth, 6 D. & R. 572; 4 B. & C. 574; 8 Man. & Ry. 572; 3 L. J. (0.8.) K. B.

Encroachments. ]—A possession of Crown-land, commencing at least fifty-five years ago, by encroachment on the Crown in the time of by encroncement on the clove. It is the control of the plaintiff's father, maintained by the father till his death, nineteen years ago, and after words continued for two years by his widow, words continued for two years by his widow, when the defendant obtained the possession. would be sufficient evidence for the jury to presume a grant from the Crown to the father, if the Crown was capable of making such a grant, in order to support an ejectment by the eldest son and heir of such first possessor. against the defendant, who had no apparent title, and whose possession was not defended by the Crown, nor found to be by licence from it.

Goodtitle d. Parker v. Baldwin, 11 East, 488.

Rebuttal of Presumption. ] - But it appearing, upon a second trial, that by 20 Car, 2 appearing, apon a second stan, but the Crown in c. 3, all future grants of land by the Crown in the Forest of Dean (within which the land in question lay) were avoided, and consequently no presumption could be made of a valid grant; the plaintiff was not entitled to recover even against a stranger, whose possession, adverse to him, was not defended by the Crown : and this notwithstanding a part of the premises was first held by the father sixty years ago; and by 9 Geo. 3, c. 16, the suit of the Crown is barred after a continuing adverse possession for sixty years under the original trespasser; for, from the death of the father, nineteen years ago, the possession was adverse to his heir, the plaintiff or, at least, the defendant's possession for the last seventeen years was adverse; and the 9 Geo. 3, c. 16, does not give a title to the first wrongful possessor and those claiming under him, but only bars the remedy of the Crown against them after sixty years' continuing adverse possession by them; and as it does not repeal the 20 Car. 2, c. 3, no presumption of a grant to legalise the possession of the father for the first forty-one years, on which alone the lessor's claim could be founded, can be made against that statute. Ib.

Rights in Town-Absence of Proof that certain Streets were Property of Crown-Adjoining Owners.]—By a charter of 1215, King John granted to the corporation of Droit. wich quicquid scilicet habemus in eadem villa adjudged by the court as sufficient ground, to have and to hold to the burgesses for even

There was no proof that certain streets in the Held, that the grantee was bound to prosecute his demesne :- Held, that the presumption that the soil of these streets was vested in the adjoining owners was not rebutted by such grant. Salt Union v. Harrey, 61 J. P. 375.

Duchy of Lancaster.]—Although the king holds lands as Duke of Lancaster, he holds them as king also, and the prerogative and privileges of the king belong to him with reference to those lands, as they do with respect to those which belong to him immediately in right of his crown; therefore a grant nuder the duchy seal is subject to all the incidents of a grant from the Crown. Alcock v. Cooke, 2 M. & P. 625; 5 Bing, 340; 7 L. J. (o.s.) C. P. 126.

Irish Grant.]-The Earl of A. being seised in fee, under a grant to his ancestor by King James II., with a licence to alien, to be held of the grantee and his heirs non obstante the Statute of Quia Emptores, conveyed the lands to J. B. and his heirs in 1834 :- Held, that no reversion being left in the earl, the lands were not let, set, or demised within the meaning of 2 & 3 Will. 4, c. 119. s. 13 (Stanley's Act), and that therefore the estate of J. P. was liable to the tithe-rent charge. Verschoyle v. Perkins, 13 Ir. Eq. R. 72.

Colonial Grants. ]-A grant of lands made by the governor to a land claimant founded upon the recommendation contained in the report of a commissioner, such grant embracing a quantity of land exceeding the amount prescribed by ordinance, sess. 1. uo. 2 of 1841 :- Held, in seire facias, void, and judgment given for the Crown. Reg. v. Clarke, 7 Moore, P. C. 77.

Querc, whether the governor of the colony of New Zealand has, under his general authority as such governor, vested in him so much of the prerogative of the Crown as relates to the making of grants of waste lands within the colony. Ib.

Anunity in fee granted by Car. 2 out of Barbadoes duties is not a rent nor realty, nor within statutes, either of frauds or de donis, &c. ; therefore, being settled on A. "and the heirs of her body," it was held to amount to a fee-simple conditional at common law, the remainder over being void; and that A., having had issue, might bar the possibility of reverter. Stafford (Earl) v. Buckley, 2 Ves. 171.

A lease granted by the Crown of all mines in the province of Nova Scotia :- Held, to include mines in the island of Cape Breton. Taylor v. Att.- Gen., 8 Sim. 413.

In the year 1827 letters of preference of escheated property in the island of Jamaiea were granted under the Great Seal of the island, by the terms of which it was provided, that the date thereof, or such further time as the governor of the island should limit and appoint. take the necessary steps to prosecute the rights of the Crown to the escheated property, otherwise the preference thereby given was to be void. The grantee entered into possession and received the rents and profits, but took no further steps to prosecute the escheat to final judgment for the Crown, Upon an information filed in 1835 by the attorney-general of Jamaica, praying received by him since he had been in possession: (0.s.) Ex. 124.

borough ever were the property of the king in the escheat to final judgment for the Crown within a proper time; and that he was liable to account to the Crown within a proper time : and that he was liable to account to the Crown for the reuts and profits received by him from the time of entering into possession. Mason V. Jamuica (Att.-Gen.), 4 Moore. P. C. 228; 7 Jur. 1071.

The act for regulating the sale of waste land belonging to the Crown in the Australian Colonies (5 & 6 Viet., c. 36) contains no reference to the rights of the crown in the precious metals to be found under the soil:—Held, that the statute had not so modified the common law that a sale of waste lands under it must be taken to include a grant of the gold and silver that may be found under the lands so sold Ib.

#### E. CROWN DEBT.

1. WHAT ARE CROWN DEBTS, AND WHAT NOT.

Term attendant is liable for king's debt. How v. Nicholl, Pre. Ch. 125; 2 Vern. 389. Bond to king, in political capacity, subsists to his successor. Rev v. Bradford, Dick. 24.

Recognizance by a gnardian in the matter of a minor is not a debt due to the Crown. Where a debt to the Crown is not of a public nature, Crown process should not issue. Usher, Ex parte, 1 Ball & B. 199.

Recognizance by a guardian in the matter of a minor not being a real debt due to the Crown, but a mere form of security, the person secured by it can derive no preference in bankruptey over other creditors. Dalton, In re, 2 Moll.

The recognizance of a tenant under the court, and his sureties, is not a debt due to the Crown, Creed v. Creed, 4 Ir. Eq. R. 299. S. P., Bell v. Tape, cited in Keily v. Murphy, San. & Sc. 488.

C. & Co. were legal mortgagees and specialty creditors for a sum of 30,000%, on Y.'s estate, Certain official persons acting as trustees for the Crown paid off this debt, and received an assignment of the mortgage, and of a covenant therein contained, with liberty to sue upon it, in trust for the Crown :-Held, that the Crown was legal mortgagee and specialty creditor for the 30,0001. originally due to C. & Co. Att.-Gen. v. Con., Pearre v. Att.-Gen., 3 H. L. Cas. 240. Reversing on this point S. C. nom. Greenwood v. Taylor, 14 Sim. 505; 9 Jur. 480.

The recognizance entered into before the clerk of parliament to seeme the costs of an appeal to the House of Lords, constitutes a Crown debt, which is not subject to the provisions of the Debtors Act, and therefore the person bound by such recognizance is, when the same is estreated, grantee should, within twelve months from the liable to imprisonment for nonpayment of the sum in which he is bound. Smith, In re, 46 L. J., Q. B. 73; 2 Ex. D. 47; 35 L. T. 858.

A Crown debtor was released from prison by the favour of the Court of Exchequer upon giving a promissory note for the amount of his debt. Smith, Ex parte, 25 W. R. 184.

An agent of a fire insurance company, who has received premiums and duties for the company to whom he has given security, is liable to a writ of immediate extent for the duties, although the that the grantee might be declared accountable company is also liable to the Crown.  $\widehat{Rex}$  to the Crown in respect of the rents and profits Wrangham, 1 C. & J. 408; 1 Tyr. 383; 9 L. A person employed in the service of the Crown issued against the estate of B., who had been a as deputy commissary-general to the forces; surely to the Crown for A., the Crown claimed abroad, and assistant commissary in the islands priority as to the whole fand in court, insisting of Guernsev and Alderney, and employed in the negotiation of Bank of England notes received from the paymaster-general of the forces, and of hills of exchange received from the Treasury on account of the public service, having also received specie on the same account, is accountable to the Crown, and is, as such accountant, within 13 Eliz. c. 4, s. 1, and his lands, of which he was serised at any time during the period of his accountability, are bound by his engagement with the public, and subjected to preognitive process for security and payment of the balance ultimately declared against him. Rew v. Ruwlinus, 12 Price, 834.

A bond to the Crown, under 33 Hen. 8, c. 39, binds all lands of the obligor over which he had a disposing power at the time he entered into the bond, and the giving of such bond is a volun-tary act on the part of the obligor, and he cannot, by afterwards exercising the power, defeat the right of the Crown. Ellis v. Reg., 6 Ex. 721—Ex. Ch. Aftirning 4 Ex. 652; 19 L. J., Ex.

33 Hen. 8, c. 39, says that all obligations and specialties made to the king, or his heirs, shall be made payable by these words:—Solvend' eidem domino Regi, hæred', vel executoribus suis. But a bond taken to the king, his heirs and successors, is good; these words in the statute being only directory. *Yale* v. *Rex*, 6 Bro. P. C.

A bond given to the Crown by the committee of a lunatic, on his appointment, is within 33 Hen. 8, c. 39, s. 50, and the Crown is entitled to treat it as a matter of record, and have a scire facias thereon. Reg. v. Chambers, 11 M. & W.

A debt due to the Crown, overriding the entire estate of the debtor, having been levied out of one portion of it only, vested in a mortgagee, the mortgagee is not entitled to contribution from purchasers of other portions of the estate of the Crown debtor, who derive title under a settlement for valuable consideration prior to such mortgage.

Hartley v. O'Flaherty, Ll. & G. t. Plunk. 208.

Deposit of title-deeds by simple contract debtor

of Crown, for securing part of purchase-money to be paid in consideration of other lands sold to him, is an equitable mortgage, and binds the Crown; and that, although purchaser have also given his bond to vendor for whole amount.

Cusherd v. Wurd, 6 Price, 411.

Where Crown had seized for its debt lands of simple contract debtor, affected with an equitable mortgage, the court ordered the money due to mortgagee to be paid out of the proceeds of the sale before the Crown should be satisfied. Ib.

A., by deed, assigned certain sums represented by a fund in court to B., in trust to apply the same in payment and discharge of money then due from A. to B., and in further payment of all and every the sums of money which B. might advance to A., and subject thereto in trust for A. A. died indebted to B. in the sum of 3,000%, due at the date of the assignment, and also largely at the date of the assignment, and as hagely indebted to the Grown. A was further indebted to a banking firm, of which B. was a partner, in a sum which was treated by the partnership as a bad debt, and in respect of which B. s share of the loss amounted to 3,914L, and a further sum of 2,313%. was paid after the death of B., by his of suitors' moneys deposited with him for safe executor, to the Crown. Upon process being custody, as treasurer for the time being, under

that the property comprised in the deed consisted of choses in action, and that no notice had been given to the trustees of the fund :-Held, that the estate of B, was entitled to the benefit of the deed, in respect of the sum due at the date of it, and the sum paid by A.'s executor, but not to the sum representing B.'s share of the loss in the partnership transaction. Foster v. Hargreaves, 1 Keen, 281,

#### 2. PRIORITIES OF.

Distress. ]-Where claims of the Crown and of a subject as creditors come into competition, the a subject as creations come into competition, the prerogative right of the Crown to priority is not limited to proceedings by writ of extent, but equally attaches in proceedings by distress, although the distress put in by the Crown be subsequent in date to that of the subject, provided the distress put in by the subject has not been completely executed by actual sale. Att.-Gen. v. Leonard, 57 L. J., Ch. 860; 38 Ch. D. 622; 52 L. T. 624; 87 W. R. 24.

Bankruptcy. ]-When claims of the Crown and of a subject, as creditors, come into competition, the prerogative right of the Crown is not limited to proceedings by writ of extent, but equally attaches to proceedings by sci. fa. upon a bond; and a debt due to the Crown, together with such costs as were incurred in proceedings to enforce it, is a preferential debt upon the assets of the bankrupt. Corley, In re, L. R. 28 Ir. 249.

Postmaster-General.] - Letter-receivers were in the habit, with the sanction of the postmastergeneral, of paying moneys received on account of the post-office into a bank to their private account, together with their own moneys, and of drawing cheques both for their own purposes and for payment to the post-office. The bank had notice that their customers were letterreceivers and drew cheques for post-office purposes. The bank having gone into liquidation:
-Held, that the postmaster-General, on behalf of the Crown, was entitled to payment in priority over other creditors of the bank of the balance due upon the letter-receivers' accounts in respect of post-office moneys. *How* v. *Ward* (2 Ex. 301, n.) followed. *West London Commercial Bank*, *In* re, 57 L. J., Ch. 925.; 38 Ch. D. 364; 59 L. T. 296.

Property Tax.]—The Crown has priority over the general creditors of a liquidating company in respect of property tax due from the company on the winding-up where no distress or entry in respect thereof has been made. Healey & Co., In re, 48 L. J., Ch. 147; 9 Ch. D. 479; 39 L. T. 53; 26 W. R. 885—C. A.

Extent of Priority in Colony. ]-Held, that the right of the Crown to be paid, in preference to other creditors, out of the estate of a defaulting treasurer (at Trinidad), was confined to his default in respect of moneys in his hands as treasurer, and as part of the revenue of the colony, and did not extend to a claim in respect an order of the Court of Audience of the island. Wildes v. Att. Gen. for Trinidad, 3 Moore, P. C. 200.

Rights of Surety.]—A surety to the Crown who has paid the debt of his deceased principal, is entitled to the Crown's priority in the administration of his principal's estate. Churchill (Lord), In rc, Manishy v. Churchill, 39 Ch. D. 174; 59 L. T. 507; 80 V. R. 803.

#### F. EXTENT, EXECUTION BY.

#### 1. GENERALLY.

Distinction between Extent in Aid and Extent in Chief in Second Degree. —The distinction between an extent in aid and an extent in chief in the second degree is this: the first is where the extent is suged at the instance of a Crown debtor against his clebtor, to aid his payment of the Crown debt, the latter is a bestle proceeding by the Crown against the debtor of a Crown debtor, against whom also an extent in chief has issued. Rev. v. Sandke, 11 Price, 772.

Does not Defeat Right of Grown Debtor to Sue his Debtor.]—An extent at the suit of the Crown against the debtor of its debtor has not, before inquisition taken, the effect of divesting the Crown debtor's right to sue his debtor or to receive the debt. Lakeman v. M'Adam, 8 Price, 576; 22 R. R. 774.

Sale of Goods under—Effect of Agent of Crown Bidding at.]—A sale under an extent is not vitiated as against a purchaser by the agent of the Crown making a bona fide bid for himself. Hew v. March, 1 C. & J. 407.

Satisfaction of—Right to Surplus.]—In 1802, in pursuance of an order of the court under 25 Geo. 3, c. 35, the extended lands of a Crown debtor were sold for more than the amount of the Crown debt, and the debtor being a lunatic, the amount of the purchase-money was, by order of the court, paid into the hands of the deputy remembrancer, and was by him invested in the public funds in the name of the accountant-general. In 1841, by 5 Vict. c. 5, the fund and accumulations were vested in the Queen's remembrancer to attend the orders of the court. On the petition of the helot of the debtor:—Held, that he was entitled to the surplus of the moneys after payment of the Crown debt, interest and costs. Delemette, In re. 27 L. J., Ex. 110; 2 H. & N. 559.

Costs of.—In cases of extent, costs are not recoverable where goods and lands are seised, and the goods alone are more than sufficient to pay the debt leviel, not even in the case of an immediate extent. Rew v. Hupper, 3 Price, 40.

Other Points.]—Notice of motion for order of sale of Crown debtor's mortgaged lands, under extent, should be given to mortgagee before the motion. Rex v. Combes, 1 Price, 207.

If estate subject to mortgage be sold absolutely, under extent, and purchase-money paid into court. Crown will not be allowed, on motion, to satisfy mortgagee, but court will order reference to deputy remembrancer to ascertain what is due on mortgage. Ib.

Court will not interfere to assist a purchaser for valuable consideration of estate, soized make extent against vendor, for which he has paid the principal part of purchase-money, and offers to pay the remainder to Crown, or to give up the estate on satisfaction made to himself. Rew v. Hollier. 2 Price. 394.

It is no objection to the title of an estate that an extent has issued from the Crown against the owner, which remained in the hands of the sheriff unexcented; it appearing that the lovids of the treasury had, in fact, compromised the debt, though a writ of amoves manus had not actually issued. Poole v. Shergold, 1 Cox, 160; 1 R. R. 37.

An extent of the Crown is an action and execution in the first instance. Marshall, Expurte, 1 Atk. 262.

Upon the assignees of a bankrupt, against whom an extent had issued, paying the Crown's debts, and performing the bankrupt's promise to pay his father's debt to the Crown, the extent was discharged. Rev v. Lacy, Bunb. 337.

25 Geo. 3, c. 35, gives the Crown no right to costs. Ib.

#### 2. EXTENT IN CHIEF.

#### a. What may be Taken Under.

Lands.]—The lands of every person who has received money belonging to the Crown, or for which he is accountant to the Crown, are liable to an extent under 13 Eliz. c. 4. Wilde v. Forte, 4 Tuntt. 384: 13 R. R. 616.

And at common law also. *Ib.*A simple contract debt to the Crown will not bind the land of the debtor in the hands of a bona fide purchaser. *Row* v. *Smith*, Wightw. 34.

Equitable Mortgage, ]—An equitable mortgage by deposit of title-deeds by an accountant of the Crown, in the hands of one who has an opportunity of knowing that the depositor is, or may become, a debtor of the Crown, is not available against an extent. Broughton v. Davis, 1 Price, 216.

An equitable mortgage, by a deposit of title-deeds, was established against the claim of the Crown under an extent. Casherd v. Att.-Gen., 1 Daniel. 238.

Equity of Redemption.]—An equity of redemption may be taken under an extent. Rew v. De la Motte, Forrest, 165.

Mortgage Term.]—Where A. having, by marriage articles, dated in 1795, covenanted to settle lands, to be purchased with a certain sum of money, to uses (in strict settlement), and in 1802 entered into bonds to the Crown, and in 1802 purchased lands in fee, and had a mortgage term assigned to a trustee to attend the inheritance, and the estate then settled to the uses declared by the articles, under which he himself only took a life interest:—Held, that the term did not protect the inheritance of the fee against the Crown's debt, the settlement being voluntary. Rew v. 8. John, 2 Price, 317.

Term to attend Inheritance.]—A term of years, originally created out of an estate purchased by a person who afterwards became indebted to the Crown, to secure a sum of money

purchaser of the estate for a valuable consideration without notice, to attend and protect the inheritance, such latter purchaser claiming directly under the first incumbrancer by a title paramount to the Crown debtor, is not liable to an extent for a Crown debt. Rev v. Lumbe, M'Clel. 402; 13 Price, 649.

Money Paid by Agent of Crown to Sheriff. |--A sheriff cannot retain against the Crown a sum of money deposited by an agent of the Crown, to cover the expenses of a sale by auction of property seized under an extent, and sold under a venditioni exponas. Her v. Jones, 1 C. & J. 140; 9 L. J. (o.s.) Ex. 2.

Goods Chargeable with Duties.]-A tax-collector was accustomed to pay moneys received on account of taxes to R., who paul the sum into his banker's, to his private account, with knowledge of the banker that the same were blended with the moneys of R. The banker having become insolvent :—Held, that an extent in chief might issue against him for the recovery of the Crown moneys, the amount being a question for a jury. Reg. v. Ward, 2 Ex. 301.

Goods which have become chargeable to the Crown for duties cannot be discharged, except by an actual bonâ fide sale. Att.-Gen. v. Trueman, 11 M. &. W. 694; 13 L. J., Ex. 70.

Crown held entitled upon information for money had and received to recover the entire proceeds of a sale of malt, on which W., who had advanced money thereon, claimed a lien for his advances, and the Crown claimed duties, the facts not amounting to an authority from the Crown for W. to appropriate them, or to payment by the Crown of his claim; and, therefore, the question mooted, whether the Crown can recover money paid under a full knowledge of the circumstances, but in ignorance of the law, not arising. Att. Gen. v. Warmsley, 12 M. & W. 179 ; 13 L. J., Ex. 66.

An extent in chief may issue against a banker for the recovery of interest allowed by him on the half-yearly balance of a tax-collector's account, in which his own and the Crown moneys are blended together: also to recover the amount of a banker's promissory note, in the hands of a tax-collector, and received by him in payment of taxes. *Iteg.* v. *Adams*, 2 Ex. 299.

A sum of money in the hands of the accountant-general in bankruptcy, to the credit of a party against whom an extent had been issued, was seized by the sheriff into the hands of the Crown, although, in consequence of its being in the accountant-general's hands, he could not obtain actual possession of it; the court granted a rule calling on the sheriff to pay over the money to the use of the Crown, but refused to make the accountant-general a party to the rule. Reg. v. Austin, 1 D. (N.S.) 666; 10 M. & W. 691; 12 L. J., Ex. 85; 6 Jur. 222.

Semble, that the lien of the Crown for duties in arrear is divisible, and confined to the several specific matters in respect of which the various several sums of the duties have accrued; and that the whole is not liable generally to the satisfaction of the duties arising on each several part. Rew v. Dale, 13 Price, 739.

The 3 Geo. 4, c. 95, s. 10, gave a lien for arrears of stage-coach duties upon the coaches real property (freehold and leasehold) should

due by one of the vendors, and vested in a and horses and barness employed therein, in trustee for that purpose, and after several mesne respect of which such arrears had accrued:—conveyances assigned to a trustee for another Held, first, that the lien attached though the property had passed to the assignees under a commission of bankruptey; and, secondly, that the duties on each coach attached as a lien upon that coach, &c., only, and not upon the general stock of coaches, horses, &c. Day, in re, M'Clel. 384.

> Goods already Seized under Fi. Fa. ]-Goods of the debtor already seized under a fi. fa., but not sold, may be taken under an extent, either in chief or in aid. Giles v. Grover, 9 Bing, 128; 2 M. & So. 197; 1 Cl. & F. 72; 6 Bligh (N.S.) 277.

> Partnership Property.]—Under an extent against one partner, the Crown can only take the separate interest of the partner, liable to the partnership debts. Hex v. Sunderson, Wightw. 50: 12 R. R. 713.

> If two writs of extent are issued, the one for a joint debt and the other for a separate debt, in the same sum, and the inquisitions find a joint debt and a separate debt in different sums, the court will not set them both aside on the ground of irregularity, but will support that which is correct. Rew v. Mallett, 1 Price, 395.

> Where a joint debt has been found, the death of one of the debtors does not vitiate the proceedings as against the survivor. Ib.

A. and P. carried on business in partnership; they were also members of a firm which traded as C. & Co.; A. & B., for the purpose of paying off certain of their debts, assigned in trust to the other members of the firm of C. & Co. portions of their shares in that firm. The assignment, which was bona fide, was regularly intimated, and it was duly entered in the books of the firm. An extent at the suit of the Crown afterwards issued against A. and B. :-Held, that the portions of shares thus assigned could not be seized under the extent. Spears v. Lord Advocate, 6 Cl. & F. 180 : 1 Robinson, 585.

Debt in Wife's Right.]—A debt due to a man jure uxoris is considered as originally due to him within 7 Jac. 1, c. 15, and therefore seisable on an extent. Reg. v. Thornton, Park, 271,

One Man's Land, where Many Liable.]-Not to extend one man's land only, where many are liable. Reg. v. Colbourne, Cary, 111.

Other Points.]—Where conusee of a statute extends lands in one county, which extent is afterwards returned and filed, yet all the lands of the conusor, though in other counties, shall Outs v. Robinson, 2 P. W. 91.

After an estate had been held under an extent

for a long time, and has gone through several hands, whether upon a bill to redeem, the defendants shall account otherwise than at the

extended value. Poole v. Guise, 1 Vern. 468.

A. is bound by statute to B.; C. lends money to A., and land is bought therewith; B., extending this land, has priority. Anon., Cary, 8.

Equitable mortgage by deposit of deeds by accountant of Crown, to one who has opportunities of knowing mortgagor is or may become a debtor to Crown, not available against extent. Broughton v. Davis, 1 Price, 216.

Agreement on borrowing (by recital in bond) money, on the part of the borrower, that certain stand pledged for repayment of it; and a de-which they arise, although process does not issue livery of the title-deeds, amounting, in equity, till after an assignment of it to a provisional to a mortgage, or right to a mortgage, creates assignee under a commission of bankruptey. a lien binding as against the prerogative lien of the Crown, in respect of a debt accruing due to the king subsequently; and the equitable mortgagees are entitled to be first paid their principal and interest out of the produce of the sale of the premises, the property of the Crown debtor seised under an extent in chief. Fector v. Philpott, 12 Price, 197; 26 R. R. 650.

Debt to the Crown levied out of lands mortgaged by debtor subsequent to becoming indebted to the Crown :- Held, that all the estates of which he was seised whilst a Crown officer must, according to their ratable value, be contributory with the mortgaged premises to pay the debt; excepting, however, lands purchased under decree of foreclosure against debtor; the purchaser not having notice of the Crown debt, and having got in an old judgment against the ancestor of the debtor : the court would itself be the agent of a fraud if it displaced a title given by itself, where the proceedings were in all respects conformable to the rules and established law of the court : the purchaser paying his money into court, and the conveyance made under its sanction, and everything transacted not only with regularity, but optima fide by the purchaser. But although all the estates are thus contributory, in ease of the mortgagee, yet, as between the debtor's eldest son deriving under settlement, and purchasers from the son, the contributory fund must be so marshalled as to make the son's remaining property first applicable, and if that be insufficient, the portion of the last purchaser must be applied before that of any prior parchaser. Hartley v. O'Flaherty, Beat. 61.

#### b. Priority of.

Over Extents in Aid.]-Immediate extent and extent in chief, in the second or any degree, are to be satisfied before an extent in aid of a prior teste, where the same goods were seized under both extents, although the inquisition on the latter was taken before that on the former, and on the same day as the inquisition on the immediate extent, and the venditioni exponas on the extent in aid was tested before that which issued on the extent in chief in the particular degree. Rew v. Larking, 8 Price, 683.

It is not necessary that the Crown, in proceeding to recover debts of its debtor by extent within the first degree, should first apply the immediate debtor's proper effects in discharge of its debts, before it resorts to the debtor's debts. 1b.

Over a Commission. ]-If an extent and a commission issue on the same day, the extent shall have the preference. Rex v. Earl, Bunb. 33.

Over Assignees in Bankruptcy. ]-Where the adjudication in bankruptcy and appointment of. an official assignee take place at an earlier period of the same day on which a writ of extent is issued against the bankrupt for a Crown debt, the fraction of a day is not to be taken in account, and the title of the Crown must prevail. his hands unsold, an extent came at the king's Reg. v. Edwards, 9 Ex. 628; 2 C. L. R. 590; 23 L. J., Ex. 42; 18 Jur. 384; 2 W. R. 333—Ex. Ch.

The lien of the Crown for duties in arrear

Res v. Dale, 13 Price, 739.

Replication to a plea in bar to an extent in aid, that the defendant was trustee under a prior deed of assignment for the general benefit of all the insolvent's creditors; that the prosecutor of the extent was indebted to the Crown at the time of executing the deed; that the insolvent then carried on trade, and was not then seised of lands; that the insolvent was then indebted to the prosecutor, and that the prosecutor had not executed the assignment, is bad. Rew v. Watson, 3 Price, 6.

Over Landlord. |-Although the title of the Crown attaches from the teste of the writ, it is commensurate only with the interest of its debtor; and, therefore, when that was determined by the act of seizure under a claim of forfeiture in a lease, the title of the Crown was defeated by the same event. Rev v. Topping, M'Clel, & Y. 544; 29 R. R. 839.

Over Executions of the Subject. ]-The provision of the latter part of 33 Hen. 8, c. 39, s. 74, applies only to cases where the goods of the debter are not only taken in execution, but sold, the property in them not being altered till then; and until the property be altered and transferred absolutely from the debtor, by sale and delivery, the Crown's execution is to be preferred, even where the Crown process was so sued out. Rex

v. Sloper, 6 Price, 114. Process sued out by the Crown against a defendant to recover penalties, upon which judgment for the Crown is afterwards obtained, entitles the king's execution to have priority within 33 Hen. 8, c. 39, s. 74, before the execution of a subject whose execution had issued and been commenced on a judgment recovered against the same defendant prior to the king's judgment, but subsequent to the commencement of the king's process; the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. Butler v. Butler, 1 East, 338. S. P., Att.-Gen. v. Aldersey, 1 East, 341 ; 6 R. R. 279.

Although Extent is Tested after Delivery of Subject's Writ to Sheriff. ]—Goods seized under a fi. fa., at the suit of a subject, are before sale liable to be taken by virtue of the king's extent, tested after the delivery of the fi. fa. to the sheriff. Res v. Wells, 16 East, 278, n.; 14 R. R. 347. S. P., contra, Rorke v. Dayrell, 4 Term Rep. 402 ; 2 R. R. 417 ; and Uppom v. Sumner, 2 W. Bl. 1294.

Recognised and adhered to by the Court of Exchequer as clear law; and, as it stood uncontradicted by later authority, although at variance with former determinations, they would not allow it to be questioned on an interlocutory motion. Res v. Slaper, 6 Price, 114. And see Rew v. Osborne, 6 Price, 94; 20 R. R. 619; and Stucy v. Hulse, 2 Dougl. 411.

Where goods were taken in execution by the sheriff on a fi, fa., and whilst they remained in suit, tested after the entry of the sheriff under the fi. fa.; and the sheriff thereupon seized the said goods subject to the former seizure, and attaches on the subject-matter in respect of afterwards sold them under a venditioni exponas

ceeds of such sale by order of the Court of the money to be paid by the sheriff to the officer Exchequer :- Held, that, at all events without eletermining whether the king's extent was under that if the judgment was reversed the party the circumstances entitled to priority, the plaintiff could not maintain money had and received against the sheriff for the proceeds of such sale. Thurston v. Mills, 16 East, 254. And see 13 R. R. 347, n.

The sheriff seized the goods of a debtor under a fi. fa., and whilst they remained in his hands unsold an extent in chief in the second degree tested after the seizure was delivered to the sheriff :- Held, that the goods might be seized and sold under the extent, without regard to the ti. fa.; and that it makes no difference whether the extent is in chief or in aid. Giles v. Grarer. 1 Cl. & F. 72; 6 Bligh (N.s.) 277; 2 M. & Scott, 197: 9 Bing, 128,

The doctrine of the Crown process having priority, where it bears teste on a day subsequent to a subject's execution on a fieri facias under which the sheriff has seized, applies to cases of extents in aid. Rex v. Slaper, 6 Price, 144.

- Or at the same Time. ]-Where writs of extent and fieri facias were issued against the goods of the defendant, tested on the same day, the court refused to grant a writ of venditioni exponas on the return to the fieri facias. Rev v. Deron (Sheriff), 1 Chit, 643.

- Extent Delivered after Sale by Sheriff. -A fieri facias issued at the suit of the plaintiff on Friday, the 14th of November, against the goods of J. S. : on Saturday, the 15th, the sheriff seized and sold part of the goods, and the re-mainder by 12 o'clock on Monday, the 17th; after they had been delivered to the purchasers, and removed, but while the money arising from the proceeds of the sale remained in the hands of the sheriff, namely, at six in the evening of the 17th, a writ of extent was delivered to him : -Held, that by the sale the execution of the plaintiff was executed, and that he might recover the moneys levied under such sale from the sheriff in an action for money had and received. Swain v. Morland, 1 Br. & B. 370; Gow, 39; 3 Moore, 740; 21 R. R. 651.

Enlargement of Time for Returning. ] - The court, upon the application of the sheriff, enlarged the time for his making a return to a fi. fa. apon a suggestion of a reasonable doubt whether the goods seized under the writ were not covered by an extent afterwards issued at the suit of the Crown for malt duties under 28 Geo. 3, c. 37, s. 21, for the purpose of inducing the plaintiff to go into the Court of Exchequer, and there contest the question of right with the Crown in a more eligible manner than in the King's Bench. Wells v. Pickman, 7 T. R. 174; 4 R. R. 410.

The court allowed five days' time to the sheriff to make his return to a fi. fa., on the snggestion of a difficulty occasioned by a writ of extent having been afterwards issued at the suit of the Crown; but the rule for further time was granted on payment of costs. Rev v. Deron (Sheriff), supra.

Writ of Error by Execution Creditor. |- Where. on a judgment for the Crown in an action for penalties, ar extent was issued and a levy made in the sheriff's hands, the defendant brought a

issued upon such extent, and paid over the pro- writ of error, the court, on application, ordered of the Crown, notwithstanding it was objected would not be able to obtain a writ of restitution. but would be driven to a petition of right; the court holding that the Crown could not be placed in a worse situation than a subject under similar circumstances; and the court could not take notice that greater difficulties existed in obtaining restitution from the Crown than from the subject. Res v. Burns, 1 Y. & J. 579.

Levy under an Extent-Return of Nulla bona by Sheriff to Writ of Fi. Fa.]—The sheriff entered and took possession of the defendant's goods under a fi. fa. Before the sale, the officers of the customs entered to levy for a penalty recovered against the defendant for an offence against the revenue. The sheriff permitted the goods to be taken for the penalty, and returned nulla bona to the fi. fa.:—Held, that he was justified in so doing, as there is no distinction between a warrant to levy a penalty given to the Crown by statute and an execution under an extent, Grove v. Aldridge, 2 M. & Scott, 568; 9 Bing, 428.

#### c. Proceedings in.

Inquisition - Finding of ] - An inquisition finding special matter, without stating any con-clusion as a fact, is bad, and may be quashed on motion. Rev v. Sherwood, 3 Price, 269.

An inquisition finding A. indebted to B. and the other partners and proprietors of a certain society or company called the Kent Insurance Company is sufficiently certain without naming the individual members of such company, although they are not incorporated. Runsbottam v. Rex. 7 Price 570.

Upon a seire facias to recover money found due to the Crown for duties of customs by an inquisition taken under a commission to find debts, it appeared on the record that the commission, which was tested the 21st February, and returnable the 15th April, 1843, authorised the commissioners to inquire whether D, is now indebted in any and what sums of money. The inquisition was taken and returned on the 1st March, 1843, and the jury found that D. was, on the day of taking that inquisition, indebted to the Crown in 2621. 10s., for the duty of customs on silk imported by him between the 6th and 14th February, 1841, and that the sum and every part thereof still remained due and unpaid:— Held, that this fluding was good in form, and was warranted by the commission. Dean v. Reg. (in error), 15 M. & W. 475; 3 D. & L. 714; 15 L. J., Ex. 236.

The scire facias was tested the 30th March, 1843 :- Held, that its having issued before the return-day of the commission was a mere irregularity, and not a ground of error. Ih.

In an immediate extent, on an inquisition to find debts, the jury may find the fact of a debt being due to the Crown, on the sole evidence of an affidavit that the debt is due. Reg. v. Ryle, 9 M. & W. 227; 1 D. (N.s.) 431; 11 L. J., Ex. 234 : 6 Jur. 238.

On the execution of a commission issued previously to an extent in chief, it is competent to the jury to find the debts due to the Crown on any evidence that will satisfy them of the fact; and the common-law rules of evidence are not by the sheriff, and whilst the money levied was obligatory on them or on the commissioner. Ib. For a form of a commission, see 6 Jur. 238. n.

— Nature of ]—The inquisition is not Maberly, 3 L. J., Ex. 154; 2 Dowl. P. C. 383; wholly an ex parte proceeding, and a claimant 2 C. & M. 537; 4 Tyr. 545. of property in the goods inquired of may assert his claim before the sheriff, and put material questions to witnesses examined on the part of the prosecution, in the way of cross-examination, to shew that the goods belonged to him; and if the sheriff refuses to permit such interrogatories to be put, the court will set aside the extent and inquisition, Rev v. Collingridge, 3 Price, 280.

When it can be Traversed. ]-The court will admit a party claiming goods seized by the sheriff, under a capias utlagatum, to enter his claim, and traverse the inquisition after the time for so doing has expired, and a venditioni exponas executed, where the claimant's attorney has mistaken his course, and brought an action against the sheriff instead of having claimed and traversed on payment of costs. Rex v. Randell, 5 Price, 576.

It is sufficient, if a defendant claiming goods seized under an extent traverses the property being in the debtor to the crown's debtor at the time of the seizure or of taking the inquisition ; and it is not necessary to say at the time of the issuing of the extent. Rex v. Lumbton. 5 Price.

\_\_\_\_ Onus Probandi.]—Parties claiming goods which have been found by inquisition to be the property of a defendant under an extent must shew title in themselves, and cannot, unless that title is admitted on the record, object on demurrer to the proceedings upon the extent. Rew v. Soulby, 1 Y. & J. 249.

- Scire Facias, Founded on.]-Where a scire facias, founded on an inquisition, misrecites the inquisition, and therefore fixes by such recital a day on which the debt had been found to be due differing from the true day named in the inquisition, the court will give leave to amend the writ on payment of the costs, even after the defendants have pleaded. Rew v. Scott, 4 Price, 181.

If an inquisition to find debts, executed in vacation, were returnable in the following term, and a scire facias issued thereon, tested as of the term preceding the vacation, the court would set it aside for the repugnancy which must appear on the face of the record; nor would they allow it to be aided by inserting the true dates, by means of a memorandum on the record. Rev v. Pearson, 3 Price, 288.

- Doubt as to Priority of Writ. |-- Upon an inquiry under an extent, it appeared that the defendant had assigned all his property two days before the teste of the writ, by a deed, which was an act of bankruptcy, and upon which a fiat was issued before the teste of the writ. The sheriff returned that, to the knowledge of the jurors, the defendant had no goods. Upon an application by the attorney-general, the court ordered a writ ad melius inquirendum to issue. that the facts as to the assignment might appear upon the inquisition, it being suggested that the Crown would be entitled to the goods as against the assignees. Reg. v. Jobling, 4 Ex. 483; 19 L. J., Ex. 14.

Return of Writ. ]-Writs of extent held returnable in vacation, under 5 & 6 Vict. c. 86, 8. 8. Reg. v. Renton, 2 Ex. 216; 5 D. & L. 750; 17 L. J., Ex. 204.

Pleadings.]-A plea stating that the defendant accepted a bill drawn upon him by the original debtor, and which did not become due till after the inquisition was taken, is good. Res v. Darcson, Wightw. 32.

A defendant cannot enter a claim and traverse an inquisition after he has moved to quash the proceedings on affidavits which were satisfactorily answered; and a rule for that purpose was discharged. Rew v. Biehley, 4 Price, 323.

Election as to Proceedings by Extent or Scire-Facias.]—The Crown has no election to proceed either by extent or scire facias where the debtoris not insolvent. Rea v. Thompson, 3 Price,

When Court will Grant a New Writ for same: Claim. ]-The court will not grant a new writ of extent of the date of a former, tested between eight and nine years before, on the ground that the defendant had been since found to have been further indebted to the Crown, and to havehad, at the time of issuing the first extent, property not then known to belong to him, and though his goods and chattels, seized and sold under that writ, produced only so much as would satisfy but a very small part of the Crown's original debt; but a new writ of present teste should be issued, which might be doneat any time, on application to a baron, where, while the Crown debt remaining unsatisfied, the-defendant becomes possessed of newly-acquired-property. Rew v. Harroy, 7 Price, 238.

— For Different Claim. ]—Where an extent to find debts had been issued against a person in the service of the Crown, and an inquisition taken thereon, such proceedings were held to be noobjection to a second extent and an inquisition by the same revenue board against the sameproperty on a prior claim. Rev v. Rawlings, 12' Price, 834.

To found and support such proceedings, a statement that the party owed to the king a sum of money claimed to be due from him to the-Crown, as the balance of his account delivered in to the commissioners for auditing the public accounts in his capacity, &c., is a sufficient averment and finding a debt due to the king.

A person claiming to be an incumbrancer on lands seized by the Crown under an extent and inquisition against the Crown debtor is not entitled to notice of the holding a further inqusition under another extent against the sameperson, on a similar charge of prior date, although on the first inquisition the jury had returned him an incumbrancer on the estate found to belong to the debtor. Ib.

The court refused an application on the part of the incumbrancer, for an order that he might have notice of the holding any further inquisition. Ib.

\_\_\_\_ Date of Writ.]—The court refused to allow the writ to be ante-dated. Rex v.

But, where the extent is issued against a surety, the affidavit need not state that application has been made to the principal debtor for payment, or that he is in decayed and insolvent circumstances. Rev v. Marsh. M'Clel. 688: 13 Price. 826 : 28 R. R. 748, 758,

Where an extent in chief had been issued for where an extent in chief had been issued and the recovery of a sum of money, being proceeds of assessed taxes for part of a year, deposited by a collector with a banking-house which had stopped payment, and such sum was partly composed of balances left in the hands of the collector upon his several monthly payments to the receiver-general, the court refused to refer it to the king's remembrancer to see (in effect) whether the poundage upon all those payments ought not to be deducted from the sum mentioned in the extent, as being the collector's and not the king's money : upon the grounds-1st, that the application was without precedent; 2nd, that the collector's title did not accrue till the completion of his collection, and payment of his entire assessment: 3rd, that the same did not come within the jurisdiction of the court as a debt or liquidated demand, but was subject to the control of the lords of the treasury, who have all the requisite accounts before them, as an equitable claim to be adjusted or wholly disallowed, according to circumstances; 4th, that it would be impossible for the master, without the accounts, to see whether ultimately the collector would have any claim. Ih.

It is not necessary in the affidavit made for obtaining a baron's fiat for an extent in chief in the second degree that there should be any averment of the insolvency of the Crown debtor, or any fact stated from which it may be inferred. Rew v. Shackell, 11 Price, 772.

Nor is it necessary in such a case to negative collusion. Ib.

- Objecting to.]-After a defendant has obtained time to plead, he cannot object to the affidavit on motion. Rev v. Rippon, 3 Price, 38.

Crown Agent may bid at Sale. ]-A sale under an extent is not vitiated as against a purchaser by the agent of the Crown bona fide bidding for himself. Rev v. Marsh, I C. & J. 406.

Resale at loss of Lands bought at Sale under Extent—Conveyance to Second Purchaser. ]— Where lands had been bought at a sale under an extent, and the purchaser resold them at a loss, the court ordered the second purchaser's name to be substituted in the contract, and the conveyances to be made to him, the original consideration being expressed in the deed. Rev v. Rawlings, 2 C. M. & R. 471; 4 L. J., Ex. 295.

Grounds for Discharging Person taken under. Application to discharge defendant in prison under an extent for duties in his hands (being a part of money received by him for premiums and duties on policies as agent for an insurance company), on the ground of his having been arrested by the office for the whole balance due from him to them, including such duties, before the extent issued, as to which debt he was afterwards discharged under the insolvent act, was refused, by discharging a rule to shew cause;

and unequivocal allegation of a breach of the the court holding, that such a ground raised a bould: therefore, where the allegation of the constitution of merrits which could not properly be breach in the affidavit was ambiguous, an extent brought before them but by traversing the sueed against one of the obligors was set aside. Inquisition; and that they could not set aside an extent quia improvide emanavit on motion, on a statement of such facts by affidavit as would amount to a defence. Rev v. Seton, 8 Price, 671.

> Power of Crown to Retake. ]-A defendant in execution, under a writ of extent at the suit of the Crown, who has been taken from prison under an order of the commissioners of excise for the purpose of giving evidence, without any writ or other process being issued, and after giving such evidence has been reconveyed to prison is not entitled to his discharge; as, even assuming it to amount to a voluntary escape, the Crown has power to retake and detain him in custody under the original writ. Reg. v. Renton. 5 D, & L. 750 : 2 Ex. 216.

> Interest, ]-A debt due to the Crown, although originally merely a simple contract debt, if it has been brought into court in the shape of the produce of a sale under an extent, carries interest from the time when the debt shall have been ascertained by the deputy remembrancer's re-port, notwithstanding there is no specific appropriation in the report. Rev. v. Mainwaring, 2 Price, 67.

#### 3. EXTENT IN AID.

#### a Who Entitled to

Bankers.]—Bankers having money in their house arising from the assessed taxes paid in for the purpose of being paid over to the Exchequer on account of a receiver-general, for the due payment of which by him they have given a bond to the Crown, are still entitled to sue out an extent in aid, and that upon affidavit stating generally their having received the money for that purpose. Rew v. Gibbs, 7 Price, 633.

An immediate debtor to the Crown, indebted by reason of his receipt of the Crown's money, as a country banker, to whom it had been paid by the district collector of excise for the purpose of being remitted by him to London, is not entitled (although he has entered into the usual bond to the Crown given by persons in such situations to pay over the money, or remit good bills for the amount, within twenty-one days after the receipt of it) to sue out an extent in his own aid, unless there has been, in point of fact, a literal breach of the condition of the bond; and such breach must be stated in the affidavit to obtain the fiat for the extent. Rew v. Turleton, 9 Price, 647.

If there has been no breach of the bond, the

obligor can only obtain an extent upon a commission and inquisition to find a debt due to the Crown, as in the ordinary course of proceeding with respect to simple contract debtors of the Crown. Ib.

Brewer.]-A brewer who is indebted for excise duties is entitled to an extent in aid. Rex v. Rippon, 2 Price, 398.

Maltster.]-But the surety in a bond to the Crown by a maltster, for securing the payment of duties on malt made by him, is not entitled to prosecute an extent in aid. Rex v. Sly, 2 Price,

Committee of Lunatic against preceding Com- | covered judgments against the executors, though mittee. ]-The court refused to grant a fiat for an extent, on an application made by a committee against a preceding committee (on the usual bond to the Crown), where he had been declared bankrupt under a commission of bankruptcy issued against him so long as ten years before the application. The remedy of the party is by scire facias. Lacy. In re, 10 Price, 135.

Other Persons. ]-An obligor to the Crown by bond conditioned to sell all such sugars as should be delivered to him, as agent for the sale and disposal of certain sugars, and to account for and pay over the produce of the sale of the said sugars to, &c., might sue out a writ of extent in aid under the proviso in the Extents in Aid Act. 1817, 57 Geo. 3, c. 117, as upon a debt due from him to the Crown, being the balance of moneys received by him between the date of his appointment and the time of issuing the extent, arising from the sale of sugars delivered to him after his appointment, and previously to the date of

the bond. Res v. Kynaston, 11 Price, 598.

A debt due to the Crown for duties payable in respect of post-horses, income-tax, stagecoaches, and assessed taxes, does not entitle the Crown's debtor to an extent in aid. Rea v.

Wilton, 2 Price, 368.

The claim of an indorsee against the drawer of a bill of exchange is an original debt, for which a debtor to the Crown may sue out an extent. Rea v. Sheriff, 1 Anst. 190.

Where a debtor to the Crown took out an extent for a large sum, when a small part was, on his own shewing, capable of dispute :-- Held,

that the extent was not void. Ib.

A Crown debtor who has issued prerogative process against his own debtor is not entitled to continue those proceedings after he has paid his debt to the Crown. Rew v. Bingham, 2 D. P. C. 128; 2 C. & J. 131; 1 C. & M. 872: 3 Tyr. 938; 2 L. J., Ex. 266.

There is no equity for a person against whom an extent in aid has issued, to be reimbursed by his creditor on the ground that he has property sufficient to satisfy his debt to the Crown without having recourse to the extent in aid.

Phillips v. Shaw, 8 Ves. 241.

Court of Exchequer will not, in exercise of its equitable jurisdiction over extents, grant a writ of amoveas manus to release property seised under extent in aid against a debtor in a more remote degree, on ground that debt which had been found on original commission to be due to king's debtor has been subsequently satisfied by payment of bills of exchange deposited by him for securing that debt. if it appear that those bills were not bona fide the property of the person depositing them, who thereby committed a breach of trust. Rex v. Blackett, 1 Price, 96, n.

Equitable mortgagee is not entitled to cost of defending extent in aid, or to be excused from paying deposit on sale. Stephens, Ex parte and

In re, 2 Mont. & Ayr. 31.

A farmer of the excise having estate of his own sufficient to satisfy what he owed the king, takes out an extent in aid against a person who owed him money. Capell v. Brewer, 1

Vern. 469.

The court would not relieve an executor against an extent in aid taken out by a simple contract creditor against him, whereby he preferred himself to bond creditors, who had re- 298.

the defendant confessed he was able to pay the king. Dichinson v. Molineux, Pre. Ch. 47

Assignees under a commission of bankruptcy bring a bill for an account against some persons who had seised the bankrupt's estate by virtue of three extents, one for the king and the other two were extents in aid. Bill dismissed, the matter being properly cognisable in the Court of Exchequer, which is the King's Court of Revenue. Brown v. Trunt, 2 Vern. 426, S. C. sub nom. Brown v. Bradshaw, Pre. Ch. 158,

Court of Chancery will not examine the quantum of the king's debt, nor how far extents

sued out are necessary. Ib.

But it is otherwise where defendant, who has sned out an extent in aid, confesses by answer he has sufficient estate of his own to pay the king's debt; or where it appears to be a frandulent contrivance by an extent in aid, to give a preference to a debt of an inferior nature. Ib.

A collector of taxes in custody under an extent is not entitled to be discharged, though his deficiency has been made good to the Crown by a reassessment on the parish. Rex v. Ben-

nett. Wightw. 1.

A bond to the Crown, though not forfeited, is sufficient to entitle the obligor to an extent in aid. Rew v. Mainwaring, 1 Price, 292.

# b. What may be Taken under.

Debts. ]-The sheriff may seize the debts due to the debtor in the third degree, exclusive of the immediate debtor to the Crown. Rew v. Lushington, 1 Price, 94.

Goods.]-Where goods of the debtor have been seized to an amount, by the appraisement, beyond what is sufficient to satisfy the debt due to the Crown, the debtor's lands cannot be sold. Rece v. Hopper, 3 Price, 40.

——Already Seized under Fi. Fa.]—Goods of the debtor already seized under fi. fa., but not sold, may be taken under an extent either in chief or in aid. Giles v. Grover. 9 Bing. 128; 2 M. & Sc. 197; 1 Cl. & F. 72; 6 Bligh (N.S.) 277.

Bills of Exchange, ]-Where orders have been sent by an insolvent merchant to his agents abroad to hold balances in their hands at the disposal of certain persons named by him, who are, in point of fact, appointed trustees for his general creditors, by a deed termed a deed of inspection, in which he relinquishes all claim to his business, but agrees to conduct it to the winding-up on their account as their agent :-Held, not to protect bills of exchange transmitted by such foreign agents, made payable to the insolvent to satisfy balances due to him in their hands from a creditor not a party to the deed, on whose behalf the sheriff had seized the bills, under an extent, whilst in his possession, and unindorsed, against such a proceeding resorted to after the arrangement, although the foreign agents have acceded to such arrangement, because, for want of a specific appropriation of the bills, and an express consideration quoad those particular bills being shown to have been the foundation of their being assigned to the trustees, they were held to be the property of the insolvent merchant, notwithstanding the arrangement, and therefore lawfully seized. Rew v. Hunter, 4 Price, 258,

Cash, Notes, Cheques, and Bills of Exchange, banking-house, containing cash, notes, and cheques of the latter, and bills of exchange, the morning of the 4th, who was in the habit of whilst remaining model in the sheriff's han calling for such parcels before banking hours, is Rev v. Giles, 8 Price, 293. See 22 R. R. 759. seizable under an extent in aid, tested on the 2nd of July, and returnable on the 6th of November, although the inquisition, finding the debt due to the debtor of the Crown debtor, was not taken till the 4th of November following: because such circumstances do not amount to a delivery of the parcels to the persons to whom it Ex. 266. was addressed, or their agent, and therefore confers no right of property. Seens, if it had been delivered to the postman, Rea v. Lambton, 5 Price, 428: 19

in the banking-house, under such circumstances remain there at the risk of the bankers who made

it up, and it is still subject to their control. Ib. A writ of extent binds from the teste, and such property as a bill of exchange is bound while in the custody of the debtor. Ib.

Account, and Repayment of Surplus. ] - Semble, that the Court of Exchange had power to refer it to the Master to take an account of the rents and profits extended to the plaintiff, and to order him to refund the surplus, if it should appear that he had been overpaid, Brookbank v. Miers, 4 Dowl. P. C. 179.

Person of Defendant.]-The capias clause of the writ of extent is not usually enforced. Rev v. Plaw, 3 Price, 94.

But an extent in aid against the body of a defendant may be issued, although not applied for in open court. Rev v. Mares, 2 Price, 151.

A defendant taken into custody under an extent in aid was ordered to be discharged, where the sheriff had also received property more than sufficient to cover the demand. Rew v. Kinnear, 3 Price, 536.

Where the agent of an insurance company who was indebted to them for premiums and duties payable to the Crown filed his petition under 5 & 6 Vict. c. 116 (a repealed Insolvent Debtors' Act), and was afterwards arrested on an extent in chief, the court refused to discharge him upon affidavit that he was informed and believed that the Crown debt had been paid by the company who had in reality issued the extent. Reg. v. Bennison, 1 D. & L. 613.

A party in custody under a writ of extent, at the suit of the Crown, allowed voluntarily to escape, but retaken and restored into the same custody and under the same writ, is rightly in custody, and is not entitled to his discharge. Reg. v. Renton, 2 Ex. 216; 5 D. & L. 750; 17 L. J., Ex. 204.

### c. Priority of.

Over other Creditors. ]-A debtor of the Crown may gain a priority by extent for his own demand before other creditors, although it is sworn that the Crown is in no danger; and the court has no discretion to prevent him. Rex v. Blatchford, 1 Anst. 162.

Where the sheriff seized goods of a defendant Parcel containing. —A parcel made up by a under a fi. fa., sued out on a judgment recovered banking-house, scaled, and addressed to another at the suit of a subject creditor; and after the seizure, but before the sale of the goods by the sheriff, a writ of extent in aid issued, tested after specially indersed to the former to make up a the seizure, and founded on a commission to find balance due from them on their general account, debts, dated, and an inquisition taken thereon, and deposited on the 3rd of July, after the bank the same day as the writ of extent was put into was shut, with a woman servant left in care of the sheriff's hands to be executed :—Held, that the banking-house, to be given to the postman in the extent attached upon the goods so taken whilst remaining unsold in the sheriff's hands.

> Cesser of, after Crown Debt paid. ]-A Crown debtor, after he has paid his debt to the Crown, cannot continue prerogative proceedings against his own debtor. Reg. v. Bingham, 1 C. & M. 862; 3 Tyr. 938; 2 Dowl. P. C. 128; 2 L. J.,

# d. Proceedings in.

When a Crown debtor is entitled to an extent The contents of such a parcel, while remaining in aid, he need not have the sanction of the solicitors or officers of any of the revenue boards. Rer v. Williams, 3 Price, 75.

When the surety of a Crown debtor has paid he debt of his principal, an order that he shall be placed in the situation of the Crown, and a writ of extent be put in force in his behalf, is not absolute in the first instance, though notice of motion has been served on the principal and the Crown, and no one appears to oppose the application. Reg. v. Salter, 1 H. & N. 274,

Affidavit.]-A plaintiff, having recovered damages for a libel against the proprietor of a newspaper, is not entitled to an extent against the principal and sureties in the cognisance given by them to secure the payment of penalties under 11 Geo. 4 & 1 Will. 4, c. 73, s. 3, merely by getting a return of nulla bona to a fi. fa. issued against the principal; but he must convince the court, by affidavit, that every exertion has been made to obtain satisfaction from the defendant. Pennell v. Thompson, 1 C. & M. 875; 3 Tyr. 823; 1 D. P. C. 137.

Amendment of Writ.]—On a motion opposed by counsel the court ordered an amendment of a writ of extent in aid, issued to find debts, by inserting therein the word "second," being the day of the mouth on which the extent in fact issued and on which the flat bore date; a blank having been left in the process for the day of the month, which was not supplied, nor was the omission observed till after the inquisition taken thereon had been returned into court. Rew v. Attwood, 9 Price, 483.

Inquisition-Finding of.]-Where an extent issued in aid of a company of individuals (not incorporated), and the inquisition found that their debtor was indebted to L. and H. (two of the company, who had executed the usual bond to the Crown as taken from joint insurance com-panies, under 22 Geo. 2, c. 48, on behalf of themselves and the company), and the other partners and proprietors of a certain society called, &c. :-Held, sufficient, on motion in arrest of judgment, and that it was not a fatal objection not to have named all the members of the company in the finding of the debt by the inquisition. Rea v. Ramsbottom, 5 Price, 447.

Nor is a finding that two persons were indebted

to L and H, and the other partners and pro- ing the ad valorem duty on two conveyances, prietors of the unincorporated company at varidebts are due to L. and H. on behalf of themselves and a certain society called, &c. 1b.

A recital in a writ of extent that two persons are indebted to the Crown by bond (generally) is sufficient to authorise a command to the sheriff to inquire of debts due to two such persons ou behalf of themselves and other persons. Ib.

In an inquisition on an extent in aid it is sufficient that the prosecutor of the extent is found to be indebted to the Crown (generally) at the time of taking the inquisition, without stating the amount of the debt or the time and manner of its accraing due. Rex v. Franklin, 5 Price, 614.

When Writ will be Set aside.]—The court will not set aside an extent in aid on the ground that the debt levied under it is of greater amount than the debt sworn to be due from the original debtor of the Crown. Rec v. Bunney, 1 Price, 394.

In one case the court observed, that if on the trial of the cause there should appear reason for considering the proceeding to be framed for the purpose of unduly obtaining an extent, which could not be supported, the defendant would be protected by the court, who would stay the proceedings after verdict, and on an application by the defendant would recollect that a motion had been made. Rew v. Burbery, 10 Price, 46.

The court ordered a fiat to be quashed, quia

improvide emanavit, and an extent in aid issued thereon to be set aside upon a summary motion; the objections, founded on affidavits, were that the inquisition on which the flat was obtained, and the extent sucd out, was made without viva voce testimony having been offered to the jury of the existence of the debt; and that they found the debt to be due solely on the usual affidavit on which the judge's fiat was obtained and made for that purpose, by or on the part of the prosecutors of the extent. Rev v. Harnblower, 11 Price, 29. But see Reg. v. Ryle, 6 Jnr 238

The court will not juterfere to assist a purchaser of an estate seized under an extent, for which he has paid part of the purchase-money, on an offer of arrangement. Row v. Hollier, 2 Price, 394.

Satisfaction of prior Extent-Right to Surplus. - Where an extent in chief has been satisfied, parties prosecuting an extent in aid should apply to the court by motion to be paid out of the overplus. Rew v. Larking, 8 Price, 683.

The court will order the residue of the pro-

ceeds, after the debt of the Crown has been satisfied, to be paid into court to the credit of the cause. Rew v. Freume, 1 Price, 299.

So they will, on motion, order the surplus to be refunded with costs where a greater sum than is netually due has been levied. Rew v. Edwards, 1 Price, 447.

Purchase under-Reconveyance by Purchaser. -An extent having issued against a defendant, certain freehold property was seized and sold under 25 Geo. 3, c. 35. The purchaser having paid the purchase-money into the bank after-wards, and before any conveyance was executed, sold the property to another person for a less sum, and, in order to avoid the necessity of paysic lands devised before lands descended, under

applied to the court that the sub-purchaser's ance with a command to the sheriff to find what name might be substituted in the conveyance for that of the original purchaser. The court declined to grant the application unless with the consent of all parties; which was afterwards obtained, and an order made. Rev v. Rawlings, 2 C. M. & R. 471; 4 D. P. C. 407; 5 Tyr. 895; 4 L. J., Ex. 295.

> Order for Sale of Land Seized under. ]-Lands held by a debtor to the Crown under lease on lives from a collegiate body having been seized under an extent in aid, previously to 25 Geo. 3. c. 35, the court made an order for the sale of the lands under that statute. Reg. v. Lane, 6 M. & W. 489; 9 L. J., Ex. 175; 4 Jur. 464.

Leave to Traverse. ]-The court will not give a defendant leave to traverse an extent in aid who has let the time within which he ought to plead pass by without doing so, on the failure of a motion to set aside the proceedings. Rew v. Gibbs, 7 Price, 633,

### 4. AMOVEAS MANUS.

When Granted. The court will not give judgment as if the plea is confessed for the defendants (claiming as assignces the goods of a bankrupt seized under an extent), on motion for that purpose, where the attorney-general has not demurred, replied, or otherwise proceeded; but it seems that in such a case they would grant an amoves manns. Rew v. Ecans, 6 Price, 480; 20 R. R. 676. And see Rew v. Hupper, 3 Price, 40: 18 R. R. 641; and Rew v. Glenny, 2 Price,

The court will not grant an amoveas manus to release property seized under an extent in aid against a debtor, on the ground that the debt which had been found on the original commission to be due to the king's debtor, had been subsequently satisfied by the payment of bills deposited with him for securing that debt, if it appears that the bills were not in fact the property of the person depositing them. Rev v. Blackett, 1 Price, 96.

An action commenced after an extent issued against the debtor of a Crown debtor, but before the taking of an inquisition under it, and proceeded in by the assignee of the plaintiff (who had in the meantime become bankrupt) in his name after inquisition taken, and the debt so sued for had been seized under it into the hands of the Crown, and an amovens manus issued on the application of the bankrupt after issue joined :-Held, to have been well proceeded in. Lakeman v. M'Adam, 8 Price, 576; 22 R. R. 774.

Practice as to.]—Upon a proceeding of amoveas manus, the court may take judicial notice of the bond on which the extent has issued. Reg. v. Ellis, 4 Ex. 652; 19 L. J., Ex. 77.

# 5. DIEM CLAUSIT EXTREMUM.

When Issued, -A debtor of the Crown cannot have a diem clausit extremum issued after the death of his debtor, against the estate, unless the debt has been found in the lifetime of the deceased. Hippinley, Ex purte, 2 Price, 379.

a writ of diem clausit extremum. Rev v. Hassel, | that E. also was ignorant of them ; that E. died

To ground this writ, a scire facias against the devisees is not necessary where the debt is on record. Ib.

Absolute in the first Instance.]-Where a erown debtor has died insolvent, a motion for a diem clausit extremum is absolute in the first instance. Rew v. Crewe (Lord), 5 D. P. C. 158.

Action of Court under. ]-Where freehold and leasehold property had been seized under a diem clausit extremum, on an old commission and inquisition, and various claims were entered on the part of persons insisting on a prior right to that of the king and the executor of the deceased Crown debtor, and his surviving partners in trade, and the purchasers of part of his leasehold estate from his executors and mortgagecs applied by motion to the court (without prejudice to the right to traverse the debt found due to the Crown) for an amoveas manns as to the leasehold property, for a reference as to the partnership property, and a further reference as to part of the leasehold estates which had been sold, and the proceeds of which had been applied in paying off or reducing mortgages on the other parts of the property, the court refused to entertain any part of the application, on the ground that where so many claims were made and points of law were raised they could not act in a summary way without the consent of the Crown. Rew v. Hodge, 12 Price, 537.

### G. ESCHEAT.

Escheat Procedure Act, 1887, 50 & 51 Vict. c. 53. Escheat Procedure Rules, 1889.

# 1. INQUISITION.

An inquisition will not entitle the Crown to seize where there is a legal title in possession.

Buryess v. Wheate, 1 Eden, 188; 1 W. Bl. 121.

Where the nominee of the Crown was in

possession of an intestate's estate and certain parties, who had failed to prove themselves next of kin before the Master, obtained an issue to try that question, the court would not, against the consent of the nominee of the Crown, who was defendant, grant an advance out of the found. Layton v. Manlore, 2 Salk. 469. estate for the purpose of trying the issue. Nie v. Maule, 4 Myl. & C. 342; 8 L. J., Ch. 329; 3 Jur. 669.

Finding not alien not conclusive against the Crown ; though no new commission ; but a melius inquirendum issues, if ground for it: if again so found, conclusive. Duplessis, Ex parte, 2 Ves.

J. M. having granted an annuity of 300L, charged on all his property, to A. and her assigns for ever, devised his estates upon trust to pay debts, &c. ; and as to the residue, to the use of his illegimate daughter E. for life, remainder to K. and his heirs. A, filed her bill nineteen years after the testator's death, and soon after the death of E., the tenant for life, against K., the remainderman in possession, the executor and trustee of the will, and the attorney-general, stating that no demand on account of the annuity was ever made upon E.; that during E.'s lifetime A. was ignorant of her rights, and Orown, when the mortgagor has died without

intestate and unmarried, and that upon her death all her property vested in the Crown; and praying that the arrears of the annuity from the time of testator's death might be raised, &c. Upon demurrer to this bill :- Held, that supposing her personal estate should have been represented, the attorney-general would under the circumstances, in right of the Crown, and without any grant of administration, have sufficiently represented it. M'Kiernan v. Kernan. 4 Ir. Eq. 269; Fl. & K. 353.

Semble, that the courts lean strongly towards applications for further investigation in cases in which property falls to the Crown, as that generally happens not from want of next of kin but from failure of legal evidence of their title. Robson v. Att.-Gen., 10 Cl. & F. 471. And see S. C. sub nom. Monkton v. Att.-Gen., 2 Russ, & M. 147.

Order made under the Escheat Act, 4 & 5 Will. 4, c. 23, for a reference to inquire whether a person convicted of felony in the year 1822 was a trustee of stock standing in his name for the petitioner, and whether any grant thereof had been made by the Crown —Held, not necessary to serve the Attorney-General on behalf of the Crown with notice of the application to the court. Tyson, In re, 1 Jur. 281.

### 2. TRAVERSE OF INQUISITION.

Right of subject to traverse inquisition extends to every case in which property is found in Crown, and is not confined to cases where Crown claims property by reason of incidents of tenure. But when application for permission to traverse is made to this court, it will not be authorised, unless petitioner makes out prima facie title against Crown. Gwydir (Lord), Ex parte, 4 Madd, 281,

Order upon petition for leave to traverse an inquisition upon a commission of escheat, found in favour of the Crown. Webster, Ex parte, 6 Ves. 809.

Application for leave to traverse an inquisition refused, no evidence being produced, except the oath of the applicant, to invalidate the inquisition. A mere trustee, it seems, is not allowed to traverse. Scaller, In re, 1 Madd, 581. Inquisition finding some points well, and nothing as to others, may be supplied by melius inquirendum; otherwise, if defective in points

The supposed heir of a bare trustee who was stated to have died without heirs cannot traverse an inquisition of escheat where there is no evidence except the oath of the applicant to invalidate the inquisition. Sudler, In re, 1 Madd. 581.

The court, upon the petition of the lord of a manor, ordered that he should be at liberty to traverse an inquisition, under which it had been found that certain hereditaments held of the manor had devolved on the Crown for want of heirs. Beaufort (Duke), Ex parte, Parry, In re, 35 L. J., Ch. 651; L. R. 2 Eq. 95; 14 L. T. 617.

### 3. ON FAILURE OF HEIRS.

# a. Mortgages.

As to escheat of mortgagee's estate. See Pawlett v. Att. Gen., Hardr. 460.

Mortgagee by deposit may sell against the

Prinsett v. Tyler, 1 Jur. 470.

hundred years, and having subsequently mortgaged them to B. for an additional sum by deposit of the title-deeds. The fee simple was not worth the mortgage money :--Held, nevertheless, that the mortgagor could not be deemed a bare trustee for the mortgagee within the statute 4 & 5 Will, 4, c. 23, s. 2, so as to deprive the Crown of the equity of redemption, but it was ordered that the estate should be sold in the administration of assets, and B. declared a purchaser with liberty to apply to the Crown for a grant of the fee simple. Rogers v. Maule, 1 . & Coll. C. C. 4.

A. made a mortgage in fee, and died intestate and without heirs :- Held, that the equity of redemption did not escheat to the Crown, but belonged to the mortgagee, subject to the debts. Beale v. Symonds, 16 Beav. 406; 22 L. J., Ch. 708; 1 W. R. 137.

Where the lord of the manor took by escheat, on the death of the tenant without heirs, the fee simple, subject to a mortgage for a term created by the tenant:—Held, that as against the mortgagee, the lord had a right in equity to redeem. Downe (Viscount) v. Morris, 3 Hare, 394; 13 L. J., Ch. 337; 8 Jur. 486.

Where a copyhold was surrendered to a mort-gagee and his heirs, and no condition was expressed in the surrender, and the mortgagee died intestate and without an heir :- Held, that the lord of the manor was entitled to enter Att.-Gen. upon the copyhold as an escheat.

v. Leeds, 2 Myl. & K. 343. If the lord, taking lands by escheat on the failure of heirs of his tenant, is liable, under 3 & 4 Will. 4, c. 104, out of such lands to pay a mortgage debt of the tenant charged thereon, he is cutitled to redeem the lands and get in the securities which the creditor held for the debt. Ib.

An escheat was in its nature feodal; and in default of heirs, the land, strictly speaking, reverted. Burgess v. Wheate, 1 Eden, 277; 1 W. Rl 121.

# b. Other Property.

By letters patent of 31 Car. 2, the lands of H. were granted to Sir G. A. in tail male, and a rent of threepence per acre, the amount of quit rent prescribed by the Act of Settlement, was reserved. In 1681 Sir G. A. conveyed the lands to S. and his heirs, saving the estate and right of the Crown. In 1776 the estate tail determined by failure of the issue male of Sir G. A. The representatives of S. remained in possession of the lands down to the filing of the bill in 1841, and dealt with the estate as an absolute estate in fee. The rent reserved by the letters patent was regularly paid to the proper officer, and the usual receipt given for it as quit rent:—Held, that the right of the Crown to the land on the determination of the estate tail was barred by the 48 Geo. 3, c. 47, the case not coming within any of the exceptions in the first section of that act. Tuthill v. Rogers, 6 Ir. Eq. R. 429 ; 1 Jo. & Lat. 36.

heirs. Semble, no escheat of an equitable in- applicable to real estate; the money not having been laid out, the Crown, on failure of heirs, A. died intestate, unmarried and illegitimate, has no equity against next of kin to have it having mortgaged his real estates to B. for five laid out in real estate in order to claim by escheat. The devisees, on becoming absolutely entitled, have the option given by the will; and a deed of appointment by one, a feme covert, was held sufficient indication of her intention that it should continue personal property, against her heir claiming it as ineffectually disposed of for want of her examination. Walker v. Denne. 2 Ves. J. 170; 2 R. R.

Trustee not having the legal estate cannot hold against the Crown claiming by escheat.

A., seised in fee ex parte paterna, conveys to trustees in trust for herself, her heirs and assigns, to the intent that she should appoint, &c., and for no other use. A. died without appointment, and without heirs ex parte paterna: -Held, that the heir ex parte materna was not entitled, and that from the analogy between trusts and legal estates, the Crown was entitled by escheat; but that if the conveyance had barred the Crown of its rights, as between the maternal heir and trustee, the former was entitled. Burgess v. Wheate, 1 Eden, 177; 1 W. Bl. 121.

A testator devised a share in the New River Company to such trust as he should afterwards declare, but he never made any declaration of trust as to it. The testator died without having any heir at law :- Held, that A., and not the Crown, was entitled to it. Davall v. New River Ch., 3 De G. & Sm. 894; 18 L. J., Ch. 299; 13 Jur. 761.

Under the Escheat Act, trust moneys may be followed into land against the lords of the fee: and if it were otherwise, the estate in the hands of the lord by escheat is liable to the debts of the person whose estate has escheated. Hughes v. Wells, 9 Hare, 749; 16 Jur. 927.

Where lands escheat to the king, he shall have the benefit of a term to attend the inheritance. Bodmin v. Vandebenby, 1 Vern. 357; Pre. Ch. 65; 2 Ch. Ca. 172.

Devise of copyhold land in fee, on condition to pay 1,000% to charity. Testator having left no next of kin, nor any customary heir, and gift to charity being void, devisee held entitled to 1,000/, and not the Crown or lord of manor. Henchman v. Att.-Gen., 3 Myl. & K. 485. Reversing 2 Sim. & S. 498.

The effect of a testamentary appointment, either of real or personal estate, to a trustee apon trust for A., who dies in the lifetime of the appointor, is that the appointed property does not revert to the donor of the power, nor to those who would have taken under a gift over (if any) in default of appointment, but remains part of the general estate of the ap-pointor. Semble, if the heir at law could not be found, the title of the trustee was good as against the Crown. Van Hagan, In re, Sperling v. Rockfort, 50 L. J., Ch. 1; 16 Ch. D. 18; 44 L. T. 161; 29 W. R. 84.

A devise to trustees and their heirs for an illegitimate person and his heirs. Upon the death of the cestui que trust intestate and without heirs :- Held, that a freehold lease for lives passed, under the Wills Act, 1837, 7 Will. 4, and 1 Vict. c. 26, to the Crown, and did not Testator directed money to be laid out in majors, lands, tenements, tithes, and heredita 30 L. J., Ch. 881; 7 Jur. (8.8.) 246; 3 L. 7.531; ments, on very long terms, with limitations 19 W. R. 211—128. A testator without heirs died seised of free- to be used in an application to parliament for holds which he had not charged with debts:— the act, expressing, however, a doubt whether Held, that as against the lord claiming by escheat they were assets for the payment of the testator's debts. Evans v. Brown, 5 Beav. 114 : 11 L. J., Ch. 349 : 6 Jur. 380.

Quere, whether such freeholds are liable to the debts in priority to, or pari passu with, lands specifically devised. Ih.

# c. Re-grant by Crown.

It is the ordinary rule for the Crown to give a lease to the party discovering an escheat. Mogg-ridge v. Thuckwell, 7 Ves. 71; 6 R. R. 76.

A. and B. join in a petition to the Crown, representing an estate to have escheated, and procure a grant of it to be made to them :-Held, that A. could not afterwards set up a claim to one part under a prior title in himself. while taking the benefit of the grant as to the rest. Cumming v. Forrester, 2 Jac. & Walk. 334 : 22 R. R. 157.

The grantee of letters of preference of escheated property in Jamaica is bound to prosecute the escheat to final judgment for the Crown within a proper time, otherwise he will be held accountable to the Crown in respect of the rents and profits from the time of his entering into possession, although the letters of preference and the possession have not the effect of making the grantce the bailiff of the Crown. And this is so although the estate be encumbered to such an extent that the interest of the Crown is swallowed up. Mason v. Att.-Gen. for Junaica, 4 Moore, P. C. 228; 7 Jur. 1071.

#### d. Other Matters.

Bank stock was purchased by the government of Maryland before the American war, and vested in trustees for the discharge of certain bills. After the peace, upon a bill under an assignment by the state of part of the stock as a compensation to mortgagees of lands that were confiscated, the fund subject to that assignment was claimed by the new state, and there being no claim under the bills, the whole was claimed by the surviving trustees beneficially, also by the proprietary under the old government; and a specific lien was insisted on in respect of losses by confiscation occasioned by the refusal of the trustees to transfer :-Held, that there was no lien; that the new state could take only such rights of the old as were within their jurisdiction; that the claims of the plaintiff, the state, and in respect of the confiscations, were the subject of treaty, not of municipal jurisdiction, and the fund, no object of the trust existing, must be at the disposal of the Crown. The court cannot decree against a title in the Crown apparent on the record, though not insisted on at the hearing. Burclay v. Russell, 3 Ves. 424.
Bill for the specific performance of a covenant,

by which the defendants engaged, within two years, to procure the heir at law of A. B. to convev certain lands to the plaintiffs, or within the same period to prefer a petition to the House of Lords for, and to use their utmost endeavours to procure, an act of parliament for substituting a trustee in the place of the heir, in case such heir could not be found, or there should not be any heir. On inquiry, no heir being found, the court decreed the defendants to allow their names voluntarily; but not subject to debts at large.

the act, expressing, however, a doubt whether such an application could succeed, the estate appearing to have escheated. The court will not decree that which seems to be impossible ; and it is more than doubtful whether the old law now prevails by which a man was com-pellable to procure his wife to levy a fine. Erderick v. Coxwell, 3 Y. & J. 514.

The repealed 8 Hen. 6, c, 16, and 18 Hen. 6, c. 6, prohibiting the granting to farm of lands seized into the king's hands upon inquest before escheators, until such inquest is returned in the chancery or exchequer, and for a month afterwards, if the king's title to the same is not found on record, unless to the party grieved who shall have tendered his traverse to such inquest, and avoiding all grants made contrary thereto, extended to the case of an eschent upon the death of the tenant last seised without heirs, where no immediate tenure of the Crown was found by the inquest; and as the Crown could not grant to a stranger in such a case without office, neither could a plaintiff in ejectment ecover upon the demise of the Crown. Doe d. Hayne v. Redfern, 12 East, 96.

The repealed 2 & 3 Edw. 6, c. 8, s. 8 (which was in general terms, and not confined to the particular inquisitions mentioned in other clauses of the act), extended to avoid any such inquisition or office before escheators not finding of whom the lands are holden, in the same manner as if the jury had expressly found their ignorance of the tenure. 1b.

Copyholds. — Copyholds cannot escheat to the rown. Walker v. Denne, 2 Ves. jun. 170.

Son of Illegitimate Father.]—Where lands descend to the son of an illegitimate father, who is proved to have been the purchaser, and the son dies seised, intestate and without issue, such land does not devolve upon his heirs ex parte materna, but escheats to the Crown, notwithstanding the Inheritance Act, 1833, 3 & 4 Will. 4, c. 106, s. 2. Doe d. Blackburn v. Blackburn, 1 M. & Rob. 547

Felo de se.]-Freeholds of inheritance which belong to a felo de se when he so dies, do not season to a read the Second to the heir at law. Chambers v. Norvie, 29 Beav. 246. Affirmed, 7 Jun. (N.S.) 689; 4 L. T. 345; 9 W. R. 794—L.JJ.

Duties of Grantee of Escheat. ]-The grantee of escheated property is bound to prosecute the escheat to final judgment for the Crown within a proper time; is liable to account to the Crown within a proper time ; and is liable to account to the Crown for the rents and profits received by him from the time of entering into possession. Muson v. Att.-Gen. for Jamaica, 4 Moore, P. C. 228; 7 Jur. 1071.

Bankrupt's Land.]—Semble, that freehold pro-perty of bankrupt disclaimed by trustee under s. 23 of the Bankruptcy Act, 1869 (repealed), reverts to the Crown. Mercer and Moore, In re, or Beyrdsworth and Moore, In re, 49 L. J., Ch. 201; 14 Ch. D. 287; 42 L. T. 311; 28 W. R. 485.

Debts. ]-On forfeiture of an estate, the Crown or its grantee takes, subject to all charges, fairly binding the party with reference to it, although

to be relieved against conveyance on the ground estate. Ib. of fraud, &c., as the original party would have.

Bedford (Duke) v. Coke, 2 Ves. 116. S. P., and administration was granted to a person as

Evans v. Brown, 5 Beav. 111: 11 L. J., Ch.

"the natural and lawful sister" of A. B. It

349; 6 Jun. 380; Hughes v. Welk, 9 Hare, 749; appearing from the proceedings in the cause, that 16 Jur. 927.

# 4. ON FAILURE OF PERSONAL REPRESENTA-

Absolute Right of Crown.]-The personal estate of an intestate who leaves no next of kin, belongs absolutely to the Crown, as part of the droits of the Crown. The fact that these droits are by statute paid into the Treasury, and made to form part of the public revenue, makes no difference in this matter. Att.-Gen. v. Köhler, 9 H. L. Cas. 654; 8 Jnr. (N.S.) 467; 5 L. T. 5; 9 W. R. 993.

The right to goods belonging to persons dying intestate without leaving husband or widow and without kindred, as "bona vacantia," has from the earliest times been vested in the king in right of his crown. Dyke v. Walford, Moore, P. C. 434; 12 Jur. 839,

Duchy of Lancaster.]—The Queen being entitled to the Duchy of Lancaster, separate from the Crown of England, is entitled to the goods of a bastard intestate dying without next of kin in right of her duchy of Lancaster. Ib.

Duchy of Cornwall.]-T. C. died in Cornwall, intestate, without known relations. The court granted letters of administration of his estate for the use of His Royal Highness the Prince of Wales as Duke of Cornwall; but, semble, without prejudice to the rights of the Crown. Cornwall (Solicitor of Ducky) v. Cunning, 5 P. D. 114; 41 L. T. 737; 28 W. R. 278.

Letters of Administration granted to Duke—Evidence.]—On motion for grant of letters of administration of an intestate's effects of Cornwall, it is not necessary, if the facts are sufficiently set forth in the warrant, that they should be verified by affidavit. Griffith, In the goods of, 53 L. J. P. 30; 9 P. D. 63; 32 W. R. 524; 48 J. P. 312.

Illegitimacy.]—Semble, that the attorney-general, without taking out administration, sufficiently represents for the purposes of a suit the personal estate of a bastard. M'Kiernan v. Kernan, 1 Fl. & K. 352.

A bastard dies intestate, without wife or issue, and leaving personal estate; the king is entitled, and the ordinary, of course, grants administration to the patentee of the Crown. Jones v. Goodchild, 3 P. W. 33; 2 Eq. Abr. 168.

Quere, if a church lease for three lives is granted to a bastard and his heirs, who dies without issue and intestate, what shall become of the lease? Ib.

One having a bastard leaves personal estate to her executor, in trust for the bastard, who dies intestate, and without wife or issue. The exedemurrer disallowed, for that the executor has no heir at law or next of kin. The court

The Crown in such case has the same equity the legal title, and consequently may sue for the

A. B. was illegitimate, the court refused to pay the fund to the administratrix, but directed it to be carried over to a separate account, with directions that it should not be paid out of court without notice to the Crown. Long v. Wakeling, 1 Beav. 400.

A settlor settled 1,000% upon trust for his illegitimate daughter. The settlement contained a proviso that if at her death the daughter should not be under coverture (which event happened), the money should be held in trust for her, her executors, administrators and assigns. Then followed a clause, that if any interest in the fund would, but for that proviso, be held in trust for the Crown, or belong to the trustees of the settlement, then this money was to be held upon trusts in favour of the settlor and his widow : Held, that the gift over after the absolute gift was void for repugnancy, and that the Crown took. Wilcocks, In re, 45 L. J., Ch. 163; 83 L. T. 719; 24 W. R. 290.

One seised in fee of land limits a term to trustees for 100 years, upon such trust as he, by deed or will, should appoint, and, for want of such appointment, to attend the inheritance, and afterwards, by a nuncupative will, gives all to J. S., and, being a bastard, dies without issue. This will not pass the trust of the term. Thruston v. Att.-Gen., 1 Vern. 340.

- Husband Surviving Bastard Wife. ] -The Crown has no claim as against the surviving husband of a bastard wife. Hawkins v. Hawkins, 4 L. J., Ch. 9.

Surplus Proceeds of Leaseholds Directed to be Sold. - Upon the construction of a will :- Held. that executors were entitled, as against the Crown claiming in default of next of kin of the testatrix, to the surplus proceeds of certain leaseto his royal highness the Prince of Wales, as Duke holds which were bequeathed to be sold for payment of the testatrix's debts and legacies. Russell v. Clowes, 2 Coll. 648; 10 Jur. 732.

> Further Investigation. ] - Semble, that the courts lean strongly towards applications for further investigation in cases in which property falls to the Crown, as that generally happens not from want of next of kin, but from failure of legal evidence of their title, Robson v. Att.-Gen. 10 Cl, & F, 471. And see S, C, sub nom, Monkton v. Att.-Gen., 2 Russ. & M. 147.

Executors not Beneficially Entitled. -- Where personal property is given to executors upon trust, they are excluded from claiming for their own benefit; and if the trust fails, and there are no next of kin, the executor is trustee for the Crown. Powell v. Merrett, 1 Sm. & G. 381; 22 L. J., Ch. 408; 17 Jur. 449.

A testatrix, by will, in 1841, gave two devisees. who were also her executors, all her real and personal estate, upon trust for sale, and she gave out of the produce of her real and personal cutor brings a bill against one who has part of estate 50', to each executor for his trouble, and personal estate in his hands. The defendant other pecuniary legacies. There was no gift of dommy, because the attorney-general and the the residue, and after payment of debts are administrators of the bastard are not parties; legacies a surplus remained. The testatrix left

57

estate, and the Crown was declared to be entitled to the surplus of the personal estate.

Cradock v. Owen, 2 Sm. & G. 241.

three persons, upon trust to pay various legacies; he also gave legacies of unequal amounts to each of his trustees, whom he appointed executors. The trustees were also empowered to appoint new trustees in the place of those unable to act. The testator afterwards gave an additional legacy to one of his executors. He was illegitimate, and died without having ever been married :-Held, that the undisposed-of residue did not belong to the executors, but lapsed to the Crown, and that it was unaffected by the Executors Act, 1830,

it was unaneuted by the facetrois Act, 1830, 11 Geo. 4 & I Will. 4, c. 40. Read v. Stedman, 26 Beav. 495; 28 L. J., Ch. 481.

A. devised his residuary personal estate to his executors, upon trusts which failed under the Statute of Mortmain; he then devised real estates to his wife, charged with a mortgage, and also charged with the payment of his debts. The testator made his will, and died in 1858, leaving a widow, but no child or next of kin :-Held, that the executors did not take the personalty for their own benefit, but as trustees for the widow and the Crown in moieties; that the general debts were to be paid out of the personalty : but that the devisee of the real estate was not entitled to have the mortgage debt discharged out of the personalty. Davre v. Patrickson, 29 L. J., Ch. 846; 6 Jur. (N.S.) 863; 8 W. R. 597,

A testatrix devised real and personal estate to executors and three trustees, in trust to sell, immediately after her death, and invest the proceeds, and out of the income to pay certain annuities, and the residue in trust for such persons as by any codicil she should direct. She made no codicil, and died, leaving no heir or next of kin :- Held, that the Crown was entitled only to the residue of the personal estate, and that the proceeds of the real estate belonged to the trustees, the Crown having no equity to compol the conversion of the real into personal estate. Taylor v. Haygarth, 14 Sim. 8.

A man dying possessed of leasehold property, which he orders to be sold and the money paid to a charity, which is prevented from taking effect by the Statute of Mortmain, the executor having a legacy and there being no next of kin, is a trustee for the Crown. Middleton v. Spicer,

1 Bro. C. C. 201.

B. devised and bequeathed the residue of his freehold, leasehold and personal estates to five trustees (whom he appointed executors), four of them being ministers of the Presbyterian church in London, and the fifth being, as well as the testator, a member of that church. The answer admitted that it was the expressed wish and hope of the testator, as to his residuary property generally, that his residuary legatees would make use of the same for the benefit of a Presbyterian college, to which he had been in his lifetime a benefactor; and the trustees also admitted that they did not allege, or contend, or believe, that the testator intended them to enjoy the property beneficially. There were no next of kin :- Held, that the bequest of the leascholds was void, and that that portion of the residuary estate belonged to the Crown. Johnstone v. Hamilton, 11 Jur. (N.S.) 777; 12 L. T. 822; 13 W. R. 961.

apportioned the legacies and costs of the suit The Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, between the proceeds of the real and personal c. 40, s. 2), does not affect the rule laid down in Middleton v. Spicer (1 Bro. C. C. 201, supra). Ib.

Effect of Marriage Settlement.] - By a A testator, who died in 1855, by will gave all marriage settlement, a fund, the property of the property and the residue of his estate to the wife, was settled on her and her husband and their issue, and in default of issue on the wife's next of kin. The wife, who was illegitimate, died without issue, and her husband administered to her :--Held, that the Crown was not entitled to the fund, but that it belonged to the husband as administrator to his wife. kins v. Hawkins, 7 Sim. 173; 4 L. J., Ch. 9.

By a marriage settlement, a fund belonging: to the wife was assigned to trustees for her separate use for life, with remainder to the children of the marriage with power of appointment, and in default to her next of kin. On her death without issue and intestate, not having exercised the power of appointment, it appearing that she was illegitimate, the husband was held entitled to the fund in his marital right, as all the trusts of the settlement which intercepted the marital right had failed. Anon., I Giff.

Executors, when Beneficially Entitled.]—A. testatrix, by her will dated in 1878, after directing her just debts and funeral expenses to be paid by her executors, appointed her friend and medical advisor, R., and her friend, C., solicitor, her executors, and gave a number of legacies, including one of 1,000*t* to R., and another of 100% to C., and revoked all other wills made by her. Testatrix died in 1878, without any next of kin, possessed of large personal estate:-Held, that the executors, R. and C., were absolutely entitled as against the Crown to the personal estate for their own benefit. Knowles, In re. Rouse v. Chalk, 49 L. J., Ch. 625; 43 L. T. 152; 28 W. R. 975.

Irrecoverability from Successor to Crown of Payment to Predecessor.]—Money paid to one sovereign in this right cannot, if improperly paid, be recovered from that sovereign's successor. A nominee of the Crown taking out administration to the estate of an intestate is under the same obligation as any other administrator. The 15 & 16 Vict. c. 3, only dispenses with the necessity of his giving the usual bond to the ordinary, but imposes on him all the duties and liabilities of a private administrator. If he improperly pays to the Crown part of the intestate's effects, though such payment is made nuder authority of a warrant of the sign-manual, he makes himself personally liable to restore it to parties afterwards proving themselves legally entitled. Att.-Gen. v. Köhler, supra.

Upon his death that liability only continues. against his personal representatives, and not against his successor in office; but that successor may make himself personally liable for the acts of his predecessor, as by taking out letters of administration de bonis non to the same estate.

Where the nominee of the Crown has improperly paid money (thus coming to his hands) to the then sovereign, and the succeeding nominee of the Crown had taken out letters of administration de bonis non to the same estate, and, in a suit by the next of kin against him, had only contested the fact of the claimants being truly the next of kin, and denied, if they were so, liability to pay interest on the sumnext of kin, and the claimants having satisfactorily established their title to that character, the liability to pay interest followed, as of course, on the liability to pay the principal. Ib.

A., as administrator on the nomination of the Crown, in a suit by the alleged next of kin, died ; B., his snecessor in office, took out letters de honis non. A bill to revive the suit was filed, and an order made thereon, reciting the prayer of the bill thus : "That the suit and proceedings, which had so become abated. might be revived, and be in the same plight and condition against B. as they were at the time of the death of A., and that the plaintiffs might have the same relief against B. as they would have been entitled to and had against A, had he been living," and then added, "which is hereby ordered by the court as prayed " :- Held, that this order did not of itself create any liability in B., but merely put the suit in the same state as it had been in before A.'s death. Ib.

Payment of Interest by Crown. ]-The trustees and executors of a will administered the estate, and upon its being decided in a suit instituted for the purpose that there was an intestacy, and no heir or next of kin being discovered, the trustees assigned the leasehold property to the solicitor for the treasury, to be held for the afterwards, established their claim as next of kin of the testator, and the court declared them entitled :- Held, that the Crown was not chargeable with interest on the rents and profits received from the property while in its possession. Gosman, In re, 50 L. J., Ch. 624; 17 Ch. D. 771: 45 L. T. 267; 29 W. R. 793—C. A.

A., on behalf of the Crown, took out administration to the estate of B., who, it was alleged. had died without leaving any next of kin, and as such administrator sold out a sum of stock belonging to B., and paid the proceeds into the Some years after a suit was instituted by the next of kin of B. against A., and a decree obtained in his favour :- Held, that interest was payable on the proceeds of the sale of the stock since the time of the sale. Turner

v. Maule, 18 L. J., Ch. 454; 14 Jur. 165.
Where administration of the effects of an intestate has been granted to the nominee of the Crown in the absence of any next of kin, the nominee of the Crown is liable to pay interest to the next of kin upon the balance in the hands of the nominee. Edgar v. Reynolds, 4 Drew. 269; 27 L. J., Ch. 562; 4 Jur. (N.S.) 399; 6 W. R. 404.

Where property, no next of kin appearing, had been taken possession of by the solicitor to the treasury, who had paid off all the debts of the intestate, and then paid over the balance to the Crown, and, after some years, the claim of the next of kin was established, and the solicitor of the treasury ordered to pay over the principal amount, with interest, to the next of kin. Partington v. Att.-Gen., 38 L. J., Ex. 205; L. R. 4 H. L. 100; 21 L. T. 370.

Costs. ]- The solicitor for the affairs of the treasury, as nominee of the Crown, having taken out letters of administration to the goods of an intestate, on the assumption that he had died without next to kin :- Held, not entitled

claimed .—Held, that this was in substance an rightfully claiming as next of kin. Kane v. admission of liability to pay the principal to the Reynolds, 4 De G., M. & G. 565; 24 L. J., Ch. 321; 1 Jnr. (N.S.) 148; 3 W. R. 85-L.J.J.

The nominee of the Crown had successfully resisted, in a previous suit, an unfounded claim by a person wrongfully asserting a title as next of kin, and in the suit of the rightful claimant there had been the usual decree for an account, with all just allowances:-Held, without deciding that the costs of the previous suit might have been included under just allowances, that inasmuch as no objections had been taken to the chief clerk's certificate by the nomince of the Crown, he was precluded from raising the question as to his right to the costs of defending the previous suit, when the cause came on before the court for further consideration. Ib.

Where the Crown and an alien were adverse and misuccessful claimants to estates, they were ordered to pay their own costs. Rittson v. Stordy,

1 Jur. (N.S.) 771; 3 W. R. 627. B. died intestate, and his estate was administered to by the Crown. Parties claimed his property, but all failed to substantiate their right, with the exception of C., who afterwards defended a suit successfully against another When the decree was taken, the claimant. court held, that the Crown was liable to pay interest. The attorney-general, on behalf of the Crown, appealed upon the whole case to the House of Lords. The decree having directed payment of costs out of the fund which subject thereto was to be carried over to other suits relating to the property, C. moved for payment of his costs pending the appeal of the Crown. The attorney-general also moved that the fund might not be parted with till after the appeal had been heard:—Held, that, as the question whether the Crown was entitled to interest on balances or not had been decided by the court for the first time, upon which point the House of Lords might take a different view, and as also the matter decided involved very doubtful and difficult questions of law and fact, the Court would retain the fund until the appeal was heard; but that C.'s costs in defending the suit against another claimant must be paid out of the fund at once, as had he not appeared as defendant the attorney-general must have done so. Bauer v. Mitford, 3 L. T. 575; 9 W. R. 185.

# H. PETITION OF RIGHT.

Petition of Right Act, 1860, 23 & 24 Vict. c. 34 (" Bovill's Act "),

#### 1. GENERALLY.

Right of Subject to Investigation. |- It is not competent to the king, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right, semble. Ryres v. Wellington (Duke), 9 Beav. 579; 15 L. J., Ch. 461; 10 Jur. 697.

Not against succeeding Sovereign. ]-It does not lie against the succeeding sovereign for injuries sustained in a preceding reign. Canterbury (Fiscount) v. Reg., 1 Ph. 306; 12 L. J., Ch. 281; 7 Jur. 224.

East India Company - Annexation by.]-A to the costs of a suit instituted by a person petition of right claimed from the Queen payment of debts which were incurred by the ruler of Oude | wrongful act done by a servant of the Crown in as part of the public debt of that state before it the supposed performance of his daty. Tobbia r. was annexed by the East India Company: Reg., 16 C. B. (XS.) 310; 33 L. J., C. P. 199; 10 Held, assuming the liability to pay the debts to Reg. (XS.) 120; 10 L. T. 762; 12 W. R. S.) Held, assuming the liability to pay the debts to have been transferred to the East India Company by the annexation, that such liability was transferred by the Government of India Act, 1858 (21 & 22 Vict. c, 106), ss, 65-68, from the East India Company to the secretary of state in council for India; that the remedy, if any, was by action against him; and that the petition of right, therefore, could not be sustained. Frith v. Rep., 41 L. J., Ex. 171; L. R. 7 Ex. 365; 26 L. T. 774; 21 W. R. 19.

Sum due from Chinese Merchants-Crown not agreed to pay to the British government 3,000,000 dollars on account of debts due to British subjects from certain Chinese merchants, who had become insolvent, being largely indebted to British subjects. The money laving been re-British subjects. The money having been re-ceived by the British government:—Held, that a petition of right would not lie by one of the British subjects to obtain payment of a sum of money alleged to be due to him from one of the Chinese merchants, on the grounds that there was nothing in the terms of the treaty to make the Crown agent a trustee in respect of any specific sum for the suppliant or any other person; and that, in all that relates to the making and performing of a treaty with another sovereign. the Crown cannot be either a trustee or an agent for any subject. Rustomjec v. Reg., 46 L. J., Q. B. 238; 2 Q. B. D. 69; 36 L. T. 190; 25 W. R. 333-C. A.

Compensation for Office. - Demurrer allowed to a petition of right presented by a medical officer in the army, claiming compensation for loss sustained by him by reason of his being deprived of an appointment alleged by him to be permanent, and compulsorily retired upon half pay. Tufnell, Ju rv., 45 L. J., Ch. 731; 3 Ch. D. 164; 34 L. T. 838; 24 W. R. 915.

Compensation for Loss. -A British subject claimed to be entitled to compensation for the losses suffered by him through confiscation of his property in the first French revolution. The governments of England and France entered into conventions respecting compensation to be afforded to British subjects. The English government received all the money agreed upon between the two governments as the amount of compensation, and undertook to satisfy all the claimants, An act of parliament was passed, declaring how claims were to be preferred and liquidated. He presented his claim to the commissioners appointed under the act and adopted the modes of proceeding provided by it; his claim was rejected. After payment of the claims which were estab-lished to the satisfaction of the commissioners, a surplus remained, which, in accordance with the provisions of the act, was paid over to the Lords of the Treasury. He proceeded to make his claim afresh under a petition of right:—Held, that he had no remedy except under the provisions of the act. De Bode v. Reg., 3 H. L. Cas. 449. S. C., in Q. B., 8 Q. B. 208; 10 Jur. 773; in Ex. Ch., 13 Q. B. 380; 14 Jur. 970.

Tort of Servant of Crown. ]-A petition of right will not lie to recover compensation for a could not, before the Patents Act, 1883, be

S. P., Canterbury (Viscount) v. Reg., supra.
An officer of the navy employed in the sup pression of the slave trade destroyed, in the supposed performance of his duty, a vessel not engaged in the slave trade. The owners of the ship sought redress from the Crown by petition of right: Held, that no complaint was shewn in respect of which a petition of right could be maintained, on the grounds, first, that the seizure of the ship was not made in obedience to a command of her majesty, but in the supposed performance of a duty imposed upon the officer by act a Trustee.]-By a treaty between the Queen of of parliament; secondly, that if the officer was England and the Emperor of China, the Emperor assumed to be an agent of the Queen to seize vessels engaged in the slave trade, he acted beyond his authority, and could not make his principal liable in respect of such seizure; and, thirdly, that a petition of right cannot be maintained to recover unliquidated damages for a trespass. Ib.

A petition of right will not lie for a claim founded upon tort, on the ground that the Crown

can do no wrong. Ih.

In a suit against her majesty's deputy commissarv-general for Natal, and as such representing her majesty's commissariat department, to recover certain moneys as the price or hire of certain waggons and oxen, for the carriage of certain goods, for damages for illegal acts of defendant or his employees, and for general damage :- Held, that the government revenue cannot be reached by a suit against a public officer in his official capacity. Quære, whether the court would have had jurisdiction if a petition of right had been presented and the Crown had ordered that right should be done. Palmer v. Hutchinson, 50 L. J., P. C. 62; 6 App. Cas. 619: 45 L. T. 180-P. C.

Not limited to Chattels or Land. ]-A petition of right is not limited to specific chattels or land, but will lie for breach of contract, or to recover money claimed either by way of debt or by way of damages on breach of contract. Thomas v. Reg., 44 L. J., Q. B. 9; L. R. 10 Q. B. 31; 31 L. T. 439; 23 W. R. 176. A petition of right alleged, in a first count, a

mutual agreement between the suppliant and the secretary of state for war, that in consideration of the suppliant's referring an invention, devised by him for rifled artillery, with plans and models, to the ordnance select committee, in the event of the invention being approved and adopted, a reward should be given to the suppliant, the amount to be determined by the master-general and the board of ordnance. Although all conditions precedent were fulfilled, the amount of the reward had not been determined, nor any part paid to the suppliant. A second count alleged that, in consideration of the suppliant's shewing and delivering up his plans of the invention to her majesty's government, the government promised to reimburse the expenses incurred by him. Although all conditions precedent were fulfilled. the government had not reimbursed to the suppliant any part of the premises:-Held, that, assuming the authority of the secretary of state for war and the government to make such contracts, the two counts were good in law, Ib.

Patent, Infringement of .] - A petition of right

maintained against the Crown in respect of the He then brought an action against the governinfringement of a patent right by the Admiralty. ment under the local act to afford relief in sub-Feather v. Reg., 6 B. & S. 257; 35 L. J., Q. B. stitution of the process by petition of right:—

Damages for Breach of Contract by the Crown. It is settled law that a petition of right will lic for damages resulting from a breach of contract by the Crown. Thomas v. Reg. (L. R. 10 Q. B. 31), and Feather v. Reg. (6 B. & S. 293), approved. It is immaterial whether the breach is occasioned by the acts or by the omissions of the Crown officials. Windsor and Annapolis Ry. v. Reg., 55 L. J., P. C. 41; 11 App. Cas. 607; 55 L. T. 271; 51 J. P. 260—P. C.

Repayment of Income Tax. ]-A land company paid debenture interest in excess of the assess ments under schedule A., deducted income tax from the interest, and returned the whole amount deducted for assessment under schedule D.:-Held, that a petition of right did not lie to obtain repayment of the sum paid under schedule D. Holborn Viaduct Land Co. v. Reg., 52 J. P. 341.

Land in Colonies.]—Where land in a colony is vested in the Queen by a colonial act for the public purposes of the colony, the 23 & 24 Vict. c. 34, does not give jurisdiction to the Court of Chancery to entertain proceedings against the Crown as a trustee of such land present within the jurisdiction of the court. *Holmes, In re.* 2 J. & H. 527; 31 L. J., Ch. 58; 8 Jur. (N.S.) 76;

5 L. T. 548; 10 W. R. 39.

By an act of the legislature of Canada, land taken for a canal was vested in the Queen. By a second act the land so taken was vested in the officers of the ordnauce; and it was cuacted that so much of the land taken as had not been used for the canal should be restored to the owners, By a third act the lands were revested in the Queen for the purposes of the colony, and subject to future colonial legislation. To a petition of right by suppliants claiming the restoration of lands taken for the canal from their predecessors in title, but not used, a demurrer was allowed on the ground that the courts of this country had no jurisdiction. Ib.

The fiction that the Crown is at all times present in all parts of its dominions does not give jurisdiction to the courts in this country, acting in personam, to entertain a petition of right as to lands situate in a colony and vested in the Crown for the purposes of the colony by an act of the provincial legislature. Ib.

But generally in the Australian colonies local acts have been passed giving the subject a similar mode of redress against the Crown and local government, by petition of right, as is conferred Boverlinen, by Jeruson of Fight, as is contered by Sir William Bovill's Act (23 & 24 Vict. c. 34). Robertson v. Dunaresq, 2 Moore, P. C. (N.S.) 66; 3 N. R. 58; 10 L. T. 110; 13 W. R. 280.

An officer in military service in a colony sold his commission, and settled there on the promise of a grant of "an allotment of land" at W. This promise was made verbally by the governor, and afterwards recognised by him and his successors in certain official letters and minutes, but was never performed. Subsequently the settlor consented to an allotment of land at H. being substituted for that at W. The second allottent was otherwise disposed of, and was lerror upon any judgments given by the Neuen's never conveyed to him, and he was subsequently Bench; Common Pleas, or Exchequer shall be offered a third allottener at L, which he refused. Texturable before the judges and barons, or judges.

200; 12 L.T.114. S.P., Dizon v. London Small Held, that proceedings under this act materially Arms Ch., 46 L. J., Q. B. 617; 1 App. Cas. 632; different from ordinary actions, both in the nature 35 L. T. 559; 25 W. R. 142. be supported :- Held, also, that the letters and minutes of the governor afforded good evidence of the fact of such a promise being given, and the agreement to settle in the colony would constitute a good consideration, if it were necessary, to prove this. Damages for breach of such a promise were rightly assessed by reference to the highest value of that of which the claimant had been deprived during the breach of agreement.

### 2 PROCEDURE.

#### a. At Common Law.

When a petition of right is referred to the Lord Chancellor, with the indorsement, "let right be done," if such right, supposing it to exist, is subject to certain rules of proceeding for its ascertainment and enforcement, those rules must be followed, and the rights of the parties will be bound by all equities to which they are properly subject. Moncton v. Att.-Gen., 2 Mac. & G.

The first step in proceedings upon a petition of right on which the royal indorsement has been made, is to ascertain the facts on which the petitioner's claim is founded; and a commission for that purpose is of course, unless the attorneygeneral is willing to admit the facts as alleged and to take issue upon them by demurrer. Bode (Baron), In re, 2 Ph. 85; 4 Jur. 645.

The Lord Chancellor will not make an order for a commission upon a petition of right without notice to the attorney-general. Robson, In re. 2

Ph. 84; 16 L. J., Ch. 105.

A petition of right was addressed to the king "in his Court of Exchequer," and concluded with a prayer that he would be pleased to order that right be done, and to indorse his royal declaration thereon to that effect; and that he would refer the petition, with such order and declaration thereon, "to the barons of his majesty's Exchequer." The king indorsed the petition, "Let right be done".—Held, that the Court of Exchequer had no jurisdiction in the matter. Pering, In re, 2 M. & W. 873; 5 D. P. C. 750; M. & H. 223.

Where a petition of right is indorsed generally, it goes to the Court of Chancery; and in order to give the other courts jurisdiction, there must be a special indorsement, commanding right tobe done in the particular court. Ib.

A legatee claiming under an alleged will of George III., under his sign-manual, in pursuance of 40 Geo. 3, c. 88, s. 10, filed a bill against the executors of George IV., alleging that he and his. executors had possessed the assets of George III.; and it alleged that the will had not been and, being a sovereign's will, could not be proved. A demurrer was allowed, on the ground that, until the will had been proved, the Court of Chancery had no jurisdiction; and, semble, that the proper remedy against George IV. would have been by petition of right. Ryves v. Wellington (Duke). 9 Beav. 579.

By 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, writs of

only of the other two courts, in the Exchequer Reg., 45 L. J., Q. B. 249; 1 Q. B. D. 487; 34 L. T. Chamber:—Held, that the Crown was bound by 278; 24 W. R. 428. that enactment, and therefore a writ of error lies upon a judgment for the Crown in a petition of right to the Exchequer Chamber. De Bode (Baron) v. Reg. (in error), 13 Q. B. 380; 14 Jur. 970-Ex. Ch.

A writ of error upon a judgment for the Crown in a petition of right may be brought by the executor of the suppliant; and a writ of scire facias ad audiendum errores is not necessary.

The Queen's Bench has power to give judgment in a petition of right; and the proper form of a judgment for the Crown is, "that the suppliant take nothing by his petition." Ib.

Course of proceeding by a subject to enforce a claim to property as against the Crown. Taylor

v. Att.-Gen., 8 Sim. 413.

Preliminary commission to investigate claim upon petition of right substantially dispensed But upon inquisition found, the Crown is entitled to dispute facts, or admitting them to demur. Reg. v. Frantzius, 6 W. R. 288.

A plaintiff filed a bill for an injunction against the secretary-at-war, as an officer of the Crown, The defendant, on the ground that the plaintiff's remedy was by petition of right, and not by bill, put in an appearance, but raised the question of jurisdiction. The plaintiff, after the time had expired, moved for leave to enter an appearance for the defendant :- Held, that the court could not recognise the right of any subject of the Grown to refuse to appear. The question of jurisdiction should be argued after appearance, upon demurrer or otherwise. Felkin v. Herbert (Lord), 30 L. J., Ch. 604; 9 W. R. 609.

The attorney-general may dispense with the usual preliminary investigation on a petition of right. Von Frantzius, Ew parte, 2 De G. & J.

126; 27 L. J., Ch. 368.

On applying for time to answer the case found on the inquisition, the Crown ought not to be precluded from demurring. Ib.

In the place of the usual commission issued on

a petition of right, the court, with the assent of the attorney-general, issued a formal commission, the return to which was to be made on the oath of the petitioner. Von Frantzius, Ex parte, 26 L. J., Ch. 797.

Leave given to a petitioner who had presented a petition of right to file a bill against the attorney-general, notwithstanding the issuing of a commission under the petition of right. Ralt. In re, 4 De G. & J. 44.

### b. Under Petition of Right Act.

Injunction.]—A motion in a suit by the attorney-general for an injunction to restrain a contractor with the secretary of state for war from continuing on the site of government land. after notice to quit, given under the powers of the contract; and a motion by the contractor (who had presented a petition of right) for an injunction to restrain the secretary of state for war from preventing the suppliant completing his contract, and from continuing the super-intending officer of engineers in the supervision of the works, ordered to stand until the hearing of the suits. Kirk v. Reg., Ir. R. 14 Eq. 558.

be pleaded to a petition of right. Rustomjee v. action lay. Irwin v. Grey, 3 F. & F. 635.

Discovery of Documents-Suppliant not entitled to.]-There is nothing in the Petition of Right Act, 1860 (23 & 24 Vict, c. 34) to apply the provisions as to discovery in the Common Law provisions as to uscovery in the common Law Procedure Act, 1854, s. 50, to the procedure under a petition of right, and the suppliant under a petition of right is not, therefore, entitled to a discovery of documents. Thomas v. Rep., 14 L. J., Q. B. 17; L. R. 10 Q. B. 44; 23 W. B. 345. See next case.

— But Crown is.]—In a petition of right the Crown is entitled as against the suppliant to an order for the discovery of documents, by the combined effect of the Petifion of Right Act, 1860 (23 & 24 Vict. c. 34), s. 7, and the Rules of the Supreme Court, Ord. XXXI. r. 12. Tomline v. Reg., 48 L. J., Ex. 453; 4 Ex. D. 252; 40 L. T. 542; 27 W. R. 651—C. A.

Pleadings. ]—The Crown may plead and demur, or plead double, to a petition of right, under 23 & 24 Viet. c. 34, without leave of a judge. Tobin v. Rey., 14 C. B. (N.S.) 505; 32 L. J., C. P. 216; 9 Jur. (N.S.) 1130; 8 L. T. 392; 11 W. R.

Trial.]-On the trial of a petition of right, setting up a contract on the part of the Crown, the counsel for the Crown is not entitled to crossexamine the suppliant as to a copy of a memo-randum signed by him, without giving proper evidence to account for the absence of the original; and a search must be proved in the proper department. But the court will adjourn the trial in order to enable the Crown to make and prove such a search, under 23 & 24 Viet.

c. 34, s. 7. Scott v. Reg., 2 F. & F. 634. Held, also, that the counsel for the Crown, in summing up, might comment on the whole of the evidence. Ib.

Error.]-Under the Petition of Right Act, 1860, 23 & 24 Viet. c. 84, which incorporates so far as applicable the provisions of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, the suppliant may give notice to the Crown to assign errors, in order to plead thereto matter of fact in bar, without stating what matter of fact he intends to plead; and unless it appears that his object is not bona fide, and is only for delay, the notice will not be set aside on affidavit that there is no matter of fact which can really be pleaded in bar of error. Dixon v. Reg., 11 W. R. 68: 8 L. T. 578.

### 3. REFUSAL TO PRESENT.

When Action Lies, ]-In an action against a secretary of state for not submitting to the sovereign a petition of right, presented under the Petition of Right Act, 1860, 23 & 24 Vict. c. 34, it appeared that the secretary of state had submitted the petition to her majesty, and had given her majesty certain advice upon it, which was that her flat should not be granted :-Limitations, Statute of. ]-The statute cannot that this put an end to the case, and that no maintained against the Crown in respect of the | He then brought an action against the govern-Feather v. Reg., 6 B. & S. 257; 35 L. J., Q. B. 200; 12 L.T. 114. S.P., Dixon v. London Small Arms Co., 46 L. J., Q.B. 617; 1 App. Cas. 632; 35 L. T. 559; 25 W. R. 142.

Damages for Breach of Contract by the Crown. It is settled law that a petition of right will lie for damages resulting from a breach of contract by the Crown. Thomas v. Reg. (L. R. 10 Q. B. 31), and Feather v. Reg. (6 B. & S. 293), approved. It is immaterial whether the breach is occasioned by the acts or by the omissions of the Crown officials. Windsor and Annapolis Ry. v. Reg., 55 L. J., P. C. 41; 11 App. Cas. 607; 55 L. T. 271; 51 J. P. 260—P. C.

Repayment of Income Tax. ]-A land company paid debenture interest in excess of the assessments under schedule A., deducted income tax from the interest, and returned the whole amount deducted for assessment under schedule D.:-Held, that a petition of right did not lie to obtain repayment of the sum paid under schedule D. Holborn Viaduct Land Co. v. Reg., 52 J. P. 341.

Land in Colonies. I-Where land in a colony is vested in the Queen by a colonial act for the public purposes of the colony, the 23 & 24 Vict. c. 34, does not give jurisdiction to the Court of Chancery to entertain proceedings against the Crown as a trustee of such land present within the jurisdiction of the court. Halmes, In re, 2 J. & H. 527; 31 L. J., Ch. 58; 8 Jur. (N.S.) 76;

5 L. T. 548: 10 W. R. 39.

By an act of the legislature of Canada, land taken for a canal was vested in the Queen. By a second act the land so taken was vested in the officers of the ordnance; and it was enacted that so much of the land taken as had not been used for the canal should be restored to the owners, By a third act the lands were revested in the Queen for the purposes of the colony, and subject to future colonial legislation. To a petition of right by suppliants claiming the restoration of lands taken for the canal from their predecessors in title, but not used, a demurrer was allowed on the ground that the courts of this country had

the ground that the courts of this country had no jurisdiction. *Ib.*The fletion that the Crown is at all times present in all parts of its dominions does not give inrisdiction to the courts in this country, acting in personam, to entertain a petition of right as to lands situate in a colony and vested in the Crown for the purposes of the colony by

an act of the provincial legislature. Ib.

But generally in the Australian colonies local acts have been passed giving the subject a similar mode of redress against the Crown and local government, by petition of right, as is conferred by Sir William Bovill's Act (23 & 24 Vict. c. 34). Robertson v. Dumaresq, 2 Moore, P. C. (N.S.) 66; 3 N. R. 58; 10 L. T. 110; 13 W. R. 280.

An officer in military service in a colony sold his commission, and settled there on the promise of a grant of "an allotment of land" at W. This promise was made verbally by the governor, and afterwards recognised by him and his successors in certain official letters and minutes, but was never performed. Subsequently the settlor consented to an allotment of land at H. being substituted for that at W. The second allotment was otherwise disposed of, and was never conveyed to him, and he was subsequently offered a third allotment at L., which he refused. returnable before the judges and barons, or judges.

infringement of a patent right by the Admiralty. ment under the local act to afford relief in substitution of the process by petition of right :-Held, that proceedings under this act materially differed from ordinary actions, both in the nature of the claim and the evidence by which it may be supported :- Held, also, that the letters and minutes of the governor afforded good evidence of the fact of such a promise being given, and the agreement to settle in the colony would constitute a good consideration, if it were necessary, to prove this. Damages for breach of such a promise were rightly assessed by reference to the highest value of that of which the claimant had been deprived during the breach of agreement.

#### 9 PROCEDURE

#### a. At Common Law.

When a petition of right is referred to the Lord Chancellor, with the indorsement, "let right be done," if such right, supposing it to exist, is subject to certain rules of proceeding for its ascertainment and enforcement, those rules must be followed, and the rights of the parties will be bound by all equities to which they are properly subject. Moncton v. Att.-Gen., 2 Mac. & G.

The first step in proceedings upon a petition of right on which the royal indorsement has been made, is to ascertain the facts on which the petitioner's claim is founded; and a commission for that purpose is of course, unless the attorneygeneral is willing to admit the facts as alleged and to take issue upon them by denurrer. De Bode (Baron), In rc, 2 Ph. 85; 4 Jur. 645.

The Lord Chancellor will not make an order

for a commission upon a petition of right without notice to the attorney-general. Robson, In re. 2

Ph. 84; 16 L. J., Ch. 105.

A petition of right was addressed to the king "in his Court of Exchequer," and concluded with a prayer that he would be pleased to order that right be done, and to indorse his royal declaration thereon to that effect; and that he would refer the petition, with such order and declaration thereon, "to the barons of his majesty's Exchequer." The king indorsed the petition, "Let right be done":—Held, that the Court of Exchanger had no jurisdiction in the matter. Pering, In re, 2 M. & W. 873; 5 D. P. C. 750; M. & H. 223.

Where a petition of right is indorsed generally, it goes to the Court of Chancery ; and in order to give the other courts jurisdiction, there must be a special indorsement, commanding right to

be done in the particular court. Ib.

A legatee claiming under an alleged will of George III., under his sign-manual, in pursuance of 40 Geo. 3, c. 88, s. 10, filed a bill against the executors of George IV., alleging that he and his executors had possessed the assets of George III.; and it alleged that the will had not been and, being a sovereign's will, could not be proved. A demurrer was allowed, on the ground that, until the will had been proved, the Court of Chancery had no jurisdiction; and, semble, that the proper remedy against George IV. would have been by petition of right. Ryves v. Wellington (Duke). 9 Beav. 579.

By 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, writs of error upon any judgments given by the Queen's Bench, Common Pleas, or Exchequer shall be only of the other two courts, in the Exchequer Reg., 45 L. J., Q. B. 249; 1 Q. B. D. 487; 34 L. T. Chamber:—Held, that the Crown was bound by 1278; 24 W. R. 428. that enactment, and therefore a writ of error lies upon a judgment for the Crown in a petition of right to the Exchequer Chamber. De Bode (Baron) v. Rey. (in error), 13 Q. B. 380; 14 Jur. 970-Ex. Ch.

A writ of error upon a judgment for the Crown in a petition of right may be brought by the executor of the suppliant; and a writ of scire facias ad andiendum errores is not necessary. Ib.

The Queen's Bench has power to give judgment in a petition of right; and the proper form of a judgment for the Crown is, "that the suppliant take nothing by his petition." Th

Course of proceeding by a subject to enforce a claim to property as against the Crown. Taylor v. Att.-Gen., 8 Sim. 413.

Preliminary commission to investigate claim upon petition of right substantially dispensed with. But upon inquisition found, the Crown is entitled to dispute facts, or admitting them to demur. Reg. v. Frantzius, 6 W. R. 288.

A plaintiff filed a bill for an injunction against the secretary-at-war, as an officer of the Crown. The defendant, on the ground that the plaintiff's remedy was by petition of right, and not by bill, put in an appearance, but raised the question of jurisdiction. The plaintiff, after the time had expired, moved for leave to enter an appearance for the defendant :-Held, that the court could not recognise the right of any subject of the Crown to refuse to appear. The question of jurisdiction should be argued after appearance, upon demurrer or otherwise, Felhin v. Herbert (Lord), 30 L. J., Ch. 604; 9 W. R. 609.

The attorney-general may dispense with the usual preliminary investigation on a petition of right. Von Frantzius, Ex parte, 2 De G. & J.

126: 27 L. J., Ch. 368.

On applying for time to answer the case found on the inquisition, the Crown ought not to be precluded from demurring. *Ib*.

In the place of the usual commission issued on

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Pleadings. ]—The Crown may plead and demur, or plead double, to a petition of right, under 23 or pieda double, to a petition of right, under 25 & 24 Vict. c. 34, without leave of a judge. Tubin v. Reg., 14 C. B. (8.8.) 505; 32 L. J., C. P. 216; 9 Jur. (8.8.) 1130; 8 L. T. 392; 11 W. R.

Trial. ]-On the trial of a petition of right, setting up a contract on the part of the Crown, the counsel for the Crown is not entitled to crossexamine the suppliant as to a copy of a memo-randum signed by him, without giving proper evidence to account for the absence of the original; and a search must be proved in the proper department. But the court will adjourn the trial in order to enable the Crown to make and prove such a search, under 23 & 24 Vict, c. 34, s. 7. Scott v. Reg., 2 F. & F. 634.

Held, also, that the counsel for the Crown, in summing up, might comment on the whole of

the evidence. Ib.

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# I. LAW OFFICERS.

### 1. GENERALLY.

Precedence.]—After the 14th Dec., 1814, the thermer and solicitor-general took precedence before all the Queen's serjeants; whereas before they were accustomed to have place and audience in the courts next after the von most ancient of the Queen's serjeants, but before the others. 6 Taunt. 242; 2 Ves. & B. 422.

The attorney-general in the Queen's business, has pre-audience in the Exchequer over the postman and tubman. Reg. v. Exerter (Bishap), 7 M. & W. 189: 9 D. P. C. 276; 10 L. J., Ex. 92.;

5 Jur. 102.

Although not a serjeant, he had a right of audience in the Common Pleas, ir. a cause in which the Crown was interested, before the exclusive privileges of the serjeants were abolished by 9 & 10 Vict. c. 54. Paddack v. Fuerster, 8 D. P. C. 834; 1 Scott (N.R.) 391; 1 Man. & G. 522

The attorney-general, by an order of the House of Lords, has pre-eminence over the lord advocate, and the solicitor-general over the Scotch

solicitor-general, 2 Cl. & F. 482.

The Crown has no precedence in a criminal court. The Court of Exchequer is the only court in which the Crown has right of precedence in revenue cases. Reg. v. Landon, 1 F. & F. 381.

Right of Reply.]—Where a question affecting the Crown is discussed on motion, the attorney-general, having shewn cause against the rule, has no right to reply. Reg. v. Treasury Commissioners, 16 Q, B. 357; 20 L. J., Q, B. 305; 15 Jun 767.

Where the Crown, by any of its officers, is a party respondent in an appeal, it is not the usage of the Honse of Lords to allow the counsel for the Crown a general reply after the reply of the appellant. Lord Advacate v. Douglas (Lord), 9 CI, & F. 132.

Representation of Crown by.]—The attorneygeneral is the only legal representative of the Crown in the courts. Rex v. Austen, 8 Price, 142.

But during the vacancy of the office the whole business and authority of the attorney-general devolve upon the solicitor-general. Rew v. Wilkes, 4 Burr. 2527, 2554, 2570.

The attorney-general is an officer of the Crown, and in that sense only the officer of the public. Att.-Gen. v. Brown, 1 Swanst. 288; 1 Wils, 323.

— Solicitor-General.]—Where the king may have an interest to apply the excess of receipts in the nature of tolls (held not to be a charitable use), by sign-manual, the subject-matter of an information, that distinct right should be represented by the solicitor-general, who may be present at the hearing without being made a party in the cause. Att.-Gen. v. Galway Corpuration, I will. 95.

Attoracy-General for Duchy of Lancaster.]—It is not competent to the attoracy-general of the Duchy of Lancaster to exhibit an information in the High Court of Justice, and the court will order an information exhibited by him to be taken off the file on the application of the defendant even after answer put in by him. Att.-Gen. Chuchy of Lancaster) V. Dievonshire (Duke), 5 f. J. J., G. B. 271; 14 Q. B. 195; 33 W. B. 867.

The attorney-general, as such, is always supposed to be in court, and if he will not appear, it must be considered as a nill dieit. The court therefore refused to order the attorney-general to appear to a bill. Barelay v. Russell, blek. 729.

Attorney-General for Duchy of Cornwall.]-An information being laid in Middlesex by the attorney-general for the duchy of Cornwall, for the recovery of dues claimed in respect of goods imported into a port alleged to be parcel of the duchy, the defendant applied to change the venue to Devonshire, upon an ordinary affidavit that the cause of action arose and the witnesses resided there :- Held, first, that although the attorney-general may not have a right in all cases to lay and retain the venue where he pleases, he has such a right in the case of such an information, it being a suit in the nature of a transitory action. Att.-Gen. (Prince of Wales) v. Crossman, 4 H. & C. 568; 35 L. J., Ex. 215; L. R. 1 Ex. 381; 12 Jur. (N.S.) 712; 14 L. T. 856; 14 W. R. 996.

Held, secondly, that in the case of such an information relating to matters affecting the duchy of Cornwall, the attorney-general for the Prince of Wales would have the same right as the attorney-general for the Crown. Ib.

But as documents relating to the ducity of Cornwall would have to be produced from their place of deposit in Middlesex, there was no such preponderance upon the balance of convenience in favour of a trial in Devonshire as to call on the court to interfere, or to render it necessary to decide the question of prerogative, Lb:

Peerage Cases. ]—The attorney-general attends in peerage cases, as assistant to the lords' comnitioes for privileges, and it is said that he is entitled to sit (on a chair) inside the box. Saya and Sole (Barony), 1 H. L. Cus. 511, n.

Control of Law Officers by Courts.]—The courts exercise over the attorney-general the same anthority which they exercise over every other surior; and the attorney-general would not, any more than any other suitor, be permitted to prosecute any proceeding which was merely exations or had no legal object. Bley. V. Prosser, 11 Beav. 306; 18 L. J., Ch. 35; 13 Jur. 71.

Proceedings on behalf of the Public.]-The

attorney-general may properly take proceedings

on behalf of the public, when acts tending to the injury of the public are being done without lawful authority, even though no evidence be produced of actual injury having been inflicted. After the expiration of the parliamentary powers of a bridge company the company continued to carry on their operations, on and off their own lands, intending to apply for a new act to revive and extend the powers conferred by their original act. An action having been commenced by the attorney-general, on the information of two of the shareholders, for the purpose of restraining the company from proceeding with their works without due anthority, and from using the moneys of the company for such works, or for other unauthorised purposes, the company obtained their new act, and the plaintiffs thereupon obtained leave to discontinue so much of their claim as related to matters other than the claim

to have the company restrained, before the passing

of the new act, from executing works off their own lands. The action being brought to a hearing:—Held, that the action was justifiably costs of the action, other than those relating to Att.-Gen. v. Shrewsbury (Kingsland) Bridge Co., 51 L. J., Ch. 746; 21 Ch. D. 752; 46 L. T.

687; 30 W. R. 916.

Where there has been an access of the statutory powers granted to a public company, but no injury has been occasioned to any individual, and there is none which is immiuent, or of irreparable consequence, the attorney-general alone can obtain an injunction to restrain the exorbitancy. Ware v. Regent's Canal Co., 3 De G. & J. 212; 28 L. J., Ch. 158; 5 Jur. (N.S.) 25; 7 W. R. 67.

Delay or laches may not be imputed to the attorney-general suing on the behalf of the public where it might be against an individual in a similar case. Att. Gen. v. Brudford Cunal Co., right in a case involving general interest, as a

15 L. T. 9.

Action against Corporation by Freemen-Information unnecessary. ]-In an action by some (on behalf of all) of the freemen of a borough to establish the right of all the individual freemen to share for their private benefit the net proceeds of certain properties vested in the corporation :- Held, on demurrer, that the effect of the saving of rights in s. 2 of the Municipal Corporations Act of 1835 was to legalise the beneficial interests therein mentioned, without reference to the legality of their origin, and, in particular, to obviate any objection which might otherwise arise in respect of the tendency to-wards a perpetuity of any such beneficial interest. Prostney v. Colchester Corporation, 51 L. J., Ch. 805; 21 Ch. D. 111.

An action to establish such rights as aforesaid may be brought by parties claiming to be en-titled, without an information by the attorney-

general. Ib.

Information by, to restrain Public Body.]— Upon an information filed by the attorney-general to restrain a public body from transgressing powers conferred by an act of parliament, it is not necessary to prove that injury to the public will result from the acts complained of ; and in this respect there is no difference between an ex-officio information and an information at the relation of a private individual. Att.-Gen. v. Chekermouth Loval Board, 44 L. J., Ch. 118; L. R. 18 Eq. 172; 30 L. T. 590; 22 W. R. 619.

No Answer to Information, that more Persons Benefited than Harmed by Act complained of. ]-It is no answer to an information by the attorneygeneral, to say that a larger section of the public is benefited than injured by the act complained of. Att.-Gen. v. Ely, Huddenham and Sutton Ry., 38 L. J., Ch. 258; L. R. 4 Ch. 184; 20 L. T. 1; 17 W. R. 356.

Right to Sue Railway Company for Breach of its Powers. |-The right of the attorney-general to sue a railway company for breach of its powers is not taken away by the provisions of the Railway Regulation Act, 1844, 7 & 8 Vict. c. 85. Att.-Gen., v. G. N. Ry., 29 L. J., Ch. 794; 6 Jur. (N.S.) 1006; 2 L. T. 653; 8 W. R. 556.

Right to Trial at Bar-Change of Venue. ]-By the Crown Suits Act, 1865, 8, 46, where in any cause in which the attorney-general is centified an behalf of the Crown to demand as (Q. B. 205; 7 Jur. (X.S.) 674.

commenced, and that the company must pay the of right a trial at bar he states to the court that he waives that right, " the court on the applicathe part of it which had been discontinued, tion of the attorney-general shall change the venne to any county he may select":—Held, that an action under 39 & 40 Vict, c. 80, s. 10, against the secretary of the board of trade, to recover damages for the detention of a ship for survey without reasonable and probable cause, is within the above section, that the attorneygeneral is entitled to demand as of right a trial at bar in such an action, and that the court is bound on his waiving that right to change the venue to any county wherein he elects to have the action tried. Dixon v. Furrer, 56 L. J., Q. B. 53; 18 Q. B. D. 43; 55 L. T. 578; 35 W. R. 95 : 6 Asp. M. C. 52-C. A.

revenue case, to be let in to appeal than a subject has. Ling v. Ingham, 3 Moore, P. C. 26.

Fiat for Bringing Error.] — The attorney-general having refused his fiat for a writ of error to a person convicted of a misdemeanour :- Held, that in a proper case the flat was the ex debito justitize; but that the attorney-general was to determine, on his own responsibility, whether or not each case was proper, and that the court could not review his decision. *Memon, Expurte*, 4 El. & Bl. 869; 24 L. J., Q. B. 246; 1 Jur. (N.S.) 591. S. P. and S. C., 16 C. B. 97.

Where, in a colony, a person has been convieted of a criminal offence, and is undergoing his sentence, no writ of error will be granted to bring up the record of conviction unless the attorney-general has given his flat for the writ. Reg. v. Levs. El. Bl. & El. 828; 27 L. J., Q. B. 403; 5 Jur. (N.s.) 338.

Certificate of the attorney-general not necessary to entitle the party seeking writ of error to the lords in a case of misdemeanour, where, although the king's name is used, the Crown is not directly concerned. Raw v. Rowe, 2 Moll. 27.

Fiat for Information.]—It is irregular to obtain the fiat of the attorney-general to an information, original or amended, after it has been filed. Att.-Gen. v. Ironmongers' Co., 4 L. J.

Charity Cases. ] - Petitions for filling up vacancies in charity trustees require the fiat of vacancies in chartry trassecs returns the har on the served upon him. Warvick Chartites, In re, 1 Ph. 539, Petition under the Chartites Procedure Act, 1812, 52 Geo. 3, c. 101, must have the signature of the attorney-general, or of the solicitorgeneral, in case only of there being no attorneygeneral at the time. Such signature not to be affixed without the same deliberation as in the case of an information regularly filed. Skinner, Ex parte, 2 Mer. 453; 1 Wils. 14.

Court will not act under an award in a charity cause without consent of attorney-general, or inquiring whether it is for the benefit of charity. Att.-Gen. v. Hewitt, 9 Ves. 232.

CHARITY.

Entry of Nolle Prosequi.]—Where a defendant has been found guilty upon several counts of an information, the attorney-general may enter a nolle prosequi on one of the counts, after a rule nisi for a new trial. Reg. v. Leatham, 30 L. J.,

The attorney-general has power to enter a nolle prosequi on an indictment without calling upon the prosecutor to shew cause why that should not be done; and where he has done so, the court will not interfere. Reg. v. Allen, 1 B, & S, 850; 31 L. J., M. C. 129; 8 Jur. (N.S.) 230; 5 L. T. 636; 9 Cox, C. C. 120.

2. WHEN ATTORNEY-GENERAL TO BE MADE PARTY, AND WHEN NOT.

Setting Aside Lease.]-Bill to avoid a lease. on ground that the lessor was a lunatic; the attorney-general must be a party. Leigh v. Wood, Rep. t. Finch, 135.

Attorney-general is not a necessary party to bill, to set aside ecclesiastical leases. Att.-Gen.

v. Moses, 2 Madd, 294.

Bastard's Estate,]-The attorney-general, as a party in the cause, held not sufficiently to represent the estate of an intestate bastard, so as to dispense with a duly constituted legal personal representative. Bell v. Alexander, 6 Hare, 543.

Semble, that the attorney-general, without taking out administration, sufficiently represents, for the purposes of a suit, the personal estate of a bastard. M'Kiernan v. Kernan, Fl. & K. 352;

4 Ir. Eq. R. 269.

Where a bastard interested in the subject of the suit dies intestate, it is not sufficient that the attorney-general is made a party to the suit in respect of his interest, but administration must be taken out. Lewis v. Lewis, 16 Jur. 324.

One having a bastard, leaves a personal estate to her executors in trust for the bastard, who dies intestate, and without wife or issue. The executor brings a bill against one who has part of this personal estate in his hands. The defendant demnrs, because the attorney-general and the administrator of the bastard are not parties; demureer disallowed, for that the executor has the legal title, and consequently may sne for the estate. Jones v. Goodchild, 3 P. W. 33; 2 Eq. Abr. 168. And see BASTARD.

Nuisance.]-A bill may be filed to restrain a public nuisance, without making the attorneygeneral a party, if the plaintiff sustains special damage from the nuisance. Soltau v. De Held, 2 Sim, (N.S.) 133; 21 L. J., Ch. 153; 16 Jnr. 326.

An injunction was granted to restrain the ringing of six large-sized bells in the belfry of a Roman Catholic Chapel on Sundays only, for former cannot compet on Santany only, to five periods of five minutes each, the plaintiff having previously recovered 40s, damages in action at law for much more frequent ringing.

Where Few of Many Complainants Sue-Where All Sue. ]—A few of a large number of persons may institute a suit on behalf of themselves and the rest, for relief against acts injurious to their common right, although the majority approve of those acts, and disapprove of the institution of the suit; and the attorney-general need not be a party to it; but where the whole body concur in seeking relief from an abuse, the suit must be instituted by the attorney-general. Bromley v. Smith, 1 Sim. 8; 5 L. J. (o.s.) Ch. 53.

Action by Local Authority. -A local authority is not empowered by s. 107 of the Public Health Act, 1875, to bring an action in their own name for an injunction to restrain a public nuisance by which they have not suffered any special damage. Wallasey Local Board v. Gracey (56 L. J., Ch. 739; 36 Ch. D. 593) approved. Semble, if the sanction of the attorney-general be obtained, such an action may be brought in the name of the attorneygeneral at the instance of the local authority as relators. Tottenham Urban Conneil v. Williamson, 65 L. J., Q. B. 591; [1896] 2 Q. B. 353; 75 L. T. 258; 44 W. R. 676; 60 J. P. 225—C. A.

Embankments of Thames. The attorney-general (after the passing of the Court of Chancery Act, 1841, 5 Vict. c. 5) filed an information in chancery against the mayor and commonalty of London, alleging that the Crown was seised of the bed and soil of the river Thames, that the defendants were conservators thereof, and, in breach of their duty as such conservators, had granted to divers persons (also made defendants) licences to embank parts of the river, and had received fines for such licences, and that such embankments were nuisances; and the information prayed that the rights of the parties might be ascertained, that the licences might be declared void, and that injunctions might issue to prevent the completion of the embankments. The defendants denied that the embankments were misances, and demurred to the rest of the bill for want of equity :--Held, that upon these pleadings the information was maintainable. London Corporation v. Att.-Gen., 1 H. L. Cas. 440. Affirming 8 Beav. 270; 14 L. J. (N.S.) Ch. 305; 9 Jur. 570.

Abandonment of Branch Line of Railway-Restraining Opening of Direct Line. |-- Where a railway company were authorised to make a direct line of railway, with a branch railway, and were about to complete and open the direct line, but had abandoned the branch line, the attorney-general has no right to file an information to restrain the opening of the direct line as a means of compelling a completion of the branch line, alleging that the abandonment of the branch line was an injury to the public. Att.-Gen. v. Birmingham and Oxford Junction Ry., 3 Mac. & G. 453; 16 Jur. 113.

Action for Specific Performance-Inhabitants of Particular Places.]-The attorney-general is not a necessary party to a suit for specific performance, merely on the ground that certain parties to the agreement, of which specific performance is sought, entered into an agreement on behalf of themselves and all other the inhabitants of certain places mentioned. Wilson v. Furness Ry., L. R. 9 Eq. 28; 21 L. T. 553; 18. W. R. 89.

Information against Corporation. ]-A suit against a corporation to compel the performance of a public trust should be by information by the attorney-general. Evan v. Avon Corporation, 29 Beav. 144.

The attorney-general has power to restrain, or afterwards impeach, the alienation of corporate property made pending the granting of a charter, Att. Gen. v. Avon Portreeve, 2 N. R. 564; 9 Jur. (N.S.) 1117; 11 W. R. 1050—L.JJ. against an individual officer of it, making a case the Crown rate concerned, the atomorp-general in which the latter would be personally liable, is ought to be before the court. Horenden v. tot demurrable. Att.-clen. v. Limerick Corr. Almeetey (Lordy, 2 Sch. & Lef. 617. poration, Beat, 563.

Boundaries in Colonies. ]-In a suit between the proprietors of provinces granted by the Crown to settle boundaries, the attorney-general should be a party. Pen v. Baltimore (Lord), Ridgw. 332.

Foreign Government Stock.]-Court refused to order dividends received before bill filed, of stock purchased by the old government of Switzerland, to be paid into court by the trustees on application of the present government, without having the attorney-general made a party. Dolder v. Bank of England, 10 Ves. 352.

Question of Excess of Parliamentary Powers eterminable on Information by Attorney-Determinable on Information by Attorney-General alone,]—Two neighbouring gas companies, A. and B., were by their respective acts empowered to make and supply gas within certain slefined limits. B. proceeded to supply gas to buildings beyond its own parliamentary limits and within those of A., who thereupon filed a bill to restrain B. from so doing. The bill alleged that by the unauthorised acts of B., A. would be deprived of the profits arising from the sale of gas to the buildings illegally supplied or about to be supplied by B., and that great loss would be sustained by A. if such illegal acts were allowed to continue. A demarrer by B. for want of equity was allowed, on the ground that the bill had not alleged such a private injury as a court of equity could take notice of, and that the question of excess of parliamentary powers could only be determined upon an information by the attorney-general. Pudsey Coul Gas Co. v. Bradford Corporation, 42 L. J., Ch. 293; L. R. 15 Eq.

In other Matters.]—Petitions for receivers on tenants' and receivers' recognizances should be entitled in the name of the Queen, and the attorney-general should be the petitioner. Reg. v. Cruise, 2 Ir. Ch. R. 65.

In incumbrancers' suits, the attorney-general, made a party in respect of a recognizance, sufficiently represents the parties interested in it for all purposes, and it should be reported an incumbrance, though the condition be not broken, Delany v. Firman, 12 Ir. Eq. R. 304.

In suit by equitable mortgagee to obtain benefit of mortgage on lands of mortgagor (who was a simple contract debtor of Crown), which had been seized by Crown and sold, the to be paid out of the proceeds of the sale before the Crown should be satisfied; the purchaser under Crown-assignee of term therein, the debtor and the attorney-general were made

parties. Casherd v. Ward, 6 Price, 411.

To a bill by the assignce of a bankrupt against the representatives of a deceased assignee for an account of unclaimed dividends in their hands, neither the attorney-general nor the creditors to whom the dividends belonged, are necessary parties. Green v. Weston, 3 Mont. & Ayr. 414; 3 Myl. & C. 385; 7 L. J., Ch. 67; 1 Jur. 955.

When parties claim under two different grants

An information against a corporation, and also different amounts; inasmuch as the rights of

#### 3. Relators.

General Rules.]—Every information is properly the suit of the attorney-general, and he onght not to be heard as counsel for any other party but himself, as the institutor of the suit, though it has been the practice to allow the relators to appear by counsel of their own, and though the attorney-general observed that he had been heard in opposition to the information in the House of Lords in the case of Lady Hewley's charity. Att.-Gen. v. Ironmongers' Co., 1 Cr. & Ph. 208; 10 L. J., Ch. 201; 5 Jur. 356. Affirming 2 Beav. 318.

As to the position of the attorney-general in informations at the instance of a relator, and the practice in such cases. Ib.

In an information, the attorney-general, and not the relator, is the party prosecuting the cause, and therefore the court will not allow counsel for the relator to be heard in any other character than as counsel for the attorney-general, Ib,

Form and Title. ]-In an action by the attorney-general at the relation of a plaintiff, the title information should no longer be used. Att.-Gen. v. Shrewsbury Bridge Co., 42 L. T.

The attorney-general may proceed without a relator. Bedford Charity, In re, 2 Swan, 520; 19 R. R. 107.

The attorney general possesses the entire dominion over every information instituted in his name, whether it be filed ex officio or at the instance of a relator. Att.-Gen. v. Haberinstance of a relator. Att.-Gen. v. Huber-dushers' Co., 15 Beav. 397; 16 Jur., 717.

Giving Leave to File Information.]—Where it was desired to restrain a sale, to take place at a distant locality from London, so that the necessary affidavits could not be sworn at such locality in time, if the relator's authority to file an information was first required the court

dispensed with such authority. Att.-Gen. v. Murray, 11 L. T. 332; 13 W. R. 65.
When the authority of a relator had been substantially given to the filing of an information in his name, but his absence abroad prevented the filing of his anthority in strict compliance with the Chancery Judicature Act:

—Held, that such information was properly filed, and a motion to take off the file was refused with costs. Att.-Gen. v. Willshire, 45 L. J., Ch. 53.

Information at relation of lunatic not proper, he must be party. Att. Gen. v. Tiler, Dick. 378

In an information at the relation of a lunatic, proper relator was directed to be appointed, who might be responsible for the costs of the suit. Att.-Gen. v. Tyler, 2 Eden, 230.

Change of.]-Where relators refused to proceed further in an information, new relators were substituted, who offered an indemnity for all past and future costs. Att.-Gen. v. Cushel Corporation, 1 San. & Sc. 333.

An application by a number of relators named from the Crown, each reserving a rent, but of in an information, to strike out the names of several of themselves, will not be granted, even though the defendants will not be prejudiced, nuless it appears either that without the alteration justice will not be done, or that the sit cannot be so conveniently prosecuted if the alteration be not made. Att.-Gen. v. Cooper, 3 Myl. & C. 258; 1 Jur. 790.

On death of relator new one named. Att.

Gen, v. Powell, Dick, 355.

Where sole relator dies, application for new relator must be made by the attorney-general. Att.-Gen. v. Plumtree, 5 Madd. 452.

Where the original relators had after decree died, the court held that the application for the appointment of a new relator could not be made by the attorney-general, but that it must be made by the new relator with the consent of the attorney-general. Att.-Gen. v. Horreey, 1 Jur. (X.S.) 1062; 3 Eq. Bep. 1992; 3 W. R. 636.

A relator and plaintiff cannot be heard in person. Att.-Gen. v. Barker, 4 Myl. & C. 262.

Where, in an information and bill, the same individual who is named as the relator is alone the plaintiff sing in his own right, the court will not dismiss the information and bill upon the ground that the relator having been required by the attorney-general to give security for costs, has failed to do so. Alt.-Gen. v. Knight, 3 Myl. & C. 154.

Form of decree in an information without a relator where a defendant is liable to pay the costs of a co-defendant. Att.-Gen. v. Chester

Corporation, 14 Beav. 338.

The attorney-general and relator cannot be allowed to take opposite views on an information. Att.-Gen. v. Sheeboene Grummar School Governors, 18 Beav. 256; 24 L. J., Ch. 74; 18 Jur. 636.

The attorney-general may appear as counsel for defendants, to an information filed by relators in his name. Shore v. Wilson, 9 Cl. & F. 355.

A suit instituted for the purpose of regulating and apportioning a rate levied on the inhabitants of a parish, under an act of parliament, ought to be by information and bill, and not by bill only; therefore, a person who had filed a bill for this purpose, on behalf of himself and all other the rated inhabitants of the parish, upon affidavits being made of his insolvency, was onlered to give security for costs. Tredwell v. Byrch, I X, & Coll. 476.

# 4. PROCEDURE PRACTICE AND PLEADING.

Service of Process.]—Petition in the matter of a person found an idiot, must be served on the attorney-general. Watson, Ex parte, Jac. 161.

Service of petition by bankrupt who had absconded, on the attorney-general at his house, irregular; the proper service on the attorney-general is through the Crown solicitor. Mullay,

Ex parte, 3 Moll. 71.

Service upon the attorney-general (who has not been made a party to the suit) of a decree directing inquiries, does not under 15 & 16 Viet, c. 86, s. 42, so far bind the Crown as to preclude the institution, on behalf of the Crown, of further inquiries; and it is not the practice that the Crown should be restricted under such circumstances either to apply for a re-hearing, or to proceed by summons at chambers to add to the decree. Johnston v. Hamilton, 12 L. T. 822.

Suing Jointly, or Jointly and Severally.]—By the practice of the Court of Exchequer, the attorney-general land up the privilege of suing any one or more persons, jointly, or jointly and severally, indebted to the Crown, at his discretion, Att.-Genc. v. Mughes 11 L. J., Ch. 329.

The same rule as to parties must be applied in a creditors' suit, between the Crown and persons jointly, and jointly and severally, indebted to the Crown, as between subject and subject. *Ih.* 

Changing Venue.]—In an information by the attorney-general of the Prince of Wales to recover dues alleged to be payable to thin in right of his duchy of Corowall, the court refused to change the venue from Middlesex to Devonshire, on the ground of inconvenience and exposes in brigging the defendant's witnesses from Torquay to London, it appearing that it would be more convenient for the attorney-general to try in Middlesex. Att.-Gen. (Prince of Wales) V. Crossman, 4 H. & C. 568; 35 L. J. Ex. 215; L. R. 1 Ex. 381; 12 Jur. (N.S.) 712; 14 L. T. 866; 14 W. R. 1996.

It is incumbent on the officers of the Crown to make out clearly the prerogative in any case where they claim to be on a different footing from the subject, as regards procedure in any

litigation. Ib.

Effect of Statute of Limitations.]—A rector and overseers of a parish conveyed to purchasors for value (subject to a perpetual rent-charge) land belonging to the parish, and the hecome from which was applied to the relief of the poor. Above sixty years clapsed, and then the attorney-general filed an information to have the deed of conveyance cancelled :—Hebl; that the attorney-general in such a suit was merely acting for the interests of the parts-hioners; that they would mader the Limitation Act, 1883, 3 & 4 Will, 4, c. 27, have been barred as against a purchase for value; and that the, saing in their interest as against such a purchaser, was likewise barred. Augusten (Linique) (Linique

Appearance of Attorney-General for Defendant,—The attorney-general may appear, as comisel for defendants, to an information filed by relators in his name. Shore v. Wilson, 9 (d. & F. 355.)

Pleading.]—Where a question of great difficulty and delicacy arises between a subject plaintiff and the Grown defendant, the court will not allow it to be decided upon denurrer, but an answer must be filed, and the benefit of the demutrer will be reserved to the defendant. Luntour v. Alt.-Gen., 11 Jur. (N.S.) 7; 11 L. T. 613; 13 W. R. 305.

Where, upon such an order, no costs are given, the order itself ought expressly to state that

The repealed 4 & 5 Anne, c. 16, s. 4, did not extend to the case of the Crown, and therefore the court has no authority to give a defendant leave to plead several matters in an information of intrusion filed by the attorney-general. Att. Gen. v. Donaldson, 7 M. & W. 422; 9 D. P. C. 319; 5 Jun. Supplementary.

Nor to actions at the suit of the king. Rea v. Caldwell, Forcest, 57.

At common law the Crown is not precluded

and the right of the Crown to plead double is unaffected by any of the statutes or rules of transferred by any of the statutes of reasts of court relating to pleading and procedure. Tbbin v. Rey., 14 C. B. (x.s.) 505; 32 L. J., C. P. 216; 9 Jur. (x.s.) 1130; 8 L. T. 392; 11 W. R. 701. S. P., Rey. v. Diplack, 19 L. T. 380.

Reply.]-Right of Crown to general reply in all cases in the Court of Exchequer. Buckingham (Duke) v. Iuland Recenue Commissioners, 2 L. M. & P. 311.

Where the Crown is defendant in error, it is not incidental to the office of attorney-general that he should have the right to the last reply; but the court, in the exercise of its discretion, allowed it in an appeal from the revenue side of the Exchequer. Att.-Gen. v. Sillem, 33 L. J., Ex. 209; 10 Jur. (N.S.) 393; 10 L. T. 835.

# J. COSTS. 1. GENERALLY.

General Principles.]—There is no such general principle in equity that the Crown cannot receive costs. Att.-Gen. v. Ashburnham, I Sim.

Before the Crown Suits Act, 1855, 18 & 19 Vict. c. 90, the House of Lords refused to award costs against the Crown, on the ground of the inflexible rule which existed to that effect. Lord

Advocate v. Hamilton, 1 Macq. H. L. 46.
The Crown Suits Act, 1855, 18 & 19 Vict. c. 90, s. 2, which gives costs against the Crown, is confined to such informations as are mentioned in the 1st section, and to which the attorneygeneral must be a party. Reg. v. Beudle, infra.
The Exchequer Court (Scotland) Act, 1856, 19 & 20 Vict. c. 56, s. 24, allows costs to be given for or against the Crown, and applies as well to all causes presently depending as to those which shall come to depend. Alexander v. Officers of State for Scotland, L. R. 3 H. L.

Magistrates' Cases.]-On appeal from a decision of justices on an information by an excise officer, the quarter sessions have no power to order costs to a successful defendant. Rey. v. Beadle, 7 El. & Bl. 492; 26 L. J., M. C. 111; 3 order costs to a successful defendant, Jur. (N.S.) 863; 5 W. R. 498.

The Crown, and not the officer, is the party to such proceedings, and, not being named, is not bound by the Quarter Sessions Act, 1849, 12 & 13 Vict. c. 45, s. 5, which empowers quarter sessions to give costs against the unsuccessful party in any appeal. Ib.

But upon an appeal against a conviction upon the information of an officer of excise, prosecuting for the Crown by order of the commissioners of inland revenue, for an offence under 4 & 5 Will. 4, c. 85, s. 17, the court confirming the conviction, may order costs, to be paid to the excise office runder 20 & 21 Vict. c. 48. Manre v. Smith, 1 E. & E. 597, 28 L. J., M. C. 126; 5 Jur. (N.S.) 892; 7 W. R. 206.

Customs. ]-An information against two for smuggling, under the Customs Consolidation Act, 1853, 16 & 17 Viet. c. 107, contained several counts, in each of which they were charged severally. A

from pleading double, or pleading and demurring, claimed, with an arrangement that execution should issue against each for a portion only, the remembrancer, on taxing costs against one, under s. 263, having allowed the Crown costs on the whole record, the court refused to review the taxation. Att.-Gen. v. Roberts, 1 Jur. (N.S.) 1024; 4 W. R. 7.

> Excise.]-In an excise information, where the Crown, if successful, is entitled to full costs of suit, the Crown is entitled to full costs as in an ordinary suit between subject and subject, notwithstanding that the Crown solicitor conducting the information is employed by the Crown at an annual salary. Att.-Gen. v. Shillibeer, 6 D. & L. 236; 19 L. J., Ex. 115; 4 Ex. 606.

> Several Penalties.]—Where one count of an information charges several penalties, the Crown, having established a right to one penalty alone, is entitled to the costs of proving that penalty only. Ib.

Costs of Witnesses. ]-In another count the defendant was charged with the wilful omission of an entry and the Crown had a verdict :-Held, that the Crown was entitled to the costs of all such witnesses as were reasonably necessary to prove that the omission was wilful. Ib.

Proceedings before Attorney-General. ]-The court has no authority to make an order adversely with regard to the costs of proceedings before the attorney-general, not under its direction or sanction, Att.-Gen. v. Harper, 8 L. J., Ch. 12.

Appeal by Crown, ]-Against any judgment awarding costs against an officer of the Crown, suing on behalf of the Crown, an appeal may be brought, notwithstanding the general rule that no appeal lies for costs.

Action against Attorney-General-Right to Costs.] -In an action against the attorney-general and other defendants, to establish the plaintiff's right to the sca-shore, the attorney-general did not actively contest the plaintiff's claim, but did not admit the same until their right had been established by evidence at the trial :- Held, that the attorney-general was not entitled to be paid his costs of the action by the successful plaintiffs. Kilmorey (Eurl) v. Att.-Gen., 29 L. R., Ir. 320. And see Bain v. Att.-Gen., 61 L. J., P. 135-C. A.

Information - Discontinuance by Crown -Costs of Defendant.]-An English information was filed in the name of the attorney-general on behalf of her majesty against the defendant in respect of certain foreshore rights, and after the proceedings had been continued for some time, and considerable expense incurred by the defendant, the solicitor acting on behalf of the attorney-general informed the defendant's solicitor that the attorney-general did not propose to proceed further with the information. The defendant applied to the court for an order directing that the information should be dismissed, or judgment entered for the defendant, and that the Crown should pay to the defendant his costs of and incidental to the information and suit :- Held, that the court had no power to dismiss the information for want of prosecution, as by Ord, LXVIII, r. 2, the rules providing for verdict having by consent been taken against the dismissal of an action for want of prosecuboth on all the counts for the full penalties tion were not applied to proceedings on the 79

Held further, that, as the suit revenue side. Held further, that, as the suit had not been determined, the Crown could not be ordered to pay the defendant's costs. Att .-Gen. v. Williamson, 60 L. T. 930.

Costs of Counsel.]—Liberty given to except to the Master's report of taxation being applied for, on the ground of his disallowance of a brief to the attorney-general, besides two other counsel in a charity information, the report was referred back to the Master for review. Att.-Gen. v. Drapers' Co., 4 Beav. 305.

Upon the taxation of costs as between party and party, where the attorney-general is made a party to protect the interests of the Crown, the rule is to allow two counsel in addition to the attorney-general, in every case in which, if it were that of a private individual, that number of counsel would be allowed. Cockburn v. Ruphael, 12 L. J., Ch. 263; 7 Jnr. 246.

Other Points. |-The attorney-general, made a party to a cause as representing a charge belonging to a deceased bastard, is not entitled to costs if nothing is reported to be due on the

charge. Murphy v. Osborne, 9 Ir. Eq. R. 254.

In a suit to have the rights of the parties to the property in question declared, to which the attorney-general was a defendant, as representing the Crown, the court refused to give the attorney-general his costs, though it gave all the other parties their costs as between solicitor and client. Burney v. Macdonald, 15 Sim. 6; 9 Jur.

Where the interests in respect of which the attorney-general is made a party to a suit are of such a description that the court would, in the case of a private individual, allow fees to three counsel upon the taxation of cost, the court will, in such cases, allow fees to two counsel besides the attorney-general. Cockburn v. Raphael, 12 L. J., Ch. 263,

The attorney-general, appearing in support of a bill for a legacy, the bill being dismissed:— Held, not entitled to costs. Gloucester Corpora-

tion v. Wood, 3 Hare, 149.

A fund was settled on A. for life, with remainder to B. and others. B. mortgaged his reversionary share to C., and was afterwards convicted of felony. A suit was instituted for the administration of the fund, to which C. and the attorney-general were made defendants :-Held, that the attorney-general was not entitled to his costs out of the general fund. Kitchener v. Kitchener, 18 L. J., Ch. 152; 13 Jur. 761.

Where the Crown sucs without the intervention of a relator, the rule is, that costs can neither be given to nor against the Crown. Smith v. Stair (Earl), 2 H. L. Cas. 807; 13 Jur.

Costs cannot be given against the Crown where the attorney-general is not a party co nomine. Reg. v. Beadle (26 L. J., M. C. 111; 7 El. & Bl. 492) followed, in preference to Jurdin, Exparte (31 L. R., Ir. 1). Galvin, In re, 1387] 1 Ir. & 520.

The attorney-general attended in a cause to

which he was not a party, to support a claim for legacy duty upon a fund in court. The claim failed :- Held, that the Crown was not entitled to costs. Hobson v. Neale, 17 Beav, 178: 1 Eq. Rep. 165.

The solicitor for the affairs of the treasury as nommee of the Crown, having taken out letters of administration to the goods of an intestate,

on the assumption that he had died without next of kin :- Held, not entitled to the costs of a suit instituted by a person rightfully claiming as mext of kin. Kane v. Reynolds, 4 De G. M. & G. 565; 24 L. J., Ch. 321; 1 Juv. (N.s.) 148; 3 W. R. 85—L.JJ.

The nominee of the Crown had successfully resisted in a previous suit, an unfounded claim by a person wrongfully asserting a title as next of kin, and in the suit of the rightful claimant there had been the usual decree for an account, with all just allowances :- Held, without deciding that the costs of the previous suit might have been included under just allowances, that inasmuch as no objections had been taken to the chief clerk's certificate by the nomince of the Crown, he was precluded from raising the question as to his right to the costs of defending the previous suit, when the cause came on before the court for further consideration. Ib.

Where the Crown and an alien were adverse and unsuccessful claimants to estates, they were ordered to pay their own costs. Rittson v. Stordy, 3 Sm. & G. 230; 3 Eq. Rep. 1039; 1 Jur. (N.S.) 771: 2 Jur. (N.S.) 410: 3 W. R. 627.

The attorney-general pressing the claim of the Crown, and failing, not entitled to his costs of appearance. Gough v. Davies, 25 L. J., Ch. 677;

W. R. 757.

Where a plaintiff succeeds in establishing his title as next of kin to an intestate against the Crown as administrator, the costs of the suit must come out of the estate, the Crown, as in the case of an ordinary administrator, not paying any costs. Partington v. Reynolds, 6 W. R. 615.

Where in a suit against the Crown the plaintiff succeeds, and the Crown appeals and fails, it can

have no costs of such appeal. Ib.

A decree in a suit and information directed the plaintiff's costs to be paid by the defendants: -Held, that the costs of obtaining the attorneygeneral's fiat before filing the information, and in respect of proceedings entitled in the suit, which had been taken before the attorneygeneral, with reference to the withdrawal of his fiat pending an appeal, were costs in the cause, payable by the defendants. Att.-Gen. v. Halifax Corporation, 41 L. J., Ch. 100; L. R. 12 Eq. 262; 24 L. T. 655.

Where a charity information was filed without relator under the repealed 59 Geo. 3, c. 91, the court had jurisdiction to order defendant to pay costs to attorney-general, Att.-Gen. v. Ash-

burnham, 1 Sim. & S. 394.

In a charity information filed without a relator, the attorney-general did not personally appear at the hearing, but two other counsel appeared in support of the information :- Held, that the costs of a brief to the attorney-general ought to be allowed in addition to those of the two counsel, in the taxation of costs as between party and party. Att.-Gen. v. Drapers' Co., 4 Beav. 305.

#### 2. OF OR AGAINST RELATORS.

The relator, by the information, insisted on a claim, which was afterwards abandoned, having, as was alleged, shaped the whole information with a view to his own demand. As, however, directions were to be given, so that the information had a foundation, the relator was not made to pay costs. Att.-Gen. v. Bolton, 3 Atk. 321; 3 Anstr. 820 ; 4 R. R. 869.

Where the information was quite causeless and contrary to the right, the relators were ordered to pay the costs. Att.-Gen. v. Parker, 1 Ves. 43; 3 Atk. 578. Att.-Gen. v. Smart, 1 Ves. 72.
An information was dismissed, with costs,

against the relator, because it appeared to proceed from a private motive of revenge in him, and that from a very improper cause. Att.-Gen. v. Middleton, 2 Ves. 327.

If the solicitor gives a relator an indemnity for costs or uses his name without anthority (though afterwards assented to), the court will order the information to be taken off the file with the costs to be paid by the relator and attorney. Att.-Gen. v. Skinners' Co., C. P. Coop. 7.

Where relators refused to proceed further in an information, new relators who offered an indemnity for all past and future costs were substituted. Att.-Gen. v. Cashel Corporation, Sau. & Sc. 333.

A new information was filed after a former, A new information was filed after a former, and two verdicts, on full evidence, in intrusion:

—Ordered, that the attorney-general name a relator, and he to show cause why he should not be answerable for costs. Att.-Gen. v. Puckering. 2 Fowl, Exch. Pr. 313.

Defendant restrained from proceeding against relators for costs of an information dismissed with costs, upon affidavit of intention to appeal, but upon terms. Att.-Gen. v. Dublin Corporation,

2 Moll. 355. In an information against a corporation to restrain them from applying certain funds in aid of the borough fund, a decree was made by which the corporation was ordered to pay to the relator the costs of the information :-Held, that the relator was entitled to charge these costs upon a find standing in trust for the corporation, and arising from the proceeds of the sale of property belonging to the corporation. Att.-Gen v. Thet-

ford Corporation, 8 W. R. 467. Relators have their costs, charges and expenses. Att.-Gen. v. Winchester Corporation, C. P. Coop.

J. M. L.

# CROWN OFFICE.

[BY J. M. LELY.]

[CROWN OFFICE RULES, 1886,]

- A. CERTIORARI.
- B. CRIMINAL INFORMATION, 121.
- C. HABEAS CORPUS, 134.
- D. MANDAMUS, 151.
- E. PROHIBITION, 208.
- F. Quo WARRANTO, 219.

# A. CERTIORARI.

[Crown Office Rules, 1886, 28 to 42,7

- 1. When it Lies, and When Not.
  - a. Generally, 82. b. County Court, 85.
  - c. Criminal Cases, 87.
  - d. Convictions and Acquittals, 94.

  - e. To Remove Orders of Sessions, 97.
  - f. Restraint by Statute, 100.
  - g. In other Cases, 104.

- 2. How Obtained.
  - a. Application, 108,
  - b. Recognizances, 108. Notice, 110,
  - d. Limitation of Time. 113.
  - Affidavits, 114. f. Motion and Rule, 115.
- 3. Return to, 117.
- 4. Quashing Writ, 118.
- 5. Procedendo, 119.
- I. WHEN IT LIES, AND WHEN NOT.

#### a. Generally.

For Excess of Jurisdiction.]—Where a jury, summoned under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, s. 68, has taken into consideration, in awarding compensation, one claim among others as to which the jury had no jurisdiction, a certiorari lies, although such excess of jurisdiction does not appear upon the face of the proceedings; and such excess of jurisdiction may be shown by affidavit. Penny v. S. E. Ry., 7 El. & Bl. 660; 26 L. J., Q. B. 225; 8 Jur. (N.S.) 957; 5 W. R. 612.

The rule of the court is that the writ should only go when the act sought to be reviewed or quashed was in excess of jurisdiction, and not on any mere point of form. Reg. v. King, 14 Cox, C, C, 434.

To Inferior Courts only, ]—A certiorari was issued to the judge of an inferior jurisdiction to return and certify the practice of his court. Williams v. Bagot (Lord), 4 D. & R. 815; 3 B. & C. 772; 27 R. R. 482.

A certiorari lies only to inferior courts of record. Educards v. Baven, 7 D. & R. 709; 5 B. & C. 206; 2 Russ, 153; 2 Sim. & S. 514.

Record itself must be Removed.]-Where the tenor of a record instead of the record itself is removed by certiorari ont of an inferior court, it is erroneous, as no proceedings can be had upon it. Woodcraft or Woodraffe v. Kinaston, 2 Atk. 317; 9 Mod. 305; Dick. 238.

To mitigate Fine. ]-The court will not mitigate a fine imposed by an inferior court, the record whereof is removed there by certiorari. In this case, however, they recommended an application to the Exchequer. Rev v. Loveden, 8 Term Rep.

For Judicial Acts only.]—No certiorari for other than judicial acts. Rew v. Lloud. Cald.

When it Issues as of Right. |-At common law, where a person comes forward to redress an individual grievance the writ of certiorari issues as of right; where a person comes forward to assert a right in which a more or less numerous class of the public are interested, the issue of the writ is within the discretion of the court. Reg. v. Drury, [1894] 2 Ir. R. 489.

On Application of the Crown, ]-A ceron application of the course, upon the application of the Crown. Rew v. Eaton, 2 Term Rep. 89; 1 R. R. 436.

But not so when a defendant applies; he must

lay some ground for it before the court, supported by affidavit. Ib.

The writ of certiorari does not go as of right save on the application of the attorney-general in his official capacity, but if a person directly aggrieved by the order of an inferior tribunal can shew that it had no jurisdiction or had in substance exceeded its jurisdiction, or was improperly constituted, the general course is to award the writ as of common right, unless the applicant has, by his conduct, forfeited that right, or rendered it inexpedient that the court should interfere. Listowel's (Lord) Fishery, In re, Ir. R. 9 C. L. 46.

Administrative Act, Not Granted to Remove-Lighterman's Licence.]-The making of an order for the issue of a licence or certificate by the Court of the Company of Watermen and Lightermen of the River Thames authorising a person who has actually served for two years under a contract with a lighterman qualified to take apprentices, to act as a lighterman, is not a judicial, but an administrative act, and consequently such an order cannot be removed into the High Court by certiorari. Reg. v. Lucey, Gosling, Exparte, 66 L. J., Q. B. 308; [1897] 1 Q. B. 659; 61 J. P. 388.

After Judgment. |- It is a general rule, that a certiorari does not lie to remove a cause from an inferior court after judgment signed there; especially where the defendant has suffered judgment by default. Walker v. Gann, 7 D. & R. 769. S. P., Kemp v. Balne, 1 D. & L. 885; 13 L. J., Q. B. 149; 8 Jur. 619.

Where a judgment has been removed from the inferior jurisdiction pursuant to the Judgments Act, 1838, 1 & 2 Vict. c. 110, s. 22, the court will not inquire into the regularity of the proceedings

of the court below previously to judgment. Simons v. De Wrats (Count), 8 D. P. C. 646; 4 Jur. 989. A local act, establishing a court for the recovery of debts not exceeding 15L, contained a proviso that "no plaint entered in the court, nor any order, judgment, or proceeding therein, should be removed into any superior court by any writ or process whatsoever, except by leave of one of the judges of the superior courts at Westmiuster"; and then concluded with a proviso that all the provisious contained in 1 & 2 Vict. c. 110, s. 22, for the removal of judgments of inferior courts into the courts at Westminster. for the purpose of having execution issued on them, should be applicable to the newly-created court :-Held, that after judgment had once been obtained in the jufcrior court, the proceedings could only be removed for the purpose of issuing execution on them. Fow v. Veale, 8 M. & W. 126; 9 D. P. C. 798; 10 L. J., Ex. 273; 5 Jur. 345.

Does not lie after Conviction and Judgment.] -An application for a certiorari to the Queen's Bench Division does not lie after conviction and judgmeut. Poole's Case (L. R. 14, 1, 14) explained. Nally v. Reg., 16 L. R. Ir, 1; 15 Cox, C. C. 638.

Who may Apply.]—Semble, a rival publican has no locus standi to apply for a certiorari to quash a publican's licence granted to another person. Reg. v. Surrey JJ., 52 J. P. 423.

Conduct of Applicant. ]-On application for certiorari, the court will take into consideration

Position of Applicant. ]-A certiorari is not a writ of course, yet where an applicant, in the case of illegally stopping up a highway, has, by reason of his local situation, a peculiar grievance of his own, and is not merely applying as one of the public, he is entitled to the writ ex debitojustitiæ. Rog. v. Surrey JJ., 39 L. J., M. C. 145 ; L. R. 5 Q. B. 466.

When Judges are interested Parties. -- Where a sheriff, by whom a jury had been summoned under the Lands Clauses Consolidation Act, 1845, 8 & 9 Viet, c. 18, ss. 39 to 145, for awarding compensation for lands taken by a railway company, was a shareholder in the company, a certiorari was granted to bring up the inquisition. Reg. v. L. & N. W. Ry., 9 L. T. 423; 12 W. R. 208.

If an appeal is determined at quarter sessions. by magistrates, some of whom are interested in the matter, the proceeding is null, and the proper course is to quash it on certiorari. Hopkins, In re, El., Bl. & El. 100; 4 Jur. (N.S.) 529.

Action "fit to be tried" in Superior Court. |-A party to an action in the Mayor's Court is not entitled as of right to remove the action by writ of certiorari into the High Court, but can only do so by leave of a judge of the High Court in a case where it shall appear to him that the action cose where a suan appear to him that the action is one which is fit to be tried there. Symonds v. Dimsdale (2 Ex. 533) explained. Cherry v. Endean, 55 L. J., Q. B. 292; 54 L. T. 763; 34 W. R. 458.

Rule 12 of the Borough and Local Courts of Record Act, 1872, which is applicable to the Mayor's Court, provides that "no action entered in the court shall, before judgment, be removed or removable from the court into any superior court by any writ or process, except by leave of a judge of one of the superior courts, in cases a judge of the superior courts," ac. The plaintiff brought an action in the Mayor's Court against the defendant, a stockbroker, for alleged misconduct in connection with the purchase of certain shares, and claimed 1101, as damages :- Held, that the action was one which was "fit to betried" in the superior courts, and that the defendant was accordingly entitled to a writ of certiorari. Simpson v. Shaw, 56 L. J., Q. B. 92; 56 L. T. 24.

- Obstructing Right of Way. ]-An action for obstructing a right of way is not an action concerning the frechold, or inheritance, or titleof land, and, therefore, is prevented being removed out of an inferior court by 21 Jac. 1, c. 23. Franks v. Quinsce, 2 W. W. & H. 58.
- Ejectment.]-A judgment in ejectment, man inferior jurisdiction, is not within 19 Geo. 3, c. 70, s. 4; and, therefore, if the defendant leaves the jurisdiction, the judgment cannot be removed into a superior court. Doe d. Stansfield v. Shipley, 2 D. P. C. 408.

Costs—Certiorari to quash Orders of Town Council—Liability of Individual Members.]—A rule having been made absolute for a certiorari against a municipal corporation to bring up and the conduct of the party applying. Reg. v. quasis a minimplat corporation to sing aparet the conduct of the party applying. Reg. v. quasis certain orders made by the town council South Holland Drainage Committee. 8 A. & B. for illegal payments out of the borough fund:—429; 1 P. & D. 79; 1 W. W. & H. 647; 8 L. J., Held, that members of the town council who Q. B. 64. them, to pay the costs of the certiorari. Rey. v. Vaile or Whiteley, 58 L. J., M. C. 164; 23 Q. B. D. 483; 61 L. T. 253; 54 J. P. 134—D.

# b. County Court.

[County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 126.]

In what Cases. ]-The power to remove a cause by certiorari given by 9 & 10 Viet, c, 95, s, 90, was not taken away by 13 & 14 Vict. c. 61, s. 16. Parker v. Bristal and Exeter Ry., 6 Ex. 184; 20 L. J., Ex. 112. S. P., Munyran v. Wheatley, 6 Ex. 88; 20 L. J., Ex. 108. Brookman v. Wen-ham, 2 L. M. & P. 233; 20 L. J., Q. B. 278.

When a judge has declined to grant a certiorari, the court will not do so merely because it appears that possibly a serious question of law may arise (as that may be reserved by a special case), nor merely because the decision on the particular case, though involving directly only a small sum, may be of great importance to the applicant, as likely to affect other cases of a similar nature. Staples v. Accidental Death H. & W. 320. Insurance Co., 10 W. R. 59.

Devise by a testator to his son of freehold and leasehold estates and chattels as follows :- "On condition of my son paying the following sums, viz., I will, order and direct him to pay unto his mother 4s. a week, weekly and every week during her natural life":—Held, that this was not a claim of a legacy within 9 & 10 Vict. c. 95, s. 65, but of a debt; and an action having been brought in a county court, the court granted a certiorari. Longbottom v. Longbottom, 8 Ex. 203; 22 L. J., Ex. 74.

A justice of the peace sued in a county court for an act done in the execution of his office, having given notice under the Justices Protection Act, 1848, 11 & 12 Vict. c. 44, s. 10, that he objects to being sued in the county court, cannot after such notice remove the plaint into a superior court by certiorari. Weston v. Sneyd, 1 H. & N. 703; 26 L. J., Ex. 161; 5 W. B. 817.

19 Geo. 3, e. 70, s. 4, and 1 & 2 Vict. c. 110, s. 22, by which judgments of inferior courts of record are removable into the superior courts. have no application to the judgments of the county courts established under 9 & 10 Vict. c. 95. Mareton v. Holt, 10 Ex. 707; 24 L. J., Ex. 169; 1 Jur. (N.S.) 215; 3 C. L. R. 348; 3 W. R.

- Employers' Liability Act-Action in County Court and in High Court. ]—The plaintiff, a labourer in the service of the defendants. claimed compensation for injury caused by the negligence of the defendants in having defective machinery, and brought his action in the county court under the Employers' Liability Act, 1880, 43 & 44 Vict. e. 42, but in which he had given a defective notice under that act. He also brought his action in the High Court to try the question of the defendants' common law liability; in this action he claimed over 50l. The plaintiff sought to remove the action in the county court into the High Court for the purpose of consolidation, on the ground that the questions of the character of the negligence, the applicability of the act, the sufficiency of the notice, and the other questions on which the liability of the defendants v. G. W. Ry., supra.

to be ordered, on a separate application against | depended were of considerable complexity and legal difficulty:—Held, that it was clearly the object of the legislature, in providing less costly and more speedy remedies as between masters and servants, that these actions should primarily be brought in the county court; and that there was nothing in the circumstances of the present ease to warrant the removal of the action in the inferior court into the High Court. Munday v. Thames Ironworks and Shipbuilding Co., 52 L. J., Q. B. 119; 10 Q. B. D. 59; 47 L. T.

> - Action for Less than £20.]-A certiorari to a county court was refused, the plaint being for a sum under 201., although it was sworn that various nice questions of law and fact, important to the applicant, would probably arise. Solomon v. L. C. & D. Ry., 10 W. R. 59.

Where it appears, by the declaration in a cause instituted in an inferior jurisdiction, that the sum claimed by the plaintiff is exactly 20*l*., it is not necessary to enter into the recognizance required by 19 Geo. 3, c. 70, s. 6, and 7 & 8 Geo. 4, c. 71, s. 6, in order to remove it into a superior court. Brady v. Veeres, 5 D. P. C. 415; 2

In Interpleader.]—A certiorari does not lie to remove interpleader proceedings in a county count. Summers. Exparte, 2 C. L. R. 1284; 18 Jar. 522; 2 W. R. 477.

All Material Facts must be brought before the Court on Application for. ]-All the material facts relative to the state of the cause should be brought before the judge, upon the applica-tion for the writ; and, therefore, where a certiorari had been obtained without the judge having been informed that the cause had already been heard for several days in the county court, the writ was set aside as having been issued improvidently. Parker v. Bristol and Exeter  $R_{\mathcal{Y}}$ , 2 L. M. & P. 137; 6 Ex. 184; 20 L. J., Ex. 112; 15 Jur. 109.

Practice.]-A rule for a certiorari to remove a cause from a county court is absolute in the first instance, Duvding v. G. W. Ry., 3 Jur. (N.S.) 1130.

And must be made in the first instance at chambers. Staples v. Accidental Death Insurance Cr., 10 W. B. 59.

The writ must be tested of a day in term. Symonds v. Dimsdale, 6 D. & L. 17; 17 L. J., Ex. 247; 12 Jur. 485.

Costs on Removal.]—Where a defendant has removed from a county court by certiorari under 19 & 20 Viet. c. 108, s. 38, a plaint for a sum not exceeding 51., the plaintiff is not bound to follow out his suit, and if he declines the defendant cannot, after serving notice to declare, sign judgment for want of declaration or recover from the plaintiff his costs of removal. Garton v. G. W. Ry., 1 El. & El. 258; 28 L. J., Q. B. 103; 5 Jur. (N.S.) 595; 7 W. R. 53.

On an application for a certiorari to remove from a county court a cause in which the demand is over 201., the court does not make it a condition that the defendant, if successful, shall have no more costs than would have been allowed in the county court. G. W. Ry., Ex parts, 2 H. & N. 557; 3 Jur. (N.S.) 1130. S. P., Dowding

### c. In Criminal Cases,

For Removal of Indictment.]-An indictment preferred at the assizes by direction of justices at special sessions, in pursuance of the Highways Act, 1835, 5 & 6 Will. 4, c. 50, s. 95, may be removed by certiorari, such indictment being a common-law proceeding and therefore not within s. 107, which takes away the certiorari. Reg. v. Sandon, 3 El. & Bl. 547; 2 C. L. R. 1699; 23 L. J., M. C. 129; 18 Jur. 401; 2 W. R. 374.

Upon an indictment against a parish for not repairing a highway, the right to repair may come in question, so as to entitle the parish to remove it by certiorari, though the parish pleads not guilty only. Rew v. St. Mary, Taunton, 3

M. & S. 465.

An indictment found at quarter sessions upon the Toleration Act, 1 Will. & M. c. 18, for disturbing a dissenting congregation might be removed by certiorari before verdict. Rev v. Hube, 5 Term Rep. 542; 2 R. R. 669.

So an indictment found at the quarter sessions upon the Places of Religious Worship Act, 1812, 52 Geo. 3, c. 155, s. 12, for disturbing a religious assembly. Rew v. Wadley, 4 M. & S. 508; 16

R. R. 534.

Application by defendant for certiorari to remove an indictment under 5 & 6 Will. & M. e. 11, s. 2, and the repealed 5 & 6 Will. 4, c. 33, s. 2, held an application for the discretion of the judge. Reg. v. Wilks, 5 E. & B. 690; 25 L. J.,
 Q. B. 47; 1 Jur. (N.S.) 1166; 4 W. R. 86.

A constable having preferred an indictment at the quarter sessions against a butcher, for having exposed for sale corrupt and unwholesome victuals, the butcher brought an action against the constable for the seizure. On motion on behalf of the constable for a certiorari to remove the indictment, with a view to its being tried before the same forum as the action, the court allowed the writ to go. Reg. v. Broomhead, 2 D. (N.S.) 715; 7 Jur. 558.

Where an indictment for forcible entry found at the quarter sessions had been quashed by a subsequent sessions, the court granted a certiorari to bring up the indictment, in order that the court might see what had been done upon it at the sessions; it not appearing whether it had been quashed by a regular judgment, so as to enable the prosecutor to bring a writ of error on the judgment. Reg. v. Wilson, 1 New Sess. Cas. 190; 8 Jur. 1069.

A certiorari will be granted to remove an indietment, found at the quarter sessions, for a misdemeanor, and an order of that court quash-

ing it. Ib.

A rule for setting aside such an order, on the ground that it has been pronounced without jurisdiction, is not absolute in the first instance. Ib.

- After Conviction.]-If a defendant who has been convicted on an indictment in an inferior jurisdiction removes the record by certiorari, between verdict and judgment, with a view of making objections to the indictment in arrest of judgment, the court will send the record back by proceedendo, without going into the objections to the indictment. Rew v. Jackson, 6 Term Rep. 145; 3 R. R. 138.

The court refused a certiorari to remove an indictment for a misdemeanor, and proceedings applying for a new trial, on the judge's report of 2 Jur. (N.S.) 235.

the evidence, upon the ground of the verdict being against evidence and the judge's direction. Rex v. Oxford, 13 East, 411; 12 R. R. 386.

A certiorari will not lie to the sessions to re-

move a conviction for a misdemeanor before judgment, for the fine being uncertain, the court cannot tell how to assess it; otherwise, where the punishment is certain. Rea v. Nicols, 13 East, 414, h; 12 R. R. 388.

After Judgment. - After conviction and judgment on an indictment at the quarter sessions, the court will not grant a certiorari to remove the proceedings for the purpose of having such indictment quashed on motion, for error on the record. Rew v. Pennegoes, 2 D. & R. 202; 1 B. & C. 142; 25 R. R. 334.

A defendant in an indictment for a misdemeanor surreptitiously obtained an acquittal, by not complying with the practice of the sessions in giving notice of trial and bringing on the indictment for trial after disposing of the felonies ; the court would not grant a certiorari to remove the indictment in order to set aside the verdict. Reg. v. Unwin, 7 D. P. C. 578.

The court quashed a certiorari, which was issued before but not served until after judgment on an indictment for a misdemeanor. Rew v.

Seton, 7 Term Rep. 373; 4 R. R. 466,

- When there are Several Defendants. ]-The court will not grant a certiorari to remove an indictment against several defendants charged with a misdemeanor, unless they all concur in the application. Rew v. Hunt. 2 Chit. 130,

The court will grant a certiorari to remove an indictment for conspiracy, on application of one of several defendants, without the consent of the others, if the defendant will enter into a recognizance to pay costs if either he is or any of the others are convicted. Reg. v. Foulkes, 1 L. M. & P. 720; 20 L. J., M. C. 196, Several were indicted for a misdemeanor; one

was in custody on the charge, the others were out on bail. The court, on the application of one who was out on bail, granted a certiorari to remove the indictment on the terms that if the defendant in prison did not consent, the applieant was to find bail for him. Reg. v. Drake, 22 L. J., Q. B. 304.

The court will not interfere with the discretion of a judge in granting a certiorari to remove an indictment, at the instance of one of several defendants, where all the facts were fairly laid before the judge upon the application for the writ. Reg. v. Wilks, 5 E. & B. 690; 25 L. J., Q. B. 47; 1 Jur. (N.S.) 1166; 4 W. R. 86. Under 5 & 6 Will, 4, c. 33 (repealed), as well

as by the antecedent practice, a certiorari obtained by one of several defendants removed the indictment as to all, and the previous recognizances of all are discharged, though the parties not applying for the certiorari do not give any fresh security. Rev v. Boxall, 4 A. & E. 513; 1 H. & W. 741; 5 L. J., M. C. 78.

On what Grounds-In order to obtain a Fair and Impartial Trial.]-The court issued a certiorari on behalf of a prisoner to remove an inquisition before a coroner of a county in which a verdiet of murder had been given, and any indictment for murder which might be found by the grand jury at the assizes, upon affidavits that thereon at the assizes, after conviction and before a fair and impartial trial could not be had in judgment, which was prayed for the purpose of that county. Reg. v. Palmer, 5 El. & Bl. 1024;

Where a defendant was indicted for an impious libel on Christianity, the court refused to remove the indictment, on the ground that it was neither alleged that a fair trial could not be had, nor that difficult points of law were likely to arise at the trial at the sessions. Reg. v. Heywood, 4

Where it primâ facie appears that a fair and an impartial trial cannot be had in a particular place, and such is not displaced by a strong case in answer thereto, the court will grant a certiorari to remove the proceedings into the Queen's Bench to enable an application to be made in order to have such ease tried in some other jurisdiction. Reg. v. Bell, 8 Cox, C. C. 287.

An indictment found at the assizes allowed to be removed, where it appeared that paragraphs had appeared in the newspapers which were likely to prejudice the minds of the petty jurors.

Reg. v. Lever, 1 W. W. & H. 35.

The allegation of a strong prejudice entertained against a defendant by the chairman at quarter sessions is not a sufficient ground for granting a certiorari to remove an indictment for an assault.

Reg. v. Jacobs, 3 Jur. 999.

Where an indictment had been found at the Oxford sessions against two, one of them being a member of the University, and exercising great influence at the place of trial, and the other being the son of an influential magistrate in the neighbourhood, and a plaeard had been exhibited, and a series of articles published against the prosecutor, the court granted a certiorari. Reban v. Treror, 4 Jur. 292.

Where a magistrate is indicted at a quarter sessions, he being in the commission for the county, and having circulated among the other magistrates a printed account of the charges brought against him, it is a good ground, within 5 & 6 Will. 4, c. 33, s. 1, for removing the indictment. Reg. v. Grover, 8 Dowl. P. C. 325; 4 Jur.

Certiorari to remove an indictment found at sessions, on the ground that a magistrate was interested in the matter, granted. Rev v. Jones. 2 H. & W. 293.

The mere fact of a defendant on an indictment for an assault being a member of the bench of magistrates who are to try it is not a sufficient ground, within 5 & 6 Will, 4, c., 33, s. 1, for removing the indictment by certiorari. Fellowes, 4 D. P. C. 607; 1 H. & W. 648.

The Court will not remove an indictment from the quarter sessions, on the ground that the chairman of the court is intimate with the father of the prosecutrix. Reg. v. Renshaw, 5 Jur. 801.
If the number of jurors in a borough is small,

and the defendant is intimate with many of them, the Court will allow an indictment for a libel, found at the sessions for the borough, to be removed. Garbett v. Ouseley, 6 Jur. 193.

In order to induce the court to grant a rule nisi for a certiorari to remove an indictment for felony from a particular county upon the application of the defendant, it is not sufficient to swear that the political opinions entertained by that county in general are strongly opposed to those known to be professed by the defendant; and that his political employment and position have rendered him an object of peculiar dislike in the county, and subjected him to abuse and threats of violence. Lynes, Ex parte, 1 B. C. Rep. 31; 1 Cox, C. C. 262.

It is only in very exceptional cases that indictments for felony will be permitted to be removed out of a claim to property, and that difficult

into the Queen's Bench, and where an application. was made for a certiorari for such removal from the quarter sessions of a borough upon the ground of local prejudice, and difficulty in obtaining a jury, the court recommended an application to the recorder to send the case to the assizes, and the motion was withdrawn. Reg. v. Reynolds, 12 L. T. 580; 13 W. R. 925.

The fact, that a prosecution is an unusual one, that it is instituted at the suit of the Crown, whose officers will attend to prosecute, and that the defendant, on this account, desires the assistance of queen's counsel and a special jury, is a sufficient ground for granting a certiorari at his request to remove the indictment into the Queen's Bench. Reg. v. Jeffs, 9 Jur. 580; 1 Cox, C. C.

On application for a writ of certiorari toremove indictments from quarter sessions for a large borough into the High Court for trial at the county assizes, it appeared that the applicant was a tradesman in the borough who had been adjudicated bankrupt, and was in the borough charged with obtaining goods by false pretences. The great majority of his ereditors resided in the borough, where considerable feeling against him had been openly expressed by them :-Held, that although there were 20,000 names on the jury list, and that it was possible to keep all the creditors off the juries at the ensuing quarter sessions, it was reasonably probable that a fair and impartial trial could not be had in the borough, and therefore the writ must go. Reg. v. Whittuker, 59 J. P. 197.

When a probability of the existence of pre-judice to a substantial extent is established in relation to a county, the Court, in the exercise of its discretion, should not allow the fair and impartial trial of a prisoner to depend upon the power of the Crown officials to order jurors to stand aside, but should remove the proceedings by certiorari. Reg. v. Boughton, [1895] 2 Ir. R.

- That Judge has Misconceived a Point of Law. ]-A certiorari will not issue to remove a record of conviction on an indictment good on the face of it, on the ground that a judge has misconceived a question of law. Reg. v. Christian, 12 L. J., M. C. 26; 2 D. (N.s.) 408; 6 Jur. 1039.

That Difficult Points of Law will Arise. ]-A certiorari will not be granted to remove from the sessions an indietment for the obstruction of a highway, on an affidavit that difficult questions. of law might arise; some specific difficulty in point of law must be shewn. Rex v. Joule, 5 A. & E. 539; 1 N. & P. 28; 5 D. P. C. 435; 2 H. & W. 375.

The court refused to grant a certiorari for removing an indictment for perjury from the county of Leicester to London, to be tried by a special jury, upon a suggestion that the truth of special fury, upon a suggestion that the total of the evidence given by the defendant would depend upon the result of a long series of accounts, and that a point of law was likely to be raised in his favour. Reg. v. Marton, 1 Dowl. (N.S.) 543.

The court refused to grant a certiorari to-remove an indictment for an assault found against a party and his wife at the sessions, where no suspicion was cast upon the sessions, although it was alleged that the assault arose

questions, involving the right to the property, might arise, and that it was wished to have the benefit of a special jury, and the assistance of counsel who do not usually practise at the quarter sessions. Clark v. Wellington, 7 Jur. 44.

Justices-Committal for Trial-Admitting to Bail. |-The decision of justices, committing a defendant for trial, or admitting him to bail, under the Petty Sessions (Ireland) Act, 1851 (14 & 15 Vict. c. 93), s. 15 [the language of which is practically identical with s. 25 of the Indictable Offences (England) Act, 1848], cannot be brought up by certiorari. Reg. v. Roscommon JJ., [1894] 2 Ir. R. 158.

Does not lie to Central Criminal Court.]-The High Court has no jurisdiction to issue a writ of certiorari, directed to the Central Criminal Court, to remove a conviction obtained in the Central Criminal Court, for the purpose of having the same quashed. Reg. v. Bouler, 67 L. T. 354; 17 Cox; C. C. 569; 56 J. P. 792.

- Removal from the Central Criminal Court. ]-The court will remove an indictment by certiorari, at the instance of the defendant, from the Central Criminal Court, on the suggestion that it involves points of law arising out of proceedings in Chancery, relating to matters of account. Rew v. Wartnaby, 2 A. & E. 435.

The fact of an indictment being bad in point of law is not a sufficient ground to remove it from the Central Criminal Court. Templar, 5 D. P. C. 249.

The court refused to remove an indictment from the Central Criminal Court on the ground that a difficult question of law might arise. v. Templar, 1 N. & P. 91; 2 H. & W. 430.

In order to support a motion for a certiorari to remove an indictment for perjury from the Central Criminal Court, it must be shewn that points of difficulty are likely to arise on the trial. Rey. v. Josephs, 8 D. P. C. 128; 1 W. W. & H. 419.

The Central Criminal Court Act, 1834, 4 & 5 Will, 4, c. 36, s. 16, does not affect the removal of indictments from the Central Criminal Court into the Queen's Bench. Such removal held to be regulated by 5 & 6 Will. 4, c. 29 [a repealed bankruptcy act], so that a defendant removing such indictment under the latter statute became liable, in case of conviction, to pay the prosecutor the costs occasioned by such removal. Reg. v. Hawdon, 9 D. P. C. 1007; 1 Q. B. 464.

Revising Barrister's Order for Costs-Distress Warrant.]-Certiorari will not be issued to bring up distress warrant of two justices on a revising barrister's order under the Parliamentary Registration Act, 1848, 6 & 7 Vict. c. 18, ss. 46, 71, on the ground of want of jurisdiction after the warrant has been acted on. Bradley, John, In re, 11 W. R. 640.

Venue on Removal from Central Criminal Court. - By 9 & 10 Viet. c. 24, s. 3 (repealed), every writ of certiorari for removing an indictment from the Central Criminal Court had to specify the county or jurisdiction in which the same shall be tried, and a jury shall be summoned and the trial proceed in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction. An

Central Criminal Court for perjury committed within the jurisdiction of the Central Criminal Court. The perjuries assigned in one count were in respect of an oath taken before a commissioner in chancery, in the city of London; and in the other count, in respect of an oath taken in the Court of Common Pleas, in Middlesex. The indictment was removed by certiorari into the Court of Queen's Bench, and Middlesex was specified as the county in which the indictment should be tried, and the jury was taken from that county :- Held, that the Court of Queen's Bench had a discretion to name in the certiorari the county or jurisdiction in which the trial was to take place, and that by the jurors summoned from that jurisdiction the same issues could be tried that would have been tried in the Central Criminal Court had the indictment not been removed. Reg. v. Castro. 43 L. J., Q. B. 105; L. R. 9 Q. B. 350; 30 L. T. 320; 22 W. R. 187; 12 Cox, C. C. 454.

Removal to Central Criminal Court.]—Under the Central Criminal Court Act, 1834, 4 & 5 Will. 4, c. 36, s. 16, the Queen's Bench may make an order, in the nature of a certiorari, to remove an indictment for obtaining money by false pretences, from certain sessions mentioned in the act, to be tried at the Central Criminal Court, notwithstanding the [repealed] 7 & 8 Geo. 4, c. 29, s. 53, which enacted that no indictment for obtaining money by false pretences should be removed by certiorari, Reg. v. Sill, Dears, C. C. 10; 21 L. J., M. C. 214; 17 Jur. 22.

Where an indictment at sessions, under 25 Geo. 2, c. 36, for keeping a disorderly house, has been removed into the Central Criminal Court, nuder 4 & 5 Will. 4, c. 36, s. 16, the opposite party may remove it again into the Queen's Bench, notwithstanding the 25 Geo. 2, c. 36, s. 10. Reg. v. Brier, 14 Q. B. 568; 19 L. J., M. C. 121; 14 Jur. 391.

Upon an application under the Central Criminal Court Act, 1856, 19 & 20 Vict. c. 16, s. 3, to the Queen's Bench by a defendant, who had been held to bail for a felony, supposed to have been committed beyond the jurisdiction of the Central Criminal Court, for an order directing that the offence wherewith he was charged should be tried in the Central Criminal Court; the court, in the first instauce, granted a rule nisi only for the making of such order, and directed notice of the rule to be served on the prosecutor, and also on the committing magistrates. Reg. v. Waters, 13 W. R. 807.

Practice-Rule for.]-A rule for a certiorari to remove an indictment from the sessions into the Queen's Bench, on the ground that grave questions of law are likely to arise, and that a view is necessary which cannot be had at the sessions, is not necessarily a rule absolute in the first instance, but it rests in the discretion of the court so to grant it. Reg. v. Bird, 2 D. & L. 939; 14 L. J., M. C. 179; 9 Jur. 492.

- Affidavits used on Application for.]-In moving for a rule nisi for a certiorari, the affidavit must not be entitled in any cause. Nerough, Ex parte, I B. & C. 267; I L. J. (o.s.) K. B. 112.

On application for certiorari to remove indictment found at inferior court, on ground that difficult questions of law are likely to arise, either the points should be specifically stated, or indictment was found by the grand jury in the the affidavit should disclose facts from which the

likely to arise; for a mere general statement, without entering into particulars, is not sufficient. Reg. v. Hodges, 9 Jur. 665; 1 Cox, C. C. 194.

- Conduct of Trial. ]-In an indictment for stopping up a highway, removed by eertiorari into the Court of Queen's Bench, and tried at the assizes, the counsel for the defendant may sum up his evidence at the close of his case, as in a civil action, Reg. v. Broke, 1 F. & F. 514.

Entry for Trial. -In a Crown case, removed by certiorari, issue not having been joined before the commission day, although by the default of the officer :- Held, that the case could not be entered for trial. Reg. v. Luckie, 4 F. & F. 502.

Entry for and Order of Trial.]-Where an indictment for misdemeanor has been removed by certiorari, and the defendant has entered into recognizances to appear and trythe indictment, the prosecutor has a right to try it in its turn, as in that respect an indictment so removed has all the incidents of a civil action. Reg. v. Duffield, 5 Cox, C. C. 286.

Therefore, where there were two indictments for conspiracy arising out of the same transactions, one against D, and others, and the other against R. and others, and they were entered by the prosecutor in that order, Nos. "2" and "3" in the cause list, and the defendants subsequently entered the cases as Nos. "10" and "13" in the list, placing the proscention against R. and the others first, it was held that the prosecutor had the right of trying the indictments in the order entered by him. Ib.

Warrant of Remand on False Charge.]-Where a person has been taken into enstody, and subsequently remanded, on a charge which turns out to be false the court will not grant a certiorari to quash the warrant of remand, preliminary to his suing either the parties who gave him into custody, or the justices signing the warrant : for the former are entitled to whatever protection the warrant can afford them, and in an action against the latter the validity of the warrant will be tried. Reg. v. Ely JJ., Gilling, Ex parte, 4 W. R. 13.

Costs. ]-5 W. & M. c. 11, s. 3, is not confined to cases in which there is a legal obligation to intention to commit felony. Anan., 1 B. & Ad. 382. prosecute, but entitles them to costs if they institute a prosecution in obedience to a duty of imperfect obligation only. Reg. v. Kenealey, 4 Cox, C. C. 845.

It is no objection to a prosecutor's right to costs under 5 & 6 W. & M. c. 11, s. 3, that he has received aid from subscriptions towards the

expenses of the prosecution. Where one of many defendants removes an indictment by certiorari, an attachment for costs may issue against him without demand from the other defendants. Reg. v. Dobson, 2 Cox, C. C. 42.

Several Counts-Acquittal on some Counts. Conviction on Others. —An indictment containing several counts, charging different misdemeanors, was removed into the High Court by certiorari, the prosecutors entering into a recognizance, under 16 & 17 Vict. c. 30, s. 5,

court may conclude that such difficulties are defendant was convicted on some of the counts and acquitted on others. On a rule to tax the costs to be paid by the prosecutors to the defen-dant in respect of the counts on which she had been acquitted:—Held, that the defendant had not been "acquitted upon the indictment," within the meaning of the recognizance, and Within the ficking of the recognizance, and therefore was not entitled to costs. Reg. v. Bayard, [1892] 2 Q. B. 181; 67 L. T. 313; 40 W. R. 525; 56 J. P. 650.

# d. To Remove Convictions and Acquittals.

Convictions—Generally.]—It is discretionary in the court to grant or refuse a certiorari to remove a conviction before justices of the peace; and if the court sees that the justices have drawn the proper conclusion from presumptive evidence, they will not grant a certiorari. Rex v. Buss, 5 Term Rep. 251; Nolan, 227.
A conviction under the Game Act, 1831,

A conviction under the Game Act, 1631, 1 & 2 Will, 4, c. 32, s. 80, its still irremovable under s. 45, notwithstanding the [repealed] 5 & 6 Will, 4, c. 20, s. 21. Rew v. Hester, 4 D. P. C. 589, 1 H. & W. 650.

Where it is enacted, generally, that no summary conviction in pursuance of an act shall be removed by certiorari into a superior court, a certiorari may, nevertheless, be issued at the instance of a private prosecutor, although the application is not made by the attorney-general, and the Crown is not directly interested. Rex v. Boultbee, 6 N. & M. 26; 4 A. & E. 498; 5 L. J., M. C. 57.

The court, in deciding on the legality of a conviction, cannot take cognisance of any fact contained in the certiorari, by which the conviction is removed, and not apparent on the conviction. Rev v. Liston, 5 Term Rep. 838; Nolan, 259.

Two justices convicted summarily as of a common assault, where it appeared by the deposition that the defendant had laid hands upon the prosecutor in an indecent manner, but without violence. A certiorari being moved for, on the ground that the offence, if committed, was accompanied by a felonious attempt, and therefore within 9 Geo. 4, c. 3, s. 29 (repealed), the court refused to interfere, inasmuch as no excess of jurisdiction appeared on the face of the conviction, and the evidence (of which the magistrates were the judges) did not shew an

The court will not grant a certiorari to bring up a conviction by justices in a matter over which they have jurisdiction, even though it is alleged that they convicted without any evidence whatever. Blewitt, Er parte, 14 L. T. 598.

A certiorari was granted to bring up a conviction by justices for an offence created by the Railway Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 3, upon the ground that the justices were shareholders, and therefore interested in the railway company, in respect of which the offence was committed. Reg. v. Hammond, 9 L. T. 423; 12 W. R. 208.

\_\_\_\_ Defect in—Right of Justices to Substi-tute fresh Conviction where former Drawn up and Filed. ]-When justices have convicted for an offence unknown to the law, and have returned the conviction to the clerk of the peace, the recognization and the second representation of the control of the places, the court will allow a rule for a certificart to ex-she should be acquitted upon the indictment, her notwithstanding that the justices in skewing costs incurred subsequent to the removal. The lease against such rule return a corrected record

of the conviction, shewing such conviction to of Queen's Bench. have been properly made. Austin, Ex parte, 50 L. J., M. C. S; 44 L. T. 102; 45 J. P. 302.

Before Filing with Clerk of Peace. ]-K. was charged with opening his premises for sale of intoxicating liquors on Sunday within the prohibited hours, and was convicted and fined 51., and also 13s. 6d. for costs. The conviction, when drawn up, contained no clause of distress, but ordered imprisonment in default of payment: -Semble, the justices might draw up a fresh conviction containing the clause of distress, any time before filing it with the clerk of the peace. Kenyon, Ex parte, 45 J. P. 303.

Indictment for Misdemeanor.]-The affidavit in support of an application for a certiorari to remove an indictment for a misdemeanor must be brought within the terms of the Criminal Procedure Act, 1853, 16 & 17 Vict. c. 30, s. 4. Reg. v. Gate Tulford Inhabitants, 3 W. R. 212. S. P., Reg. v. Russell, 1 W. R. 171.

- Under Malicious Injuries to Property Act. ]-A conviction by justices, under the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), s. 52, cannot be brought up upon a writ of certiorari on the ground that their jurisdiction was ousted by a mere boua fide claim of right. Reg. v. Mussett, 26 L. T. 429; 20 W. R. 670. The proviso in s. 52, that "nothing herein

contained shall extend to any case where the party acted under a fair and reasonable supposition that he had a right to do the act complained of," impliedly restricts the exemp-tion of bona fide claims of right from summary jurisdiction to cases where the justices are satisfied of the fairness and reasonableness. 1b.

For Selling Meat unfit for Food.]—A conviction under s. 63 of the repealed Public Health Act, 1848, 11 & 12 Vict. c. 63, for selling meat unfit for food, could only be removed on certiorari on the ground of excess of jurisdiction. Reg. v. Staffordshire JJ., 16 L. T. 430.

Effect of Railways Clauses Consolidation Act. ] -The Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, is so incorporated with the Town Police Clauses Act, 1847, 10 & 11 Vict. c. 34, as to take away the right to remedy by certiorari. 1b.

Quarter Sessions-Amendment of Summary Conviction imposing Imprisonment in Default of Distress-Striking out "hard labour." ]-The defendant was convicted by a metropolitan police magistrate under the Public Health the terminal points and the terminal points are the te fine without appealing to quarter sessions :-Held, on certiforari, that the conviction must be quashed. Reg. v. London JJ., Savendere, Exparte, 64 L. J., M. C. 273; 72 L. T. 568; 18 Cox, C. C. 153; 59 J. P. 279.

Together with Special Case.]—On an appeal against a conviction under the Cruelty to Animals Act, 1849, 12 & 13 Vict. c. 92, s. 2, passed for the more effectual prevention of cruelty to animals, the sessions, with the consent of counsel on both sides, confirmed the convic-

A writ of certiorari for the purpose of bringing up the conviction and the case had been obtained. By s. 26 of the act, no conviction, judgment or proceeding relative thereto, shall be removed by certiorari, or otherwise, into any superior court :- Held, that the writ of certiorari, having been taken away generally, without any exception, in favour of a special case, the consent of the parties could not give the court jurisdiction, and therefore that the writ had issued improvidently, and must be quashed. Reg. v. Chantrell, 44 L. J., M. C. 94; L. R. 10 Q. B. 587; 33 L. T. 305; 23 W. R. 707.

- Under Summary Jurisdiction Act, 1879.] -The Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 40, renders a writ of certiorari nnecessary to bring up a case stated by sessions on a rating appeal. The clerk of the peace, on receiving notice from the solicitor of the party requiring it, should send up the case to the Crown Office. Clark v. Alderbury Union, 29 W. R. 334.

 While an Appeal is Pending.]—A certiorari will not be granted where a person has been committed by the justices to the sessions as a vagrant, against which commitment he has appealed. Rew v. Sparrow, 2 Term Rep. 196, n.; 1 R. R. 459.

Special Cases.]-Where a case was stated by the sessions for the opinion of the court, and the proceedings, including the order of sessions, were removed by certiorari, under s, 108 of the Highways Act, 1835, 5 & 6 Will. 4, c. 50 (the certiorari whys Ace, 1000, 5 & 6 of 11. 4, c. 50 class certainer being taken away as to questions of form by s. 107), the court cannot look at any question except that stated in the case, and has not jurisdiction to quash the order, though bad on the face of it. Reg. v. Thomas, 7 El. & Bl. 399; 3 Jur. (N.S.) 713; 5 W. R. 321.

Although the certiorari is taken away on appeal at the quarter sessions against a conviction, a case stated by consent of parties raising the question of jurisdiction may be brought up for The purpose of being quashed. Reg. v. Dickenson, 7 El. & Bl. 831; 26 L. J., M. C. 204; 3 Jnr. (N.S.) 1076; 5 W. R. 321.

Upon a case stated under 7 & 8 Geo. 4, c. 53, s. 84, it is unnecessary to bring the record before the court by certiorari; if the facts appear by affidavit it is sufficient. Reg. v. Gamble, 16 L. J., M. C. 149.

Where a case has been sent from the sessions, the court will not, upon the certiorari, go intoany objections arising on the face of the order itself, not raised by the case. Reg. v. Hartpury, 2 New Sess. Cas. 648; 16 L. J., M. C. 105.

If it is intended to object to the order of sessions as bad on the face thereof upon any grounds not raised by the special case, the certiorari must be moved for in open court, and such additional grounds of objection stated. Reg. v. Heyop, 8 Q. B. 547; 2 New Sess. Cas. 270; 15 L. J., M. C. 70; 10 Jur. 200.

Acquittals, ]—A certiorari lies to the justices at sessions to bring up the record of an acquittal remaining in the court. Jackson v. Oaks, 11 Jur. 1105.

Whether or not a justice of the peace may draw up a corrected record of a summary conviction after he has returned one record of it totion, subject to a case to be stated for the Court | the quarter sessions, he cannot do so in a case-

where the first conviction has been brought up by certiorari and quashed. Chancy v. Payne, 1 G. & D. 348; 1 Q. B. 712; 6 Jur. 80.

Practice on.]-The court will not quash a conviction unless the original record is brought up. Rey. v. Brickhall, 12 W. R. 909.

where a conviction is removed no motion can be made in arrest of judgment, unless the defendant is personally present. Rex v. Spraggs, 1 W. Bl. 209.

The proper practice upon the return of a certiorari to remove a conviction is, that the

case should be put into the Crown paper. Reg. v. Lord, 16 L. J., M. C. 15.

# e. To Remove Orders of Sessions.

Jurisdiction of Justices.]—When an order of justices is returned, and the proceedings are regular in practice, and the case is one over which the justices had jurisdiction, the court will not hear affidavits impeaching their decision on the facts; nor, if they return the evidence, will it review their judgment thereupon. Reg. v. Bolton, 4 P. & D. 679; 1 Q. B. 66; 5 Jur. 1154.

The test of jurisdiction under this rule is whether or not the justices had power to enter upon the inquiry, not whether their conclusions, in the course of it, were true or not. Ib.

It may be shewn by affidavit that they had no authority to commence an inquiry, inasmuch as the question brought before them was not one to which their jurisdiction extended; and this, although, by mis-statement, they have made the proceedings on the face of them regular. Ib.

The repealed Highway Act, 13 Geo. 3, c. 78, s. 80, which took away the certiorari, did not extend to cases where the justices at sessions acted wholly without jurisdiction. Therefore, where justices at the petty sessions made an order for the allowance of the accounts of a surveyor of highways, which accounts had not previously been verified before one justice, pursuant to the requisites of s. 48:—Held, that they acted wholly without jurisdiction; that their order was not a proceeding had pursuant to the act; and, consequently, that a certiorari lay to remove it for the purpose of having it quashed. Row v. Somersatshire J.T., 6 D. & R. 469; see S. C., 5 B. & C. 816; 8 D. & R. 738; 5 L. J. (0.8.) M. C. 35.

An order of sessions confirming a rate was removed by certiorari into the Queen's Bench; that court quashed the order of sessions. subsequent rate having been made by the sessions, open to the same objection, pending the argument on the case, but against which no appeal was made:—Held, that as the objection was made express matter for an appeal to the sessions, the appellants were not entitled to have the rate quasiled on certiorari, it being good npon the face of it. Reg. v. Middlesex JJ., 1 P. & D. 402; 9 A. & E. 540; 2 W. W. & H. 100; 8 L. J., M. C. 85.

Order of Petty Sessions Affirmed on Appeal to Quarter Sessions—Order of Quarter Sessions Quashed on Certiorari.]—An order made in petty sessions is not affected by the quashing on certiorari of an affirming order by quarter sessions. Suffolk County Lunatic Asylum v. Stow Union, 76 L. T. 494; 45 W. R. 620; 61 J. P.

Vaccination Order - Costs - Enforcement-Distress—Imprisonment.]—Sect. 6 of the Summary Jurisdiction Act, 1879, repeals s. 18 of the Summary Jurisdiction Act, 1848, only so far as the latter gives justices jurisdiction to enforce by distress and imprisonment an order directing the payment of money when such order was made on a complaint that a sum of money was claimed to be due. W. was summoned under s. 31 of the Vaccination Act, 1867, to shew cause why he should not have his child vaccinated, and an order was made on the summons directing that he should have the child vaccinated within a given time, and also directing that he should pay the costs of the order, and on his failure to do so that there should be distress, and in default of distress he should be imprisoned. On certiorari to quash this order :-Held, that it was good under s. 18 of the Summary Jurisdiction Act, 1848. Reg. v. Burrows, Wilson, Ex parte, 77 L. T. 338; 46 W. R. 29; 61 J. P. 724.

When Order has been Quashed on Appeal.] Where an appeal against an order of removal has been tried with the acquiescence of the appellants and the respondents, and the order quashed, a certiorari to remove the proceedings for the purpose of quashing the order of sessions will not be granted, although the respondents received no notice of trial, as required by a rule of court of the sessions, and were consequently wholly unprepared for the trial. Rew v. York-shire (E. R.) JJ., 3 N. & M. 93.

Order sent to Justices to be Re-stated-Reversal by them. -A certiorari removing an order of sessions, which order, upon being sent back to the sessions for re-statement, is reversed by them, does not operate to remove the new order of sessions. *Rew v. Blowam*, 3 N. & M. 385; 1 A. & E. 386; 3 L. J., M. C. 115.

For Payment of Costs.]-On an application for a certiorari to bring up an order of sessions for payment of costs, on the ground that the costs were taxed after the sessions had expired, the court refused the writ on the ground that the party should have objected at the time of taxation. Wutkins, Ex purte, 5 L. T. 605; 10 W. R. 249.

A divisional court granted a writ of certiorari to quash an order of justices for the abatement to quist an overer of insteas for the anaement of a missure:—Held, that this being a criminal matter, the court had no jurisdiction to give costs, as Ord. XLV. did not apply. Semble, the court could not give costs to successful applicants for certiorari to quash orders, whether the matter be civil or criminal. Reg. v. Parlby (No. 2), 53 J. P. 744.

Justices Interested in Subject of Order. The court will not grant a certiorari in the first instance to remove an order for the appointment of overseers for the purpose of having it quashed, on a suggestion that the justices made the appointment from corrupt and improper motives; the propriety of the appointment being matter of appeal to the sessions. Rex v. Somersetshire J.I., 1 D. & R. 443.

Where an order of quarter sessions confirming a conviction is void on the ground of interest in the justices, the court will grant a certiorari to bring up the order for the purpose of quashing it, with a view to a mandamus to enter continuances and hear the appeal. *Hopkins, Ewparte,* El. Bl. & El. 100; 4 Jur. (N.S.) 529.

- Before Filing with Clerk of Peace. - K. was charged with opening his premises for sale of intoxicating liquors on Sunday within the prohibited hours, and was convicted and fined bl., and also 13s. 6d. for costs. The conviction, when drawn up, contained no clause of distress, but ordered imprisonment in default of payment: -Semble, the justices might draw up a fresh conviction containing the clause of distress, any time before filing it with the clerk of the peace. Kenyon, Ex parte, 45 J. P. 303,

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The proviso in s. 52, that "nothing herein

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Quarter Sessions-Amendment of Summary Conviction imposing Imprisonment in Default of Distress—Striking out "hard labour."]—The defendant was convicted by a metropolitan police magistrate under the Public Health (London) Act, 1891, 54 & 56 Vict. c. 76, for not abating a nuisance. The conviction imposed a fine and imprisonment with hard labour in default of distress. The defendant paid the fine without appealing to quarter sessions :-Held, on certiorari, that the conviction must be quashed. Reg. v. London JJ., Saunders, Exparte, 64 L. J., M. C. 278; 72 L. T. 568; 18 Cox, C. O. 153; 59 J. P. 279.

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It may be shewn by affidavit that they had no

anthority to commence an inquiry, inasmuch as the question brought before them was not one to which their jurisdiction extended; and this, although, by mis-statement, they have made the proceedings on the face of them regular. Ib.

The repealed Highway Act, 13 Geo. 3, c. 78, s. 80, which took away the certiorari, did not extend to cases where the justices at sessions acted wholly without jurisdiction. Therefore, where justices at the petty sessions made an order for the allowance of the accounts of a surveyor of highways, which accounts had not previously been verified before one justice, pursuant to the requisites of s. 48:—Held, that they acted wholly without jurisdiction; that their order was not a proceeding had pursuant to the act; and, consequently, that a certiorari lay to remove it for the purpose of having it quashed. Rew v. Somersetskire JJ., 6 D. & R. 469; see S. C., 5 B. & C. 816; 8 D. & R. 733; 5 L. J. (o.s.) M. O. 35.

An order of sessions confirming a rate was removed by certiorari into the Queen's Bench; that court quashed the order of sessions, subsequent rate having been made by the sessions, open to the same objection, pending the argument on the ease, but against which no appeal was made :—Held, that as the objection was made express matter for an appeal to the sessions, the appellants were not entitled to have the rate quashed on certiorari, it being good upon the face of it. Reg. v. Middlewer JJ., 1 P. & D. 402; 9 A. & E. 540; 2 W. W. & H. 100; 8 L. J., M. C. 85.

Order of Petty Sessions Affirmed on Appeal to Quarter Sessions—Order of Quarter Sessions Quashed on Certiorari.]—An order made in petry sessions is not affected by the quashing on certiorari of an affirming order by quarter sessions. Suffolk County Lunatic Asylum v. Staw Union, 76 L. T. 494; 45 W. R. 620; 61 J. P.

Vaccination Order - Costs - Enforcementby certiforari and quashed. Chaney v. Payne, 1 G. & D. 348; 1 Q. B, 712; 6 Jur. 80.

Distress—Imprisonment.]—Sect. 6 of the Summary Jurisdiction Act, 1879, repeals s. 18 of the Summary Jurisdiction Act, 1848, only so far as the latter gives justices jurisdiction to enforce by distress and imprisonment an order directing the payment of money when such order was made on a complaint that a sum of money was claimed to be due. W. was summoned under s. 31 of the Vaccination Act, 1867, to shew cause why he should not have his child vaccinated, and an order was made on the summous directing that he should have the child vaccinated within a given time, and also directing that he should pay the costs of the order, and on his failure to do so that there should be distress, and in default of distress he should be imprisoned. On certiorari to quash this order :- Held, that it was good under s. 18 of the Summary Jurisdiction Act, 1848. Reg. v. Burroucs, Wilson, Ew parte, 77 L. T. 338; 46 W. R. 29; 61 J. P. 724.

> When Order has been Quashed on Appeal.]-Where an appeal against an order of removal has been tried with the acquiescence of the appellants and the respondents, and the order quashed, a certiorari to remove the proceedings for the purpose of quashing the order of sessions will not be granted, although the respondents reecived no notice of trial, as required by a rule of court of the sessions, and were consequently wholly unprepared for the trial. Rev v. Yorkshire (E. R.) JJ., 3 N. & M. 93.

Order sent to Justices to be Re-stated-Reversal by them.]—A certiorari removing an order of sessions, which order, upon being sent back to the sessions for re-statement, is reversed by them, does not operate to remove the new order of sessions. Rew v. Blowein, 3 N. & M. 385; 1 A. & E. 386; 3 L. J., M. C. 115.

For Payment of Costs. -On an application for a certiorari to bring up an order of sessions for payment of costs, on the ground that the costs were taxed after the sessions had expired, the court refused the writ on the ground that the party should have objected at the time of taxation. Watkins, Ex parte, 5 L. T. 605; 10 W. R. 249.

A divisional court grauted a writ of certiorari to quash an order of justices for the abatement of a nuisance —Held, that this being a criminal matter, the court had no jurisdiction to give costs, as Ord. XLV. did not apply. Semble, the court could not give costs to successful applicants for certiorari to quash orders, whether the matter be civil or eriminal. Reg. v. Parlby (No. 2), 53 J. P. 744.

Justices Interested in Subject of Order. ]-The court will not grant a certiorari in the first instance to remove an order for the appointment of overseers for the purpose of having it quashed, on a suggestion that the justices made the appointment from corrupt and improper motives; the propriety of the appointment being matter of appeal to the sessions. Rex v. Somersetshire J.J., 1 D. & R. 443.

Where an order of quarter sessions confirming a conviction is void on the ground of interest in the justices, the court will grant a certiorari to bring up the order for the purpose of quashing it, with a view to a mandamus to enter continuances and hear the appeal. Hopkins, Exparte, El. Bl. & El. 100; 4 Jur. (N.S.) 529.

Where an appeal against an order of removal | order of two justices, that a former rule has been is adjourned on the ground of the justices being equally divided, the court will not grant a certiorari for the purpose of quashing the order of removal and the order of adjournment upon affidavits shewing that the apparent equality of votes was occasioned by the vote of a magistrate who was a rated inhabitant of the respondent parish, and had joined in making the order of removal, on the ground that the court has no jurisdiction to review the order, even if erroneous. Rew v. Uske, 2 Man. & Ry. 172. S. C., nom. Rew v. Monmonthshire J.J., 8 B. & C. 137.

At whose Instance.]-A certiorari will not be granted to remove an erroncous order of sessions, at the instance of the party in whose favour the error was made. Reg. v. Derbyshire JJ., 1 C. L. R. 239.

A certiorari to bring up an order of removal may be issued at the instance of the parish upon which the order is made, before any appeal has been entered against such order. Reg. v. Wollatts or Willatts, 2 New Sess. Cas. 5; 7 Q. B. 516; 14 L. J., M. C. 157; 9 Jur. 509.

Poor Rates.]-A poor rate cannot be removed by certiorari. Rew v. Uttoweter, 1 Bott's P. L.

Or a warrant of distress to levy poor rates. Taunton, Ex parte, 1 D. P. C. 54.

Land Tax.]—The court will not grant a certio-Rew v. King, 2 Term Rep. 234.

Recognizances. ]-Although an order of the court of quarter sessions to estreat a recognizance for a forfeiture out of the sessions is a nullity, yet a certiorari will be awarded to remove it. in order to quash it. Reg. v. Yorkshire (W. R.) J.J., and to quasa ii. Reg.v. Forkshire [W. R.] J., 2 N. & P. 457; 7 A. & E. 583; 7 L. J., M. C. 9. It does not lie to remove a recognizance. Anon., Lofft. 321.

Appointing Overseer. |-- Where it is a question whether a person appointed an overseer by a justice's order is a householder, the court will not grant a certiorari to bring up the order for the purpose of quashing it. The objection must be taken by appeal to the quarter sessions. Pudding Norton Overseers, In re, 33 L. J., M. C. 136; 10 L. T. 386; 12 W. R. 762.

Order Bad on Face. ] - Where an order of removal is bad on the face of it, the court will bring it up by certiorari, for the purpose of quashing it, although no appeal has been brought, and the application for a certiorari is not made until after the expiration of the time allowed for appealing. Reg. v. Gloncestershire JJ., 1 B. C. Rep. 33; 3 D. & L. 542; 2 New Sess. Cas. 240; 15 L. J., M. C. 48; 10 Jur. 96.

Granting exclusive Audience to Counsel. The court refused to grant a certiorari to bring up an order of quarter sessions, that exclusive audience should be granted to barristers there at all times when four barristers were present. Reg. v. Denbighshire JJ., 2 New Sess. Cas. 422; 15 L. J., Q. B. 335; 10 Jur. 542. S. C., nom. Erans, Ex parte, 5 Q. B. 279.

tion to a rule for a certifrari to bring up an rules, remedies, regulations, penalties, forfeitures,

made absolute for a certiorari to remove an order of sessions confirming the order of justices on appeal, but to which no return has been made, unless it appears by affidavit that the original order has been duly returned to the sessions, Reg. v. Marvice, 2 D. & L. 952; 1 New Sess. Cas. 585; 14 L. J., M. C. 75; 9 Jur. 731.

Several Orders to the same Effect. -- Three orders for payment of a rate had been made upon the members of a bridge company; one of them had been brought up by certiorari. The court made a rule absolute for a certiorari to bring up the others. The proper course is to apply to the court, when the orders come up, to stay proceedings upon two of them, until one is disposed of. Reg. v. Chasemore, 12 Jur. 11.

Sessions Confirming Justices. - Where an order of sessions confirming an order of justices is removed by certiorari, the writ does not necessarily bring up the original order of justices. Reg. v. Cornwall JJ., 1 New Sess. Cas. 414; 9 Jnr. 110.

Recognizance to Keep the Peace. ] defendant was arrested and taken before a magistrate on a charge of using threats towards F. O. The magistrate, after hearing the evidence of F. O., refused, on the application of the defendant, to adjourn the case, and compelled him at once to enter into recognizances to keep the peace towards F. O. for twelve months, The defendant subsequently brought an action against F. O. for a malicious prosecution, and recovered a verdict for 25l. He then applied to the court for a certiorari to remove the recognizances and information, in order that the recognizances might be discharged :-Held, that the certificari should not be granted, as he had already vindi-ented his character by recovering damages for the malicious prosecution; and further, that as the magistrate had acted on an information on oath, the court could not interfere. Reg. v. Groves, S L. T. 311.

Justices-Dismissal of Summons. |- In no case can a certiorari issue to remove and quash an order of dismissal of a summons by justices, Reg. v. Antrim J.J., [1895] 2 Ir. R. 603.

# f. Restraint by Statute.

Generally. ]-A certiorari cannot be taken away by any general, but only by express, negative words. Rew v. Reeve, 1 W. Bl. 231.

If a statute, creating an offence, gives cognizance of it to one justice, with an appeal to the sessions, and takes away the certiorari as to all the proceedings, and afterwards further powers for the punishment of the offender are given to the sessions by another statute, which does not take away the certiorari, the clause for taking away the certiorari in the former act cannot be extended to the proceedings under the latter. Res v. Terret, 2 Term Rep. 735.

But where an act enabling a company to make certain canals, directed that questions of compensation should be tried by a jury, before the justices at quarter sessions, and expressly took away the certiorari, and a subsequent act enabling the company to make other canals, directed that the Previous Writ of Certiorari. ]-It is no objec- former act, and all powers, provisions, exceptions, articles, matters and things therein contained, under this act shall be removable into the shall be in full force, and shall extend to and be superior courts, unless the debt or damage used, executed, applied, enforced and put in claimed shall exceed 54,7 did not take away the used, executed, applied, enforced and put in execution, to all intents and purposes, as to that act and the several matters and things therein contained, for making and maintaining the canals to be made by virtue of that act, and for carrying the several purposes of that act into execution in as ample and beneficial a manner. to all intents and purposes, as if the same had been respectively re-enacted in the body of that act :- Held, that the clause taking away the certiorari must be considered as embodied in the latter act. Heav. V. Vorkshire (W.R.) JJ., 3 N. & M. 802; 1 A. & E. 563; 3 L. J., M. C. 117.

Order of county justices made in pursuance of the repealed 5 Geo. 4, c. 85, s. 1, and repealed Municipal Corporations Act, 1835, 5 & 6 Will. 4, Minispat Corporations Act, 1889, 5 & 6 will 4, c. 76, 8, 114, notwithstanding 8, 132 of the latter act, held removable by certiorari, Reg. v. Lanvashire JJ., 11 A. & E. 144; 3 P. & D. 86; 9

L. J., Q. B. 9.

Order of justices on surveyors of highways, order of justices on surveyors of nighways, under s. 7 of the repealed Nuisances Removal Act, 1855, 18 & 19 Vict. c. 121, for payment of expenses of a sewer, held removable, notwithstanding that writ was taken away by s. 132.

Rog. v. Gosse, 30 L. J., M. C. 41; 6 Jur. (N.S.) 1369; 3 L. T. 404.

Jurisdiction to Grant.]—When a certiorari is said to be taken away by statute, the superior court is not absolutely deprived of the power to issue the writ; but its action as to the writ is controlled and limited, and it cannot quash the order removed by certiorari except upon the ground either of a manifest defect of jurisdiction in the tribunal that made the order, or of maniffest fraud in the party procuring it. Colonial Bank of Australasia v. Willan, 43 L. J., P. C. 39; L, R. 5 P. C. 417; 30 L, T. 237; 22 W. R. 516.

Matters on which the defect of jurisdiction depends may be apparent on the face of the repeated in the interest of the face of the proceedings, or may be brought before the superior court by affidavit, but they must be extrinsic to the adjudication impeached. Ib.

Objections on the ground of defect of juris-diction may be founded on the character and constitution of the inferior court, the nature of the subject-matter of the inquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior court. Ib.

The objection of defect of jurisdiction cannot be entertained if it rests solely on the ground that the judge has erroneously found a fact which was essential to the validity of his order,

but which he was competent to try. Ib.

A section in an act of parliament taking away the writ of certiorari does not apply in the ease of a total absence of jurisdiction. Bradlaugh, Ev parte, 3 O. B. D. 509. And see also next case,

Does not Affect the Crown.]-A statute taking away a certiorari does not take it from the Crown, unless expressly mentioned. Rev v. —, 2 Chit. 136. S. P., Rex v. Davies, 5 Term Rep. 626 ; 2 R. R. 683.

The rule is not limited to eases where the Crown has an actual interest, but extends to all prosecutions in the name of the king. Rev v. Boultbee, 6 N. & M. 26; 4 A. & E. 498; 1 H. & W. 713; 5 L. J., M. C. 57.

prerogative of the Crown to remove into the Court of Exchequer a cause in any other court in which the rights of the Crown are involved. Mountion v. Wood. 1 H. & N. 58: 2 Jur. (N.S.) 452.

\_\_\_\_ No Affidavits in Answer to.]—By the repealed Excise Management Act, 1827, 7 & 8 Geo. 4, c. 53, s. 79, no certiorari shall be issued at the suit of the defendant out of any of the courts of record to remove an information before justices of the peace in pursuance of any excise. act, or a judgment thereon ; provided, that nothing herein contained shall extend to a certiorari sued on behalf of his majesty out of the exchequer. A conviction of G. for committing an offence against the excise laws, maliciously, and with intent to injure his master, under the repealed Malt Duties Act, 7 & 8 Geo. 4, c. 52, s. 46, having been removed by certiorari, a rule was obtained on behalf of the Crown, and served upon G., calling upon the convicting justices to show cause why the conviction should not be quashed. The affidavits charged frand by the master in procuring the conviction, for the purpose of relieving himself of penalties incurred by him. There were no affidavits in answer :-Held, that the court must take the charge to be admitted: and consequently had jurisdiction to quash the and consequently mat jurisdiction to quasic the conviction, notwithstanding 7 & 8 Geo. 4, c. 53, s. 79. Reg. v. Gillyard, 3 New Sess. Cas. 207; 17 L. J., M. C. 153; 12 Jur. 655.

When Summary Conviction is Authorised, together with an Appeal to Sessions, -If a statute authorising a summary conviction before a magistrate gives an appeal to the sessions, who are directed to hear and finally determine the matter, this does not take away the certiorari. even after such an appeal made and determined. Rev v. Jukes, 8 Term Rep. 542; 5 R. R. 445.

The Cruelty to Animals Act, 1849, 12 & 18 Vict. c. 92, enacts, by s. 14, that a party convicted by a justice under the act shall pay such penalty damage or compensation as the instice shall adjudge, order or award, together with the costs of conviction, to be settled by such justice : and s. 25 gives an appeal to quarter sessions in all cases where the sum adjudged to be paid on any conviction shall exceed 2l.:—Held, that this gives an appeal only in cases where the sum adjudged to be paid as penalty, damage or compensation, exclusive of the costs, exceeds 22.

Reg. v. Warwickshire J.J., 6 El. & Bl. 837; 25

L. J., M. C. 119; 2 Jur. (N.S.) 930; 4 W. R. 650.

Therefore, where a party was convicted and adjudged to pay 2s. 6d. as a penalty, and 2l. 7s. 6d. for costs, and gave notice of appeal, afterwards abandoned, and the sessions made an order upon him to pay a certain sum to the respondent towards his costs, on the appeal the court issued a certiorari to bring up the last mentioned order to be quashed, though s. 26 prohibits removal by

certiorari. Ib.

By a local act commissioners were appointed to drain and improve certain lands. The act contained several sections relating to summary proceedings before justices, and a clause enacting that no proceedings in pursuance of the act should be removed by certiorari. By a subsequent H. & W. 713: 5 L. J., M. C. 57.

Section an appeal to the quarter sessions was Section 9.0 the repealed County Courts Act, given to persons aggreived by any decision of 9.8 10 Vict. 0.95, which enacted that "no plaint i he commissioners under the act — Held, that proceedings at quarter sessions as to the summary proceedings before justices. Reg. v. Lindsey or Lindsey JJ., 2 New Sess. Cas. 56; 3 D. & L. 101; 14 L. J., M. C. 151; 9 Jur. 791. S. P., Rew v. Middlesca J.J., 8 D. & L. 117.

When Right not expressly taken away.]—If jurisdiction is given to an inferior court of common law to try a new offence created by statute, the proceedings may be removed by habeas corpus cum causa, or certiorari, unless expressly taken away: unless in cases where the statute creating the offence prescribes a special jurisdiction not known to the common law. Hartley v. Hooker, Cowp. 524.

When Order has been made without Jurisdiction.]—The adoptive Public Health Act, 1848, 11 & 12 Vict. c. 63 [repealed], by s. 55 empowered a local board of health to make by-laws for the removal by the occupier of dust, ashes, rubbish, filth, mannre, dung and soil, in or by the side of any street; and s. 115 provided that such bylaws shall not be of force until confirmed by a secretary of state. A by-law required all ocenpiers within the district to remove all snow or other obstructions from the footpath, opposite their premises, before nine a.m. Upon an information before a magistrate for disobedience to the by-law, it was objected that the by-law was void; but he decided that he could not enter into the question of the validity of the by-law, because it had been allowed by a secretary of state, and convicted the party for the alleged offence:—Held, that snow was not within the terms of s. 55, and therefore the by-law was invalid, and that the magistrate had exceeded his jurisdiction, and therefore a certiorari might ns jurisinesion, and therefore a certainfair inight issue, although it was taken away by s. 137. Reg. v. Rose, 24 L. J., M. C. 130; 1 Jur. (N.S.) 803. S. C., nom. Reg. v. Wood, 5 El. & Bl. 49; 3 W. R. 419.

Where a clerk of trustees of a turnpike-road, which was out of repair, had been summoned by a single justice, and two justices, at a special sessions for the highways, without allowing the clerk to show that the turnpike funds were insufficient, made an order convicting him in a penalty, directing him to repair the road in a specified time :- Held, that, though the certiorari was taken away by the act, the order was so entirely without jurisdiction, that a certiorari might issue to bring up the order to quash it. Reg. v. St. Albans JJ., 22 L. J., M. C. 142: 17 Jur. 581.

Formal Defect. - Where the writ of certiorari

is taken away by statute, it will nevertheless lie in the case of excess of jurisdiction; but a merely formal defect in an information whereby an alleged offence is not properly stated is not an Breadley, 63 L. J., M. C. 183; 10 R. 183; 70 L. T. 379; 17 Cox, C. C. 739; 58 J. P. 199.

When Order has been made by Interested Magistrates.]-A paving act empowered commissioners to levy rates, giving to parties grieved an appeal to the quarter sessions, whose order was to be final; and no order, rate, &c., was to be removed by certiorari. On appeal against a rate, the respondents objected to the admission of certain evidence; the sessions, by a majority of eleven magistrates to eight, held the cyldence Tolzey Court of Bristol a writ of foreign attach-

clause as to the certiorari related as well to the | admissible; three of the eleven magistrates were partners in a company to which belonged certain premises assessed to the rate in the name of the occupier. The sessions quashed the rate :-Held, that a question in the cause having been decided by a court improperly constituted, on account of the interest of the three magistrates, the clause prohibiting certiorari did not operate; and the court had the order of sessious brought up by certiorari, and quashed it on affidavit of the above facts, although the affidavits did not satisfy the court that the magistrates had acted partially. Reg. v. Cheltenham Commissioners, 1 Q. B. 467; 1 G. & D. 167; 10 L. J., M. C. 99. S. P., Reg. v. Aberdare Canal Co., 14 Q. B. 854.

But if a party to the appeal, knowing of the interest, expressly or impliedly assents to the interested magistrate acting, such party cannot afterwards make the objection. Ih.

# g. In other Cases.

Under Penal Statutes. |-- A certiorari always lies to remove proceedings under penal statutes, unless expressly taken away; and an appeal never lies, unless expressly given by statute. Rev. Cashiabury J.J., 3 D. & R. 35; 26 R. R.

Courts-Martial.]—Where the military status alone of a person is affected by the sentence of a court-martial, the Court of Queen's Bench will not interfere to control the jurisdiction of the court-martial; and therefore, where a military officer has been found guilty of an offence, and sentenced by a court-martial to be dismissed the service, the court refused to grant a certiorari to bring up the proceedings on a suggestion that the conrt-martial had no jurisdiction over the offender. Mansergh, Ele parte, 1 B. & S. 400; 30 L. J., Q. B. 296; 7 Jur. (N.S.) 825; 4 L. T. 469; 9 W. R. 703.

Colonial Courts. ]-Where, upon an indictment in a colonial court proceeding by course of the common law, the prisoner has been convicted of a criminal offence, and is in execution of the sentence, the Court of Queen's Bench will not, without the flat of the attorney-general, direct a certiorari to issue for the purpose of bringing up the record, and bringing a writ of error upon it. Lees, Ex parte, El. Bl. & El. 828; 27 L. J., Q. B. 403; 5 Jur. (N.S.) 333; 6 W. R. 660.

Indictment of a Justice at Quarter Sessions. -A justice of the peace for a county being indicted at the county quarter sessions, had circulated amongst the other justices a printed account of the charges against him :- Held, ground for removing the indictment by certiorari, within the repealed 5 & 6 W. 4, c. 33. Reg. v. Grover, 8 Dowl, P. C. 325.

Court-Leet.]—A certiorari lies to remove a presentment in a court-leet; and when removed the presentment is traversable. Rev v. Rempell, Cowp. 458.

The court will not grant a certiorari to remove the record and proceedings out of a court-leet in order to inquire into the propriety of an amerciament, where the fine has been estreated and paid. Rew v. Heaton, 2 Term Rep. 184.

Foreign Attachment.] - W. sued out of the

ruary. On the 17th, B. filed a claim alleging the goods to be his. To this W. on the 10th April replied, that the property was in C., and not in B. On the 11th of May the suit was entered in the issue book for trial, and it came on for trial on the 12th July, when B. tendered portion ordering the payment of certain sums, a certiorar;—Held, that B. was not entitled to each exceeding 50*L*, to contractors for costs a certiorari :--Held, that B. was not entitled to sue it out, under 21 Jac. 1, c. 23, s. 2. Bruce v. incurred in paving a street, no contracts having Wait, 3 M. & W. 21; 7 L. J., Ex. 13.

From Chancery to Mayor's Court. ]-When a suit in the Mayor's Court was removed by a writ of certiorari into the Court of Chancery and it appeared upon the face of the bill that some of the plaintiffs were out of the jurisdiction of the Mayor's Court, an order was made ex parte, without further evidence, that the suit in the Mayor's Court be retained in the Court of Chancery, Tracy v. Open Stock Exchange Co., 40 L. J., Ch. 159; L. R. 11 Eq. 556; 19 W. R. 379.

Mayor's Court that the registrar of that court might be at liberty to pay over to the credit of the cause in the Court of Chancery the money paid into the Mayor's Court. Ib.

Palatine Court.]—Certiorari to remove suit from Chaneery of Durham to High Court of Chancery, on account of affinity of one party, granted. Hinton v. Lawson, Cary, 48.

To remove a cause out of a court of couity in a county palatine to High Court of Chancery. Portington v. Tarbock, 1 Vern. 178.

Coroner's Inquisitions. ]—The court refused to grant a certiorari to bring up a coroner's inquisition to be quashed for irregularity, which purported to be taken before the coroner, but which was in reality taken before his clerk, and which was in other respects invalid. Duves, Ex parte, 1 P. & D. 146; 8 A. & E. 936; 1 W. W. & H.

Inquisition under Lands Clauses Act-Time for Application.] — Application having been made to the High Court of Justice for a writ of eertiorari, to bring up and quash the proceedings upon an inquisition before the sheriff as to the amount of compensation to be awarded to a claimant under the Lands Clauses Consolidation Act, 1845, on the ground that the jury in assessing the compensation had taken into consideration matters which were not legally the subject of compensation; it was proved that the appli-cants for the writ had allowed five mouths to expire without taking any objection to the proceedings :- Held, that as the time allowed for setting aside an award made under the provisions of the above-mentioned act had expired before the application was made, the writ of certiorari ought not to be granted. Reg. v. Sheward or Steward, 49 L. J., Q. B. 716; 9 Q. B. D. 741—C. A. Affirming, 42 L. T. 363; 28 W. R. 506.

On Misapplication of Funds by Urban Authority. ]-By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174, every contract made by an urban authority whereof the value or amount exceeds 501, shall be in writing and sealed with

ment against C., and seized goods of his under its expedient to give all persons interested in the it. The writ was returned on the 14th of Feb. borough fund of every borough a more direct and easy remedy for any misapplication of such fund," enacted that any order of the council of any borough for the payment of mouey out of the borough fund might be removed into the court by certiorari. A resolution was passed by a corbeen entered into under the seal of the corporation. On an application for a certiorari to bring up and quash such resolution, on the ground that it was a "misapplication" of the borough funds within 1 Vict. c. 78, s. 44:—Held, that as the work was useful and done at a reasonable cost, and there was no suggestion of corruption or partiality, there had been no "misapplication," and the court in its discretion refused to grant the certiorari. Reg. v. Norwich Corporation, 30 W. R. 752. And see Corporation.

An order was also made in the suit from the By s. 75 of the repealed Local Government Act. 1858, 21 & 22 Vict. e. 98, s. 75, a secretary of state, upon a petition of the local board of health, and after inquiry, might, by provisional order, empower that board to put in force, with reference to the land referred to in the order. the powers of the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, with respect to the purchase and taking of land otherwise than by agreement; the provisional order so made to be of no validity unless it had been confirmed by act of parliament :- Held, that such order could not be removed by certiorari in order to be quashed. Reg. v. Hastings Board of Health, 6 B. & S. 401.

> Resolution of Vestry.]—A certiorari will not lie to bring up a resolution of the vestry for the appointment of paid constables under the Parish onstables Act, 1842, 5 & 6 Vict. c. 109, s. 18, Hipperholme Constables, In re, 5 D. & L. 79; 2 B. C. Rep. 98; 11 Jur. 713.

Nor the copy of such resolution forwarded to the justices in special sessions, on which they made the appointment. Ib.

But it will lie to bring up the appointment itself made by the justices in petty sessions, where the proceedings in vestry have not been where the proceedings in vestry have not been conducted in conformity to 58 Geo. 3, c. 69, amended by 59 Geo. 3, c. 85, a poll having been demanded and refused, and the resolution being carried by a show of hands. Ib.

Consent of Commissioners to Erect Bridge. ]-By 33 Geo. 3, c. 95, for making a canal, all persons having freehold or copyhold estates of 1001, a year, in the county, and all persons residing in the county and having personal estates of 2,0001, were made commissioners for settling, determining and adjusting all questions, matters and differences which should arise between the company and proprietors of lands. The company was to make such bridges as the commissioners should judge necessary and appoint, and if owners or occupiers of lands should find the bridges so made insufficient for the commodious use and occupation of their lands, they might with the consent of the committee of the company, upon request, or in case of their refusal for twenty-one days, then with the consent of the common seal of such authority. The re-pealed I Vict. c. 78, s. 44, after reciting that "it the commissioners, make bridges at their own expense. By s. 70, no persons shall be capable [ sewers, where the chairman confessed he was of acting as a commissioner in any case where he shall be interested or concerned in the matter in question. B., an owner of lands adjoining the canal, made a request to the committee for their consent to erect a bridge over the canal, and after twenty-one days' refusal applied to the commissioners, who held a meeting, and after hearing evidence and arguments pro and contra, gave their consent. On motion to quash the above consent and approbation, removed by certionari :—Held, that it was a judicial proceeding, removable by certiorari. Reg. v. Aberdur Canal Co., 14 Q. B. 854; 19 L. J., Q. B. 251; 14 Jur. 735.

The application was on behalf of B., the owner of land adjoining the canal. In fact, however, the bridge was not wanted for the use of the lands, but to bring coals from a colliery lying beyond them, which coals would be carried by the proposed bridge across the canal to a railway. and by that railway to the town, instead of going by the canal. The chairman, and several directors and shareholders of the railway company, were sworn and acted as commissioners when the application was heard and granted :-Held, that by reason of the interest they had in the result, the proceedings were void. Ib.

Certificate for Admission of Lunatic into Asylum. ]-A certificate for the admission of a lunatic into an asylum, signed by a clergyman and oversee, under the repealed Lunaey Act, 1845, 8 & 9 Viet, c. 100, s. 48, held not removable by certicrari. Reg. v. Hatfield Peverel, 18 L. J., M. C. 225.

The objection that such a certificate is not properly the subject of a certiorari, may be taken on shewing cause against a rule to quash the certificate after it has been returned.

Liquor Licence. ]-A licence for the sale of beer granted by the solicitor of excise without the production of a certificate from the overseer. required by 3 & 4 Vict. c. 61, s. 2 [repealed], held not to be a judicial act removable by certiorari. Reg. v. Sulford Oversiers, 18 Q. B. 687; 21 L. J., M. C. 223; 16 Jur. 907. But see Reg. v. Exeter JJ. or Reg. v. Mann, 42 L. J., M. C. 35; L. R. 8 Q. B. 235; 27 L. T. 847; 21 W. R. 329.

Order of Metropolitan Board of Works. ]certiorari issued to bring up an order of the Metropolitan Board of Works, made under the Metropolis Management Act, 1855, 18 & 19 Vict. c. 120, s. 214, on an appeal from a decision of the district board, by which order compensation was granted to D. as an officer to certain commissioners. The certiorari is taken away by the act. This certiorari was issued on affidavits, by which it appeared that D. was not an officer, and that consequently the order was made without jurisdiction. On showing cause against a rule to quash this order:—Held, that the Board of Works had jurisdiction on the appeal to decide whether D. was an officer or not; and that, even assuming that their decision was wrong in fact, to quash the order was discharged, and the writ of certiorari quashed, quia improvide emauavit. Reg., v. St. Olave's Board of Works, 8 El. & Bl. 529; 27 L. J., Q. B. 5.

Presentment from before Commissioners of Sewers, —Certiorari granted to remove a pre-should not be quashed, the recognizances required sentment from before the commissioners of by 5 Geo. 2, c. 19, s. 2, not having been entered

ignorant of the law applicable to the case. Resc. v. Lewis, W. W. & D. 60. S. P., 1 Jur. 151.

#### 2. How OBTAINED.

#### a. Application.

Time for. ]-The repealed 13 Geo. 2, c. 18, s. 5, only applied to orders, &c., of justices ; and there is no general rule of practice which requires an application for a certiorari to be made within six months of the making of the order. &c., sought Six months of the maxing of the order, &C., Sought to be quashed. Reg. v. Sheffield Corporation, 40: L. J., Q. B, 247; L. R. 6 Q. B. 652; 24 L. T. 659; 19 W. R. 1159.

Where an application for a certiorari is not made under 13 Gco. 2, c. 18, s. 5, the parties applying are not limited to six months, but may apply at any more lengthened period, as the court under the circumstances may think reasonable. Ib.

An application for a writ of certiorari to bring up an order of magistrates on which a special ease has been granted must be made within six months from the date of the order and not from the settlement of the special case, Elliott v. Thompson, 33 L. T. 339; 24 W. R. 56.

Made in Vacation. ] - A judge's order or flat for a certiorari to issue in vacation can only be granted nisi. Rec v. Chipping Sodbury, 3 N. & M. 104; B L. J., M. C. 61.

By whom made.]-An application for a certicrari must be made by the person complaining of the order sought to be brought up for the purpose of being quashed, and cannot be made by another person on his behalf. Reg. v. Riull, 11 Ir. C. L. R. 280.

A certiorari will not be granted to remove an erroneous order of sessions, at the instance of the party in whose favour the error was made. Reg.

v. Derbyshire J.J., 1 C. L. R. 239.

A certiorari to bring up an order of removal may be issued at the instance of the parish upon which the order is made, before any appeal has been entered against such order. Reg. v. Wollatts or Willatts, 2 New Sess. Cas. 5; 7 Q. B. 516; 14 L. J., M. C. 157; 9 Jur. 509.

Writs of certiorari are granted, not as a matter of right, but in the exercise of a sound judicial discretion. Mayo County, In re, 14 Ir. C. L. R.

Evidence in support of. ]-To sustain an application for a certiorari to remove presentments, on the ground that they are illegal, the illegality must appear on the face of the presentments; the court will not go behind them. 1b.

Excess of jurisdiction may be shewn by extrinsic evidence upon affidavits, in order to obtain a certiorari. Penny v. S. E. Ry., 7 El. & Bl. 660; 26 L. J., Q. B. 225; 3 Jur. (N.S.) 975; 5 W. R. 612.

#### b. Recognizances.

On Removal of Judgments or Orders-When necessary. ]-A rule called upon the prosecutor of a certiorari, issued to remove an order of sessions, confirming, without appeal, an order of justices, made pursuant to 55 Geo. 3, c. 68, s. 2, for stopping up a footpath, to shew cause why it should not be quashed, the recognizances required they were entered into after the allowance:— Held, that the statute only applies to cases where there was an appeal to the sessions, and not to cases where the order was confirmed without appeal. Reg. v. Jones, 9 D. P. C. 504; 5 Jur. 364.

Held, also, that the application should have been to quash the allowance, and not the writ itself; and the court refused to mould the rule

so as to quash the allowance. Ib.

A prosecutor is not bound to enter into a recognizance in order to get a certiorari to remove an order of sessions for quashing a conviction. Reg. v. Spencer. 1 P. & D. 358 : 2 W. W. & H. 7 ; 9 A. & E. 485 : 8 L. J., M. C. 17.

On removing an action for obstructing a right of way, a recognizance must be entered into, under 19 Geo. 3, c. 70, though the action is for damages only. Frunks v. Quinsec, 2 W.

W. & H. 58.

A recognizance in the alternative, to pay the debt and costs, or render the defendant to prison, is bad. Ib.

——Amount of ]—5 Geo. 2, c. 19, is not complied with by the party and his two sureties entering into a recognizance in 251, each, but it must be in the entire sum of 50l. Rew v. Dunn. 8 Term Rep. 217.

- Prosecution by Parish. ]-Where a parish prosecutes a certiorari to remove on order of sessions, the recognizance required by 5 Geo. 2, s. ii, s. z. to prosecute with effect, must be cutered into by some one inhabitant on behalf of the rest of the parish, with two sureties. \*\*Reav. Abergete, 1 N. & P. 235; 5 A. & B. 795; 2 H. & W. 375. c. 19, s. 2, to prosecute with effect, must be

When there are several Defendants, ]-A certiorari to remove a cause out of the Mayor's Court quashed, because one of the several defendants had only put in bail for himself, and not for the others. *Keate* v. *Goldstein*, 7 B. & C. 525; 1 Man. & Ry. 305; 6 L. J. (o.s.) K. B. 33.

On Removal of Indictment. ]-An indictment was removed into the Queen's Bench by certiorari obtained at the instance of the prosecutor, who entered into a recognizance, with two sure-ties, conditioned that he should prosecute with effect and perform all such orders and things as the court should direct. The defendants having been acquitted :-Held, that as the recognizance was not in the form prescribed by the Criminal Procedure Act, 1853, 16 & 17 Vict. e. 30, s. 5, i.e. conditioned to pay the defendant's costs on acquittal, they were not cutilled to costs. Reg. v. East Stoke, 6 B. & S. 536; 34 L. J., M. C. 190; 11 Jur. (N.S.) 809; 13 W. R. 737.

A corporation is not included within the

Criminal Procedure Act, 1853, 16 & 17 Vict. c. 30, s. 5; and, therefore, where an indictment against a corporation for non-repair of a highway, which had been directed by justices to be preferred at sessions, was removed by certiorari at the instance of the prosecutor, the prosecutor was not required to enter into recognizances under that section. Reg. v. Manchester Corporation, 7 El. & Bl. 453; 26 L. J., M. C. 65; 3 Jur. (N.S.) 839; 5 W. R. 373.

Upon an application to remove an indictment

into previously to the writ being issned, although, the other defendants be convicted; and 16 & 17 Vict. c. 30, s. 5, makes no difference in this respect. Reg. v. Jewell, 7 El. & Bl. 140; 26 L. J., Q. B. 177; 3 Jur. (N.S.) 689; 5 W. R. 202.

> On Removal of Presentment. |-If a person against whom a presentment is made by a court of sewers obtains a certiorari to remove it into the Court of Oneen's Bench, he must, before the allowance of the writ, enter into the recogniz-ance required by 5 & 6 Will. 4, c. 33, s. 2. Rea. v. Baker, 28 L. J., Q. B. 377; 7 W. R. 476.

#### c. Notice.

When necessary.]-A certiorari to remove an indietment from the sessions may be sued out by the prosecutor without giving six days' previous

notice. Rew v. Battams, 1 East, 298.

The words "party, person," &c., in the statute, do not include the Crown; therefore, a certiorari on the motion of the attorney-general, was directed to issue, although the time limited by the statute for applications for such writs had clapsed and the directions in it, relative to notice to the justices, had not been complied with by the Crown. Rew v. Berkeley, 1 Ld. Ken. 80.

The notice of such motion must be given to the

justices, notwithstanding the order of sessions was made subsequently to the opinion of the court, on a case to be stated, which was the case afterwards stated and settled by the justices at the sessions. Rew v. Sussew J.J., 1 M. & S. 631,

Service of.]-Notice of intention to move for a certiorari "on the first day of next term, or so soon after as I can be heard," is irregular, if served on the first day of that term, though the party does not, in fact, move till after the expiration of six days, Flounders, In re, 4 B. & Ad. 865; 1 N. & M. 592.

The notice of application for a certiorari was sworn to have been served on F. S. and another justice, "who were present at the sessions," when the appeal mentioned in the notice was heard and were and are two of the instices "by and before whom the order of sessions mentioned in the notice was made." The notice was signed by J. M., the attorney for the inhabitants of "the respondent parish":—Held, that the service was sufficient, inasmuch as F. S., under the circumstanees, must be considered as a member of the court, and one of the justices who made the order. Reg. v. Suffolk, 18 Q. B. 416; 21 L. J., M. C. 169; 16 Jur. 612.

Service of notice of certiorari upon two justices, sworn to have been present at the hearing of the appeal, is sufficient. Reg. v. Cornwall JJ., 1 New Sess, Cas. 414: 9 Jur. 110.

- Affidavit of.]-An affidavit of service of notice for a certiorari to remove an order of justices stating, "that the deponent did serve N., esquire, one of the justices, at the dwellinghouse and usual place of abode of him, R. N., at, &c., by leaving a duplicate or counterpart of the notice with W. R., the medical assistant of R. N., he R. N. being ill in bed," is insufficient, as it does not appear that the service of the notice upon W. R. was at the dwelling-house of R. N. Reg. v. Nunn, 1 New Sess. Cas. 49.

An affidavit must shew distinctly that the by certiforar by one of several defendants, the justices upon whom the notice of the intended judge may order him to enter into a recognizance application for the writ was served, were present, to pay the costs, not only if he, but if, either of judd taking a part in the proceedings when the order was made. It was stated in an affidavit! that the deponent was present at the sessions on the day when the order was made, and did then and there see E. and L., the justices served, acting as justices of the peace:—Held, insufficient, as not shewing they were the justices by and before whom the order was made, although their names were set out in the caption of the order of sessions. Reg. v. St. James, Colchester, 2 L.

M. & P. 314; 20 L. J., M. C. 203; 15 Jur. 467. On the 20th of April, the quarter sessions granted a case for the opinion of the Queen's Bench; on the 13th October, notice in writing of an intended application for a certiorari, to bring up the order of sessions, was served upon two justices: on the 20th October, an application was made at chambers for a judge's fiat, allowing the issue of a certiorari; no judge being in town on that day, an affidavit of notice to the justices, and of the other necessary facts, was sworn before a commissioner, and on the same day the affidavit was filed at the Crown Office, and a eertiorari issued; on the 21st of October, the judge's flat was obtained, and filed at the Crown Office. Upon motion to quash the writ quia improvide emanavit :- Held, first, that the notice to the justices on the 13th of October, was in abundant time, and that such notice on the 14th of October would have been sufficient. Reg. v. St. Mary, Whitechapel, 2 D. (N.S.) 964; 12 L. J., M. C. 85; 7 Jur. 602.

Held, secondly, that, upon shewing cause against the rule for quashing the writ, which was sought to be sustained, upon the ground that the writ had been granted upon an insufficient affidavit of the service of notice, it was competent to the party shewing cause to produce affidavits in explanation of such affidavit of ser-

vice. 1b.

An affidavit that notice had been given to J. T. and H. W., two justices of the peace present at the sessions, at which the appeal mentioned in the notice came on for hearing, is insufficient, as it does not shew that J. T. and H. W. were actually present on the beach when the appeal was heard. Reg. v. W. R. JJ., 1 New Sess. Cas. 406; 2 D. & L. 500; 14 L. J., M. C. 41; 9 Jur. 133.

Writ will only issue at instance of Party giving Notice.]—A certiorari cannot be issued at the instance of any but the party who has given such notice, although he avowedly drops the proceeding, and although it is too late to give a fresh notice. Rew v. Kent JJ., 3 B. & Ad. 250 : 1 L. J., M. C. 29.

Contents of. ]-The notice must state upon the face of it the name of the party applying for the writ. Rew v. Lancashire J.J., 4 B. & Ald. 289.

In support of an application for a certiorari to remove an order of justices, the party sning forth the writ must be identified on affidavit with the party who gave the notice to the justices. Such notice ought to specify the name of the party intending to sue forth the writ. Reg. v. Shreves-bury JJ, 9 D. P. C. 501; 10 L. J., M. C. 8; 5 Jur. 291; S. C., nom. Reg. v. How, 4 P. & D. 320; 11 A. & E. 159.

It must also appear, affirmatively, on affidavit, that the justices to whom notice was given were the justices who made the order. The court will not infer the identity from the mere coincidence of names and descriptions in the order and notice, and affidavit of service. Ib.

The enlargement by consent of the rule nisi for the certiorari will not cure objections to the notice. Ib.

The quarter sessions having confirmed an order of removal subject to a case, a notice of the intention of the appellant parish to apply for a certiorari was addressed to "J. S. and T. H., two of her majesty's justices," for the West Riding of the county of York; and an affidavit of service of such notice stating, that the deponent served "J. S. and T. H. M., two of her majesty's justices of the peace" for the West Riding, is insufficient. by reason of its not stating, that the justices so served were two of the justices before whom the order of sessions was made. Reg. v. Cartworth, 1 D. & L. 837; 3 G. & D. 162; 5 Q. B. 201; 13 L. J., M. C. 26; 7 Jur. 1129.

The caption of an order of sessions contained the names of A. and B. as two of the justices before whom the order was made; and it was also sworn on behalf of an applicant for a certiorari, who was not at the sessions, that A. and B, were two of the justices present at the sessions at which such order was made :- Held, against the party serving the order of sessions, that notice of motion for the writ upon A. and B. was sufficient. Reg. v. Sevenouks, 1 New Sess. Cas. 595; 7 Q. B. 136; 14 L. J., M. C. 92;

9 Jur. 489.

It is necessary that the notice should be, in the first instance, sworn to have been given to two justices, before whom the order was made; and an omission in this respect cannot be supplied by a subsequent affidavit. Reg. v. Gilbersome, 13 L. J., M. C. 46. S. C., nom. Reg. v. Gilberdyke, 5 Q. B. 207; 8 Jur. 792.

A notice "in six days from the giving of this notice, or as soon after as counsel can be heard," is sufficient. Reg. v. Builey or Rose, 3 D. & L. 359; 2 New Sess, Cas. 166; 15 L. J., M. C. 6.

An affidavit that the notice of motion was served on three justices (naming them), and that they were present at the trial and hearing of the appeal, is a sufficient notice to the justices making the order. Reg. v. Wilts JJ., 9 D. P. C. 524; 10 L. J., M. C. 25; 5 Jur. 291.

Length of. ]-The notice must be made six days, computing one day exclusively and one day inclusively, before the rule nisi is applied for. Rev v. Cumberland J.J., 4 N. & M. 378; 1 H. & W. 16. S. P., Rew v. Goodenough, 2 A. & E. 463 : Roberts, Ex parte, 50 J. P. 567.

Rule nisi-Notice to Justices, a Condition Precedent, ]—The six days' notice to the justices, required by rule 33 of the Crown Office Rules. 1886, as a preliminary to the grant of a writ of certiorari must precede the motion for a rule nisi, and not merely the motion for the rule absolute. Roberts, Ex parte, supra.

By whom Signed.]—A notice to justices of a motion to be made for a certiorari "on behalf of the churchwardens and overseers of S.," if signed by one churchwarden, is not a smilicient notice by the "party or parties suing forth" the writ. Rew v. Cumbridgeshire JJ., 8 B. & Ad. 887; 1 L. J., M. C. 97.

A notice signed "W. and S., attorneys for the overseers of the parish of K.," is sufficiently signed. Reg. v. Westmoreland JJ., 7 Jur. 899. S. P., Rex v. Abergele, 1 N. & P. 235; 5 A. & E. 795: 2 H. & W. 375.

A notice, signed in the name of a solicitor,

who describes himself "solicitor for the present amount of the assessment:—Held, that an ehurchwardens and overseers of Market Harapplication for a certionari to remove the pre-borough," is sufficiently signed.  $\mathit{Heg}_v$ .  $\mathit{Solly}_s$ , sentenent and other proceedings, in Easter Texture and the proceedings, in Easter Texture and the proceedings in Easter Texture and the 9 D. P. C. 115; 1 W. P. C. 6.

Where the applicants are the churchwardens and overseers of a parish, it is unnecessary that it should give their names. Ib.

A notice of an intended application for a certiorari to remove an order relating to a borough, signed by "A. and B., solicitors for C., a ratesigned by "A. and B., solicitors for C., a rate-payer of the township of M., within and part of the said borough," is prima facle proof of notice from the party suing forth the writ, without any affidiavit by C. that the solicitors acted by his authority, Reg. v. Leavashive JL, 3 P. & D. 86; 11 A. & E. 144; 9 L. J., Q. B. 9; 4 Jnr. 121.

A notice of motion for a certiorari to remove an order of quarter sessions, made on appeal, setting forth the names of the appellant and of the respondents, and subscribed by "J. B., attorney for the respondents," is sufficient, though it does not expressly state that the respondents are the parties suing forth the writ. Reg. v. Wilts JJ., 9 D. P. C. 524; 10 L. J., M. C. 25; 5 Jur. 291.

A notice for a certiorari to bring up an allowance of accounts by a poor-law auditor, under the Poor Law Amendment Act, 1844, 7 & 8 Viet. c. 101, s. 35, signed by an attorney on behalf of the inhabitants of a parish, is sufficient. Reg. v. Chiddingstone, 7 Jur. (N.S.) 125.

#### d. Limitation of Time.

Six Calendar Months. ] - A certiorari to remove a conviction must be applied for within six months after the date of such conviction. Rew

v. Bunghey, 4 Term Rep. 281; 2 R. R. 381.
So, to remove an order of sessions. Ann.,
Lofft, 544. S. P., Rey. v. Anglesea JJ., 1 B. C. Rep. 75; 10 Jur. 816.

So, to remove an order of sessions confirming an order of removal by two justices, must be moved for within six calendar months after such order of sessions made. Res. v. Sussea J.J., 1

M. & S. 631.

So, where the order is subject to a ease to be stated, the certiorari must be applied for within six months after making the order of sessions, and not within six months after settling the case.

Rev. v. Susser JJ., 1 M. & S. 734.

- How Calculated.]-The six months run from the date when the sessions adjudicate on the appeal, and not from the date of the original order of justices. Reg. v. Morrice, 2 D. & L. 952; 1 New Sess. Cas. 585; 14 L. J., M. C. 75; 9 Jur. 731.

A certiorari to remove an order for stopping a highway may be applied for within six calendar months after such order has been confirmed at sessions, though more than six calendar months have clapsed since the order was made. Rew v. Middlesex JJ., 5 A. & E. 626; 1 N. & P. 92; 6 L. J., M. C. 10.

In August, 1841, a sewers' jury made a presentment of several persons, who received benefit, or avoided damage, from certain sewers; one of the persons, at a subsequent court, delivered in a paper purporting to be a traverse of the presentment. This was specially demurred to by the clerk to the commissioners for informality; the clock to the commissioners for informality | (b) If a certomar were appeared by a support and his and in September, 1841, the traverse was held only to state that the party applying and his immifficient, and in amended traverse refused, solicitor did not know at the time that one of the control of the and an assessment made upon the party. In the justices was interested. Reg. v. Kent JJ., July, 1842, he was distrained upon for the 44 J. P. 298.

1843, was made too late. Reg. v. Tower Hamlets Commissioners of Sewers, 13 L. J., Q. B. 12; 7 Jnr. 1169.

Application made within Six Months—Absence of Judge. ]—If a party attends with all necessary materials for making an application for a certiorari on the last day of the six months allowed for making such an application, and leaves his papers with the judge's clerk for the purpose of being laid before the judge, and states the nature of his application, the application will be considered in time, even though no indge should be at chambers on that day, and no decision given till a subsequent day. Reg. v. Allan or Hodgson, 4 B. & S. 915; 33 L. J., M. C. 98; 10 Jur. (N.s.) 796; 9 L. T. 761; 12 W. R. 423. But sec Reg. v. Hodgson, 9 L. T. 711.

The court refused a certiorari to bring up an order of sessions made subject to a case more than six months after the making of the order, where application had been made at chambers within the time, but had failed in consequence of non-attendance of a judge there until after the six months had expired. Linbeblig, In re, 2. New Sess. Cas. 315; 15 L. J., M. C. 92. S. P., Rey. v. Anglesen JJ., 1 B. C. Rep. 75; 10 Jur.

#### e. Affidavits.

How Intitled.]-In moving for a rule for a certiorari, it is irregular to intitle the affidavits on which the motion is founded in any cause : and if they are intitled they cannot be read. Nohro, Ex parte, 1 B. & C. 267. S. P., Reg. v. Walworth, 1 B. C. Rep. 258; 4 D. & L. 403; 10

Affidavits in support of an application to quash a certiorari, bringing up an order of justices for stopping up a road, must be intitled in the names of the parties in the proceeding, and not merely "in the Queen's Bench." Reg. v. Jones, 8 D. P. C. 80; 4 Jur. 365.

Affidavits on which a rule nisi is obtained to set aside a rule absolute for a certiorari before it has issued may be intitled "in the Queen's Bench," without naming the parties. Reg. v. Chasemore, 12 Jnr. 11,

Contents of, where Decision sought to be set aside by reason of Justices being Interested.]-W. having applied to the licensing justices for a licence for a new hotel, and the three justices who were sitting having refused it, afterwards applied to the court for a mandamus to have the case heard again on the ground that B., one of the justices, was interested as owner in one of the licensed houses near the proposed hotel. The affidavits shewed that B.'s wife had succeeded to the licensed house, and was tenant for life, but it was a small house without hotel accommodation, and not likely to be injured by the new licence being granted :- Held, (a) that a mandamus could not be granted because the decision not having been set aside or quashed on certiorari, the ease could not be heard again : (b) If a certiorari were applied for, the affidavits

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Jurat.]-In the jurat of an affidavit sworn in the country for a certiorari, the commissioner's name should be preceded by the words "before and the omission of them is a fatal defect, and not a mere irregularity. Reg. v. Norburg, 2 New Sess. Cas. 344; 15 L. J., Q. B. 264. S. P., Reg. v. Blarham, 6 Q. B. 528; 1 New Sess. Cas. 370; 2 D. & L. 168; 14 L. J., Q. B. 13; 8 Jur. 1117.

For what Admissible.]-On a return to a certiorari for bringing up an order of magistrates, made in a matter over which an act of parliament had given them original and final jurisdiction as to the merits, affidavits are admissible to shew that the charge made before the magistrates was one over which they had no jurisdiction; but when a sufficient charge, appearing on the face of the information to be within their jurisdiction, is brought before them, they act within their jurisdiction in commencing the inquiry, and affidavits are not admissible to shew that they came to a wrong conclusion. Reg. v. Bolton, 4 P. & D. 679; 1 Q. B. 66; 5 Jur. 1154.

The court will not allow the evidence in the court below to be supplemented by affidavit of other facts which occurred at the time of the offence, but were not given in evidence before the court below. Reg. v. Cork County JJ.,

15 Cox. C. C. 78.

When Necessary, -Where a certiorari is moved for to bring up the depositions against a person charged with felony, in order to have him bailed in the country, an affidavit that he cannot afford to be brought up into court by habeas corpus is not necessary. Reg. v. Gregory, 1 W. P. C. 4; 4 Jur. 1015.

In moving for a certiorari to bring up depositions taken before a coroner or magistrate, with a view to admitting a party committed for trial on a charge of murder or manslaughter, it is the proper course to produce copies of such depositions verified by affidavit, and on them to ground

the application. Roy. v. Bartholomy, Dears. C. C. 60; 17 Jur. 184.

A certiorari will not be granted to bring up an inquisition of a compensation jury, unless defects in the inquisition are positively sworn to. Rey. v. Manchester and Leeds Ry., 8 A. & E. 413; 3 N. & P. 439; 1 W. W. & H. 458; 8 L. J., Q. B. 66; 2 Jur. 857.

#### f. Motion and Rule.

Rule.]—There must be a rule nisi in the first instance for a certiorari, to remove proceedings of the commissioners of sewers. Auon., 2 Chit.

The rule for removing an indictment for nonrepair of a road from an inferior jurisdiction is nisi in the first instance. Rev v. Leeds, 5 D. P. C. 128.

In order to remove an indictment for a misdemeanor, the rule is absolute in the first instance, but in the case of a felony it is nisi. Re Spencer, 8 D. P. C. 127; 1 W. W. & H. 418.

A rule for a certiorari to remove a record from an inferior jurisdiction is absolute in the first instance. Pausey v. Goodey, 3 D. P. C. 605.

The rule for a certiorari, under 19 Geo. 3, c. 70, s. 4, is absolute in the first instance, and applies to all cases where the defendant re-moves himself and his effects out of the inferior jurisdiction. Knowles v. Lynch, 2 D. P. C.

In formâ pauperis.]-Where a defendant removes an indictment by certiorari, being, at the period when the indictment is removed, a prisoner in a debtors' prison, the court will allow him tosue in forma panperis. Nicholson, Ex parte, 4 Jur. 506.

Application by Two Parties—Death of One. ]-Where a certiorari was granted on the application of two parties, and one of them died before the matter came on for argument, the court heard the case notwithstanding. Rev v. Yorkshire (N. R.) JJ., 9 D. & R. 204.

Notice of Rule.]-Where an order of sessions has been returned under a certiorari, and a rule has been obtained to quash the order, it is a good preliminary objection to an argument on such rule, that no notice of it has been served on the justices who made the order, although served on the parties interested in supporting it. Reg. v. Spackman, 9 D. P. C. 1060.

Confirmation of Order by Quashing Rule. ]-Under 5 Geo. 2, c. 19, s. 2, an order removed by certiorari is confirmed by simply discharging the rule for quashing it. Reg. v. Latchford, 6 Q. B. 567

Appeal on.]-On a point reserved on the trial of an indictment for non-repair of a highway, removed by certiorari, there cannot be an appeal to a court of error. Reg. v. Hawkhurst, 11 W. R.

No appeal lies in a case of a certiorari. Boston v. Lelièvre, 39 L. J., P. C. 17; L. R. S. P. C. 157; 22 L. T. 735; 18 W. R. 408.

A rule for a certiorari having been obtained in the Queen's Bench Division to bring up a summary conviction by justices to quash it on the ground of want of jurisdiction, the court dis-charged the rule:—Held, that the case was within the last clause of s. 47 of the Judienture Act, 1873, as a judgment of the High Court in a criminal matter, and that there was therefore noappeal, Reg. v. Fletcher, 46 L. J., M. C. 4; 2 Q. B. D. 43; 35 L. T. 538; 25 W. R. 149; 13. Cox, C. C. 358-C. A.

Leave to Appeal not Required. ]-An appeal from an order of the Queen's Bench Division, discharging a rule for a certiorari to bring up am order of justices in petty sessions, is not an appeal from an inferior court within s. 45 of the Judicature Act, 1873, and no leave to appeal is required. Reg. v. Pemberton, Reg. v. Swith, 49 L. J., M. C. 29; 5 Q. B. D. 95; 41 L. T. 664; 28 W. R. 362; 44 J. P. 184-C. A.

Argument of Rule for Certiorari Simultaneously with Case under Summary Jurisdiction. Act, 1857, 20 & 21 Vict. c. 43. ]-A. was convicted for having woollen materials suspected to have been embezzled on his premises; he applied and obtained a case for the opinion of the Court of Queen's Bench under the Summary Inrisdiction Act, 1857, 20 & 21 Vict. c. 43, which was in due-course entered in the Crown paper; he after-wards, but before the argument of the case, ascertained that the convicting justices were connected with the woollen trade, contrary to-the Hosiery Act, 1848, 6 & 7 Vict. c. 40, s. 25. The court granted a rule nisi for a certiorari, to be heard at the same time as the special case. Reg. v. Armitage, 2 L. T. 459.

#### 3 REPURN TO

Form of.]—A return to a certiorari need not be under seal. Rew v. Pichersgill, Cald. 297. The seals of justices of over and terminer are

not essentially necessary for the removing and authenticating a record transmitted to the court. The return of justices to a certiorari is a mere ministerial act, which the court requires to be anthenticated in a particular form; but as it is a form prescribed by no positive law of the land, the court which requires it may receive and adopt any other authentic certificate, that the record transmitted is the genuine record of the court below; and the omission of the particular form can only be objected to by the court itself. Atkinson v. Reg., 3 Bro. P. C. 517.

The return of a certiorari must return the record itself, and not set it out according to its tenor. Askew v. Hayton, 1 D. P. C. 510.

The return to a certiorari to remove proceedings from an inferior court, setting out a copy of the record, but not returning the record itself, is irregular, and the court quashed the return on motion. Palmer v. Farsyth, 6 D. & R. 497; 4 B. & C. 410; 3 L. J. (o.s.) K. B. 260.

A return to a certiorari, to remove a cause, directed to the judge of an inferior court, certifying the cause, and claiming conusance by charter, is sufficient if good upon the face of it. Perrin v. West, 5 N. & M. 298; 3 A. & E. 405; 1 H. & W. 401.

Amendment of, ]—A return to a certiorari was sent back to justices by the court to be amended, because they did not put their seals to it, or describe themselves as justices. Rew v. Kenyon, 6 B. & C. 640 : 9 D. & R. 694.

The court refused a criminal information against a magistrate for returning to a certiforari a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk; the conviction returned being warranted by the facts. Rew v. Barker, 1 East.

Distress Warrant — Action — Limitation of Time.]—Where to a certiorari, to bring up an order of justices for payment of money, enforced by a distress warrant, the justices returned that there was no order in writing, and the six months within which action had to be brought under the Justices Protection Act, 1848, 11 & 12 Vict. c. 44, would elapse before cause could be shewn, the court quashed the return, and granted a rule nisi to draw up an order and return it with the warrant issued upon it. Roy. v. Trufford, Wilson, In re, 13 W. R. 55.

Enlargement of. ]-Return enlarged for a year on account of defendant's absence from England upon a voyage. Tomlinson, Richard, Ex parte, 20 L. T. 324.

Practice as to. —A defendant appealed to the sessions against a conviction on a penal statute, where the conviction was affirmed; afterwards the record was removed, and the conviction was quashed for a defect in the information: then the prosecutor moved either that the certiorari should be sent back to the magistrates, in order that they might return the original information (which had not the defect), or that a mandamus might issue to compel the magistrates to proceed

on the original information; but the court refused to make such a rule. Hex v. Jukes, 8 Term. Rep. 625; 5 R. R. 445.

After a rule for a certiorari has been made absolute, and the return thereto filed, if the certionari issued improvide, the court will order it to be superseded, and the return taken off the file. Rew v. Wakefield, 1 Burr. 489; 2 Ld. Ken.

164. Third persons cannot object to the misdirection of a certiorari, to remove a cause from an inferior court, if the proper officers, in whose keeping the record is, waive the objection, and return the record upon such writ. Daniel v. Philips, 4 Term Rep. 499.

#### 4. OHASHING WRIT.

When Writ will be Quashed.]—The court will not quash a certiorari, unless there is an admission, or something tantamount to it, by the party sning it out, that he has done it for the purpose of delay. Lundons v. Sheils, 3 D. P. C. 90.

The court will grant a rule absolute in the first instance, to quash a certiorari removing a cause out of an inferior court, which has been issued by the party moving to quash it, where no step has been taken by the other party. Ruffman v. Thornwell, 2 W. W. & H. 51.

A party indicted at sessions for obstructing a highway, obtained a certiorari, but, without informing the prosecutor that he had done so, gave notice of trial at a subsequent sessions. The prosecutor attended with his witnesses, and on the last day of the sessions, before the case was called on, the defendant lodged his certiorari. The court, under all the circumstances, quashed the certiorari, and ordered a procedendo. Rex v. Higgins, 5 A. & E. 554.

If a cause has been removed from an inferior court after judgment, a rule may be granted for quashing the certiorari, though the party is entitled to a rule for a procedendo. Ord v. Rubinson, W.W. & D. 593.

- For Misdescription of Conviction. ]-A conviction by instices of a borough on the 22nd September, 1846, for harbouring a scannar contrary to s. 40 of 7 & 8 Vict. c. 112 (repealed), was drawn up and returned to the Michaelmas sessions. On the 12th November, a certiorari at the suit of the attorney-general issued to remove the conviction, and on the 21st the justices returned a copy of it. On the 3rd December a certiorari issued to the justices of the county, to remove the record of a conviction by two justices assigned to hear and determine divers felonies, trespasses and other misdemeanors committed within the borough, for certain trespasses and contempts against the form of the statute. On the 5th the conviction was returned. Each of the writs was issued without a rule to shew cause. On the 2nd January a rule for a concilium was obtained at the instance of the attorney-general, and one of the points for argument was, that the conviction was bad in not setting forth the evidence. The court in its discretion refused an application to have the couviction taken off the file and returned to the justices in order they might amend it, on the ground that the application was too late; and upon an application to quash the writ :- Held, that the form of the writ was right. Reg. v. Turk, 10 Q. B. 540; 16 L. J., M. C. 114; 11 Jur. 774. Held, secondly, that a misdescription of the

conviction was no ground for quashing the writ after it had been obeyed and the conviction certiorari, set out a declaration in the inferior returned. Th

- For not Setting Out Order. ]-Where a certiorari had been issued to bring up an order under the Parochial Assessments Act, 1836, 6 & 7 Will, 4, c. 96, s. 6, and neither the order itself nor a copy was returned, the court quashed the writ of certiorari, as it neither set out the order nor stated that it was in writing, Reg. v. Wigan JJ., 8 Jur. 930.

Affidavits used in Proceedings to Quash. ]-Affidavits, on moving for a rule to quash a cer-tiorari, on the ground that it has issued improvidently, should not be intitled in a cause. Reg. v. Gilberdyke, 8 Jur. 792.

When Application to Quash should be made.] -A certiorari to bring up a case from the sessions was issued in December, 1848, on an affidavitof service of notice on two magistrates sworn to have been present at the time the order was made. A rule nisi to quash the order of sessions was obtained on the 5th May, in Easter Term, 1849, the return to the certiorari being filed nearly at the same time. A rule nisi to quash the certiorari on affidavit, denying the presence of one of those magistrates, obtained in Michaelmas Term, 1849, was too late. Rey. v. Basingstoke, 3 New Sess, Cas. 693; 6 D. & L. 303; 19 L. J., M. C. 28.

Where a case from the sessions comes on for argument, it is too late to take an objection to the form of the certiorari. Reg. v. Hordham, 11 A. & E. 73; 3 P. & D. 95; 9 L. J., M. C. 3; 4 Jur. 218.

## 5. Procedendo.

When Granted, ]-A certiorari to remove an order of sessions had been quashed, because the affidavit on which it issued omitted to state that the justices on whom it was served had been present at the making of the order. A fresh certiorari being subsequently moved for and refused, in consequence of more than six months having clapsed, application was then made for a mandamus, commanding the justices to enter continuances and hear; but, semble on the antecedent facts, there had been already a hearing of the appeal by the justices. On an intimation, however, that a doubt existed at the Crown Office as to whether it was the record or a transcript merely which had been returned and filed, the court granted a rule nisi for a procedendo to carry back the record to sessions. Reg. v. Curt-

worth, 8 Jur. 360.
The 17 Geo. 3, e. 56, s. 14, imposes a penalty of 201, on any person having in his possession materials purloined or embezzled, which forfeiture may be levied by distress. By a conviction by two justices under this statute, the defendant was sentenced to a forfeiture of 201, or, in default, to be committed to prison. The conviction, having been subsequently quashed on appeal, subject to a case, was removed into the Queen's Singlet to a case, was tended into equeen's Benich by certification, and confirmed. A levarifacias issued for the penalty, to which there was a return of nulla bona. The court granted a procedendo to carry back to the sessions the record of conviction, commanding the justices to proceed to enforce execution against the defendant. Reg. v. Rushworth, 1 New Sess, Cas. 415 : 9 Jur. 161.

If the city of London, in their return to a court, containing a defective count, the court will not, therefore, refuse a procedendo. Clark v. Denton, 1 B. & Ad. 92; 8 L. J. (o.s.) K. B. 333.

Where a cause was removed from an inferior court after interlocutory judgment, and before inquiry, the court refused to award a procedendo, as the cause might be removed at any time before the sheriff's jury was sworn. Goldley v. Marsden, 6 Bing, 433 : 4 M, & P, 138 : 8 L, J, (o.s.) C. P.

A procedendo was denied to a borough court, who had tried a cause without the presence of an utter barrister of three years' standing. Fairley v. M. Connell, 1 Burr. 513.

Though a habeas corpus was not delivered to the sheriff's court in London till after interlocutory judgment and notice of inquiry, yet a procedendo was denied. Cow v. Hart, 2 Burr. 758.

If the judge of an inferior court of record receives a certiorari after the time limited by 21 Jae. 1, c. 23, s. 2, a procedendo will issue; and that although in the meantime the record has been filed in the court above. Larerach v. Bean, 3 M. & W. 62; 6 Dowl. P. C. 111; M. & H. 338; 7 L. J., Ex. 10 ; 1 Jur. 964.

If an indictment for felony has been removed from an inferior court, in order to issue process of outlawry upon it, and the party accused comes in, the court will award a procedendo to carry the record back. Res v. Perry, 5 Term Rep. 478.

When a prisoner was convicted of perjury in an inferior jurisdiction, and the sentence of transportation was entered on the record as follows :- "Wherefore all and singular the premises being seen by the justices here, and fully understood, it is therefore ordered that he the said L. K. be transported to the coast of New South Wales, or some one or other of the islands adjacent, for and during the term of seven years" :- Held, that this was not a judgment, but merely an order; and the court awarded a procedendo commanding the court below to pronounce the proper judgment, and in the meantime admitted the prisoner to bail. Rew y. Kenwarthy, 3 D. & R. 173: 1 B. & C. 711.

Jurisdiction to Grant. ]—A judge of any of the three superior common law courts has jurisdiction to make an order for the issning of a procedendo, to send back proceedings on an indictment for felony removed by certionari from an inferior court, and it rests in his discretion whether such order should be made upon a summons to shew cause, or immediately. Reg. v. Scaife, 18 Q. B. 773; 2 Den. C. C. 513; 3 Car. & K. 211; 21 L. J., M. C. 221; 17 Jur. 282.

On the return of a by-law to a habeas corpus cum causa, a procedendo cannot be awarded to any corporation except London, Res v. Wor-cester Chamberlain, 2 Ld. Ken. 469.

When Stayed.]—A cause was removed from an inferior court by habeas cornus cum causa, to which a return was made, stating a custom under which the defendant was sucd and arrested: error was suggested upon the face of the proceedings below; the court would not stay procedendo merely on that ground, but left the defendant to his writ of error. Horton v. Beekman, 6 Term Rep. 760.

Practice as to.]—A cause remanded from an inferior court by habeas corpus, and afterwards

tance. *Hayward* v. *Wright*, 2 Man. & Ry. 366; 8 B. & C. 386; 6 L. J. (o.s.) K. B. 359.

The court will grant only a rule nisi in the first instance for a procedendo, a cause having been removed from an inferior court without the proper recognizance having been entered into. even where it appears on the return to the certiorari that the sum demanded was under 201. Catton v. Fuires, W. W. & D. 46.

Where one of several defendants has removed an indictment for conspiracy by certiorari and he alone has entered into the necessary recognizances, the court will not award a writ of procedendo, or impose terms as to the other defendants taking short notice of trial, although, by the practice of the court, the trial could not be pressed on against the other defendants, and great delay would probably take place. Rew v. Newton, 2 N. & P. 121; W. W. & D. 497.

Where a cause has been removed from an inferior court by habeas corpus at the defendant's instance, and no further step taken on either side for a year, the plaintiff may apply ex parte for a procedendo to issue, unless bail in the Queen's Bench is given within four days. And the bail below cannot move to set aside such procedendo when issued, until they or the defendant have put in bail in that court. Blanchard v. De la Crouée, 9 Q. B. 869; 16 L. J., Q. B. 181; 11 Jur. 283. S. P., Day v. Paupierre, 13 Q. B. 802; 18 L. J., Q. B. 270.

## B. CRIMINAL INFORMATION.

[Crown Office Rules, 1886, 43 to 50.]

- 1. General Principles, 121.
- 2. Against Magistrates, 122.
- 3. Sending a Challenge, 126.
- 4. For Libel, 127.
- 5. In other Cases, 127.
- 6. Practice.
  - Application for, 130.
     Affidavits, 131.
  - c. Practice Generally, 133.

#### 1. General Principles.

Discretionary.]—The granting of a criminal information is discretionary under the circumstances. Anon., Lofft, 323. And see Rew v. Robinson, 1 W. Bl. 541.

The court will not entertain an application for a criminal information on light or trivial grounds. or where no imputations are made individually on the person applying for the information, but will leave him to his remedy by action or indiet-ment. Reg. v. Mead, 4 Jur. 1014.

On a rule for an information, though the court may think a ground is laid, yet if under the circumstances the payment of the prosecutor's costs appears an adequate punishment, they will discharge the rule on the defendant's undertaking so to do. Rev v. Morgan, 1 Dougl. 314.

Not grantable against a very poor person.

Anon., Lofft, 155.
An information was refused until an action for the same offence was discontinued. Rex v. Fielding, 2 Burr. 654; 2 Ld. Ken. 386.

removed back by procedendo, cannot be again in case where a hospital committee had made a removed upon the ground of its alleged impor- charge against their architect of giving an improper certificate, and entered the charge on the minutes, the architect having known for six years of the charge, but only for two of the entry. Hopper, Ex parte, 2 W. R. 517.

> When Offence against Public Interests.]-Thecourt will grant a criminal information on thesole testimony of a particeps criminis (uncontradicted), where the offence is against the publicinterest, as bribery in the election of an alderman, who will, by virtue of his office, be a justice of peace. Res v. Steward or Turner, 2 B. & Ad. 12; 9 L. J. (o.s.) K. B. 148.

> Between Individuals. ]-A letter between private individuals, containing abusive matter, but not inciting to a breach of the peace, will not support an application for a criminal informa-

> tion, Dale, Ex parte, 2 C. L. R. 870; 2 W. R. 534.
>
> The court will not grant a criminal information for breach of a public statute creating a state offence on the application of a privateperson, but only on the information of the law officers of the Crown. Crawshay, Ex parte, 3 L. T. 320; 8 Cox, C. C. 356.

> If a private person desires to punish an infraction of such a statute, he must do so by the ordinary machinery for the administration of justice, by preferring an indictment. Ib.

> Ex Officio by the Attorney-General. |- Information for a misdemeanor refused to the attorney-general, on behalf of the Crown, because he may grant one himself. Rew v. Plymouth Corporation, 4 Burr. 2087.

> The court will not give leave to quash an information filed ex-officio by the attorneygeneral. He may stop the proceedings upon it by nolle prosequi, and file another. Rew v. Stratton, 1 Dougl. 239.

A defendant, in an information at the suit of the attorney-general, is not entitled to a change of venue without his consent. Att.-Gen. v. Smith, 2 Price, 113.

In an information at the suit of the Crown, the attorney-general is entitled, as a matter of right, to amend the information on payment of costs. Att.-Gen. v. Ray, 11 M. & W. 464; 12:

L. J., Ex. 352; 7 Jur. 561.

An information in rem may be amended by the-Crown, after plea pleaded, by adding additional counts, although a recognizance has been entered. into by the bail to pay the costs occasioned by the claim, such recognizance having been entered into before the information filed, Att.-Gen. v. Smith, 5 M, & W, 372,

By Solicitor-General. - May be filed by the solicitor-general during a vacancy of the office of attorney-general, and such vacancy need not be averred on the record. Rev v. Wilkes, 4 Burr. 2576. S. P., Wilkes v. Rew (in error). 4 Bro. P. C. 360.

## 2. AGAINST MAGISTRATES.

When Granted.]-When a justice of the peaceacts from indirect or corrupt motives, the court will punish him by information. Rew v. Cozens, 2 Dougl, 426.

No information will be granted against justices-Refusal on Ground of Delay.]—Rule for cri- acting in sessions, except in very fiagrant cases. minal information refused on ground of delay, Rex v. Seuford JJ., 1 W. Bl. 432. granted against them. Rev v. Jackson, 1 Term

Rep. 653 : 1 R. R. 343.

On an application for a rule nisi for a criminal information against a magistrate, the question is not whether the act done might on full investigation be found to be strictly right, but whether it proceeded from oppressive, dishonest, or corrupt motives (under which fear and favour may generally be included), or from mistake or error; in either of the latter instances the court will not grant the rule. Rev v. Borron, 3 B. & Ald. 432; 22 R. R. 447.

The court will not grant an information against a magistrate, for having improperly convicted a person, unless the party complaining makes an exculpatory affidavit, denying the facts. Rex v. Webster, 3 Term Rep. 388. See Rew v. Williams,

A criminal information was refused against a magistrate for returning to a writ of certiorari a conviction of a party in another and more formal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk; the conviction returned being warranted by the facts. Rew v. Barker, 1 East, 186.

Where the justices had not appeared to have

acted corruptly, an information was refused.

Rew v. Baylis, 3 Burr. 1318.

The court will not grant a rule nisi for a eriminal information against magistrates, unless it appears they have acted from an oppressive, dishonest, or corrupt motive, under which fear and favour are included. Fentiman, In re, 4 N. & M. 128; 1 A. & E. 127.

Misconduct in his office may render a magistrate amenable to a criminal information, though he be not actuated by motives of pecuniary interest or personal malice—as, if he gives way to passion so as clearly to interfere with the due administration of justice; but a mere display of ill-humour, or an error of judgment, such as the omission to administer an oath, or to give a cantion to a dying man before taking his examination, will not induce the court to interfere. Reg. v. Barton, 4 Cox, C. C. 353.

A criminal information was granted for these words, in a letter to a mayor : " I am sure you will not be persuaded from doing justice by any little acts of your town clerk, whose consummate malice and wickedness against me and my family will make him do anything, be it ever so vile. Rew v. Waite, 1 Wils, 22.

Improperly Issuing Summons. ] - Where a magistrate, upon whose property a malicious trespass had been committed, issued a summons requiring the offender to appear before himself, or some other magistrate, and purporting that information had been given to him (the magistrate) on oath, whereas no oath had been taken, and the information had been communicated by the magistrate to the informer; the court, in discharging a rule for a criminal information against the magistrate, refused to give him his costs. Rev v. Whateley, 4 Man. & Ry. 431,

Improperly Committing.] - An information goes against a justice for committing a man for not paying 1s. for discharging his warrant, Rev v. Jones, 1 Wils, 7.

Wherever magistrates act uprightly, though viously taking the prosecutor's oath, who was wherever magnetices are unigness, will be a peer of the realm, and also for neglecting oranted noming them. Reav. Jackson, I Term to take the noble prosecutor's recognizance to prosecute, discharged, these being deemed only irregular, not criminal. Rese v. Fielding, 2 Burr.

> No ground for criminal information where no imputation of a corrupt motive on the part of the judge. Anon., 16 Jur. 995.

Granting or Refusing Licence. - An information will be granted against a justice of the peace, as well for granting as for refusing an ale

licence improperly. Rew v. Holland and Forster, 1 Term Rep. 692; 31 R. R. 362. An information was granted against justices of

the peace for refusing to grant an ale licence from motives of resentment. Rew v. Harris, 3 Burr. 1716. And see Rew v. Young, 1 Burr. 556, An information against a justice, upon a charge of refusing to grant a licence, will be

refused if the reasons assigned for the refusal prove false in fact. Rew v. Athay, 2 Burr. 653.

An information was granted for refusing to grant licences to those publicans who voted against their recommendation of candidates for members of parliament for the borough. Rev v. Williams, 3 Burr, 1317.

Accusing Magistrate of Misconduct. ]-The court will not grant a criminal information for calling a magistrate a liar, accusing him of misconduct in reference to his having absented himself from an election of clerk to the magistrates, and threatening a repetition of the same language whenever such magistrate came into the town, unless there appears an intention to provoke a breach of the peace. Chapman, Er parte, 4 A. & E. 778.

The court will not grant a criminal information for unwritten words imputing to a justice malversation in his office, if the words neither were spoken at the time when the justice was acting, nor tended to a breach of the peace. Marlhornigh (Duke), Esc parte, 5 Q. B. 955; D. & M. 720; I New Sess. Cas. 195; 13 L. J., M. C. 105; 8 Jur. 664. See Rew v. Rea, 7 Ir. C. L. R. 584.

Rejecting Bail.]—A rule for a criminal infor-mation will not be granted against justices who wrongly or improperly reject ball, unless it manifestly appears to the court, by conclusive and satisfactory evidence, that they were also influenced by partial and corrupt motives. Reg. v. Badger, 6 Jur. 994.

Where the pecuniary sufficiency and solvency of bail are undisputed, the rejection of such bail on the ground of a coincidence of political opinion with the person or persons for whose appearance the bail offer to become surety is improper, even though such rejection by the justices is reconcilable with the absence of

corrupt motives. Ib.

Where justices reject bail on the ground that the parties entertain objectionable political opinions, and on other grounds which are concealed and not stated, the court will grant a rule nisi, calling on the magistrates refusing to shew cause why a criminal information should not be filed against them. 1b.

The justices, in answer to the rule, deposed that they were not actuated by any corrupt or Rule nisi for an information against justices of malicious motive in the rejection of the bail. the peace making a commitment without pre- The court discharged the rule, but required them to pay all the costs. S. C., D. & M. 375; with misconduct in his magisterial capacity, 4 Q. B. 468; 12 L. J., M. C. 66; 7 Jur. 216. although other misconduct is also charged. Rew.

Court will regard Motives of Acts. - When a criminal information is applied for against magistrates, the question for the court is, not whether their acts be found upon investigation to be strictly right or not, but whether they were influenced by corrupt, oppressive, or partial motives, or acted in error, and from mistake only. In the latter case the court will not grant the rule. Reg. v. Budger, D. & M. 375; 4 Q. B. 468; 12 L. J., M. C. 66; 7 Jur. 216.

Assault. - Where an assault is committed by a magistrate on an attorney several days after he had conducted certain proceedings against such magistrate, the court will not grant a rule for a criminal information (inasmuch as the breach of the peace has not been qua magistrate), but will leave the party to the remedies by indietment or action. Lee, En parte, 7 Jur. 441.
Upon a motion for a criminal information, it

appeared that the applicant was an attorney, and an officer of the court, and the person against whom the application was made was a magistrate, and that the latter had assaulted the former in revenge, it was snggested, for his having conducted some proceedings against him, on behalf of a client, before justices, for a previous assault. The court refused to interpose its extraordinary protection to the applicant, but left him to his remedy by indictment or action. Reg. v. Arrowsmith, 2 D. (N.S.) 704.

Application—Time for.]—The court will grant a rule nisi for a criminal information at the end of a term against a magistrate for malpractices during the term, but not for any misconduct before the term. Rex v. Smith, 7 Term Rep. 80.

A criminal information for misconduct in office may be moved for against a magistrate in the second term after the alleged misconduct, though an assize has intervened, the motion being made early enough to allow of cause being shewn in the same term. Reg. v. Saunders, 10 Q. B. 484.

Where facts tending to criminate a magistrate took place twelve months before the application to the court, they refused to grant a criminal information, although the prosecutor, in order to exense the delay, stated that the facts had not come to his knowledge till a very short time before the application was made. Rev v. Bishop, 5 B. & Ald. 612; 24 R. R. 494.

A criminal information may be moved for against magistrates, for misconduct in the execution of their offices, in the second term after the offence committed, there being no intervening Rew v. Harries, 13 East, 270 ; 12 R. R.

The court will not grant a rule nisi for a criminal information against a magistrate, so late in the second term after the imputed offence, as to preclude him from the opportunity of shewing cause against it in the same term. Rew v. Marshall, 13 East, 322; 12 R. R. 340.

Costs of.]—If complaint for information against justice proves frivolous, attorney as well as original complainer must pay the costs. Rex v. Fielding, 2 Burr. 654; 2 Ld. Ken. 386.

v. Hemming, 2 N. & M. 477; 5 B. & Ad. 666; 3 L. J., M. C. 3.

A magistrate is entitled in all cases to six days' notice, of an intention to apply for a rule nisi for a criminal information; and it is not suffi-cient that six days have in fact expired between the notice and the motion, if the notice contemplates an earlier application. Ib.

On an application for attachment or criminal information against a justice of the peace for misconduct in the exercise or under the authority of his office, it must be shewn that six clear days' previous notice in writing has been given to him. Reg. v. Rae, 8 Ir. R. C. L. 524.

#### 3. SENDING A CHALLENGE.

Upon what Evidence granted.] - Upon a motion for a criminal information against A, for ehallenging B., an affidavit stating, that in a correspondence between them A. had intimated an intention, after the settlement of accounts between himself and B., to require an apology for offensive expressions contained in a letter received by him from B., or "such satisfaction as is usual on such occasions between gentlemen and that afterwards C., a relation of A., came with a letter of B. in his hand, settled the account by paying a balance due from A. to B., and after saying that he had come in consequence of the letter in his hand, delivered a hostile message as from A. :- is insufficient to connect A. with the challenge; and therefore the court refused the rule. Rev v. Younghusband, 4 N. & M. 850.

Where the affidavits in support of an application for a criminal information against a party for writing letters, provoking a breach of the peace, stated the belief of the deponents, that the letters were in the handwriting of the party, not from their own knowledge of his handwriting, but from the information of other persons, the court refused a rule to shew cause, on the ground that such evidence would not warrant a grand jury in finding a true bill. Williams, Ex parte, 5 Jnr. 1133.

The court also refused leave to renew the application upon affidavits supplying sufficient

cylidence of the handwriting. Tb.

An affidavit by A., stating that B. had brought him a challenge from C., and that B. had refused to make an affidavit that C. sent him with it, is not evidence in which the court will grant a rule nisi for a criminal information against C. for sending the challenge. Rew v. Willett, 6 Term Rep. 294.

Rule to shew cause for information for challenge, granted on producing only copies of the letters containing it. Rex v. Chappel, 1 Burr. 402.

An information was refused where the charge

of giving a challenge was made under false and ambiguous colours; the words spoken admitting of a favourable interpretation, Prideaux v. Arthur, Lofft, 393.

Right to, forfeited.]—Where a person who was challenged to fight a duel applied for a criminal information, and in his affidavit, in support of the application, stated, "that the defendant had been dismissed from her majesty's service, under Notice of ]-A magistrate is catitled to circumstances which would, in the opinion of notice before an application is made for a officers and gentlemen, disentitle him to make criminal information, where he is charged any appeal to the laws of honour, in a case where no offence was given":—Held, that by easting of a parish for non-repair of a road, where it was these imputations on the defendant, the applicant deposed that a bill of indictment had been preof the court by criminal information. Reg. v. Doherty, 1 Arn, & H. 16.

The court will not grant a criminal informa-tion for sending a challenge, if, in the course of the transactions out of which it arose, the prosecutor has himself sent a challenge to a third person connected with the party against whom

he moves. Rev v. Larrieu, 7 A. & E. 277.

And this, although the prosecutor's challenge was sent into a foreign country, and did not shew any intention to break the peace here. Ib.

#### 4. FOR LIBEL.

The rule to be collected from the modern decisious is that a criminal information for libel is granted only on application of persons who are in some public office or position, and not at the suit of private persons. Reg. v. Labouchere, 53 L. J., Q. B., 862, 12 Q. B. D. 320, 50 L. T. 177, 32 W. R. 861; 12 Cox, C. C. 415; 48 J. P. 165. And see DEFAMATION.

#### 5, IN OTHER CASES,

Against Parish Officers.]—If a parish officer makes an alteration in a poor-rate, after it has been allowed by two instices, but without the approbation of the justices, he cannot be punished by information. Rew v. Barrett, 2 Dougl. 465.

An information lies for a conspiracy by parish officers and others to marry persons settled in different parishes, if the delinquents are of good situation in life, but not if they are low and indigent. Rew v. Compton, Cald. 246.

Granted against overseers for procuring a marriage to change a settlement. Rew v. Herbert,

2 Ld. Ken. 466 Granted against an overseer for procuring a pamper to marry another pamper with child of a bastard. *Itex* v. *Turrant*, 4 Burr. 2106.

Granted against overseers for procuring a soldier to marry a poor idiot chargeable to the parish. Rew v. Watson, 1 Wils. 41.

The court refused a rule to shew cause why a criminal information should not be granted against overseers for endeavouring to induce paupers fraudulently to remove to another parish, the remedy being by indictment. Reg. v. Storwood Overseers, 9 Jur. 448. S. C., nom. Reg. v. Jennings, 2 D. & L. 741; 1 New Sess. Cas. 488; 14 L. J., Q. B. 104.

By the Poor Law Amendment Act, 1834, 4 & 5 Will. 4, c. 76, s. 97, if any overseer shall purloin, embezzle, or wilfully waste or misapply any of the moneys belonging to any parish, every such offender shall, upon conviction before any two justices, forfeit for every such offence any sum not exceeding 201.; an information against a parish officer under this statute for misapplying, without the word "wilfully," is bad. Carpenter v. Mason, 4 P. & D. 439; 12 A. & E. 629; 10 L. J., M. C. 1.

Against Members of Corporation.]-Court will not grant criminal information against members of corporation for misapplication of the corporation money. Rex v. Watson, 2 Term Rep. 199;

had forfeited his right to obtain the interference ferred at the assizes, but thrown out by the grand jury; that two of the grand jurors were proprietors of land in the parish; that one of them who had acted on behalf of the parish at an earlier stage of the dispute had stated to the foreman that the road was useless, and that both had taken an active part in opposing the finding of the indictment, such deposition being contradicted only by general statements that the two had taken no undue or active part in opposing the finding. Rey. v. Upton St. Leonards, 10 Q. B. 827; 2 New Sess. Cas. 582; 16 L. J., M. C. 84; 11 Jur. 306.

> Against Theatre Proprietor for Stage Representation of Murder prejudicial to Person Committed for Trial for it. —Thurtell was committed for trial for murder of Weare. The proprietor of a theatre represented the supposed facts of the case in such a manner that when a stage mnrderer was seized, the andience expressed themselves as understanding that he represented Thurtell. The court granted a criminal information against the proprietor. Rex v. Williams, 2 L. J., K. B. (0.8.) 30; 26 R. R. 624.

Publication of Comments prejudicial to Prisoners-Publication of Criminal Proceedings.]—Pending a preliminary investigation into charge of treason felony, comments prejudicial to the prisoners were published in a newspaper -Held, that a conditional order for a criminal information should be granted against the newspaper proprietor. Reg. v. Gray, 10 Cox, C. C. 184.

The same newspaper afterwards published a report of the proceedings, part of which consisted of statements of counsel calculated to prejudice the public mind against the prisoners, who were eominited for trial. There was no suggestion that the report was not a fair one of what actually took place:—Held (Hayes, J., diss.), that the publication was privileged, and did not form a ground for granting a conditional order for a criminal information. Ib. See CONTEMPT OF COURT.

Against Person abusing Public Officer. -Criminal information will be granted against a person abusing a public officer in discharge of his duty. Rex v. Smith, 1 L. J., K. B. 31. And see CONTEMPT OF COURT,

False Return. —An information lies for a false return to a mandamus. Anon., Lofft, 185.

Refusal to serve as Sheriff. ]-An information refused against a man who refused to serve the office of one of the sheriffs of London. Rev v. Groscenor, 1 Wils. 18; 2 Str. 1193.

The court granted an information against a

person refusing to take on himself the office of sheriff, because the vacancy of the office oceasioned the stop of public justice, and the year would be nearly expired before an indictment could be brought to trial. Rew v. Woodrow, 2 Term Rep. 731.

Election of Overseers. ]-An information was refused for endeavouring to procure the appointment of certain persons to be overseers of the Against Inhabitants of Parish.]—The court poor with a view to derive a private advantage granted an information against the inhabitants to the party. Here v. Joliffe, I East, 154, n.

Surveyor improperly spending Money. - The | defendant at an election, Rev v. Isherwood, 2 surveyor of a high road having improperly expended a large sum of money, borrowed by the trustees under an act of parliament, without the consent of the trustees, which the act required to sanction the expenditure, the court refused a criminal information, no corrupt motive being expressly alleged; and they will not convert a civil into a criminal injury. Reg v. Friar, 1

Commissioners exceeding Powers.]—An information was granted against commissioners for exceeding their powers, Rew v. Rogers, 1 Ld. Ken. 373.

But refused against twelve commissioners for pulling down a turnpike, on a suggestion of irregularity in the time and manner of the meeting. Anon., Lofft, 199.

Provoking Breach of the Peace. ]-Words spoken of a person, although they may contain serious imputations, are not sufficient ground for a criminal information, unless they are of such a nature as are likely to provoke a breach of the pence. Marlbornyh (Duke), Ex parte, 5 Q. B. 955; D. & M. 720; 1 New Sess. Cas. 195; 13 L. J., M. C. 105; 8 Jur. 664.

Conspiracy to Marry. ]-The court will grant a rule nisi for an information for a conspiracy in taking away from his father's house a young man of fortune under age, for the purpose of marrying him to one of the conspirators, though the young man is not heir-apparent to his father. Rew v. Green, 3 Dougl. 36.

For an Assault committed in Colony.]-To a criminal information by the attorney-general of New South Wales against a member of the legis-lative assembly of that colony for an assault on a member, committed within the precincts of the house while the assembly was sitting, which information averred that such assault was in contempt of the assembly, a general demurrer was allowed by the Supreme Court :- Held, that the information was good, as the alleged contempt of the legislative assembly was charged only as a matter of aggravation, and could be rejected as surplusage, and that the information was sustainable for an assault. Reg. or Att.-Gen. (New South Wales) v. Macpherson, 39 L. J., P. C. 59; L. R. 3 P. C. 268; 23 L. T. 101; 18 W. R. 1053.

Nuisance. ]-An information for a nuisance will be refused, if an application to the party is not shewn. Rew v. Green, 1 Ld. Ken. 379.

Riot. ]-An information does not lie for a riot. if the parties did not disperse, and are within the penalty of the Riot Act : otherwise it does. Anon., Lofft, 253.

Nor for pretending to rend the Riot Act. Rem v. Spriggins, 1 W. Bl. 2.

All persons by their presence countenancing a riot are liable to an information. Rew v. Hunt, 1 Ld. Ken. 108.

Bribery.]-An information was granted for attempting to bribe a privy councillor to procure a reversionary patent of an office grantable by the king under the great seal. Rew v. Vaughan, 4 Burr. 2494.

An information was granted on the deposition of two persons, for the offering of a bribe by the remedy. Ib.

Ld. Ken. 202.

Other Cases.]—An information was refused against a husband for endeavonring to retake his wife contrary to articles. Rea v. Vane (Lord), 1 W. Bl. 18.

So, for embezzling money collected on a church brief. Rex v. St. Botolph, Bishapsgate, 1 W. Bl. 443. So, for burying a dead body found in a river, without sending for the coroner. Rex v. Proby, 1 Ld. Ken, 250.

But granted for maliciously pressing. Rew v. Webb, 1 W. Bl. 19.

#### 6. PRACTICE.

# a. Application for.

Must be made by Innocent Party. \_\_\_ The party applying for an information must come with clean hands into court. Rev v. Eden, Lofft, 72.

Therefore an information will be refused to cheats and gamblers against others of the same description. Rev v. Reach, 1 Burr. 548. description.

So, an information for a challenge was denied to the first sender of it. Rew v. Hankey, 1 Burr.

In order to maintain an application for a criminal information the applicant must leave himself wholly in the hands of the court, and in no way whatever make libellous attacks on the other side. Reg. v. Nottingham Journal Pro-prietors, 9 D. P. C. 1042.

Although a party applying for a criminal in-formation must show himself to be an innocent party, yet the court made a rule absolute for such information against the publisher of a libel, which affected several parties, notwith-standing that the character of the person princhally attacked, and on whose affidavit the rule nisi had been obtained, was impeached on shewing cause. Reg. v. Gregory, 1 P. & D. 110; 8 A. & E. 901.

Second Application for. ]-The court will not permit a second application to be made for a criminal information unless leave was reserved for the purpose on the first application from very special circumstances, such as being met by affidavits which afterwards turned out to be based on perjury. Munster, Ex parte, 20 L. T. 612.

Before taking other Proceedings. ]-To obtain a criminal information, the applicant should apply to the court in the first instance, and before he has elected to take another course of proceeding. Reg. v. Marshatl, 4 El. & Bl. 475; 3 C. L. R. 676; 24 L. J., Q. B. 242; 1 Jur. (N.S.) 676 ; 3 W. R. 170.

Against County Court Judge. ]-A rule was obtained for a criminal information against a county court judge for alleged misconduct in his office. The affidavit in support stated, that the applicant had addressed a memorial to the Lord Chancellor, setting forth the facts. It appeared from affidavit in answer that the memorial to the Lord Chancellor contained general charges of misconduct, and specified the particular misconduct complained of, and prayed for an inquiry into the behaviour of the judge, and that the Lord Chancellor had declined to The court discharged the rule on interfere. the ground that the applicant had elected his

his assailant into the custody of a policeman, and gave him in charge at the police-station, where-upon he was locked up till he gave bail for his appearance to answer the charge on the following day, but no further proceedings were taken, the court made a rule absolute for a criminal information for the assault. Reg. v. Gwilt, 3 P. & D. 176; 8 D. P. C. 476; 11 A. & E. 587; 9 L. J., Q. B. 148; 4 Jur. 316.

But the court refused a rule for a criminal information for an assault upon its appearing that the applicant had taken out a warrant against the other party; though the applicant offered that it should be part of the rule, that he should abandon the proceedings or the warrant. Anon.,

4 A. & E. 576, n.

To be Made within what Time.]-Where a party had been aware of the facts on which the application for a criminal information against a magistrate would be founded early in Easter Term, and did not make the application till the last day but three of Trinty Term, the court refused a rule nisi. Heg. v. Harris, 13 L. J., M. C. 162 : 8 Jur. 516.

The court will not grant a rule for a criminal information in a case where a whole term has been allowed to intervene between the facts

alleged and the application to the jurisdiction of the court. Reg. v. Heat, 4 Jur. 339. The court will not grant a rule nisi for a

criminal information on the last day of term,

Tunner, Es parte, 3 Jur. 10.

Leave to file a criminal information for a libel should be applied for in a reasonable time, before the expiration of the second term, after the publication of it, if it comes to the knowledge of the prosecutor early enough to enable him to move within that period. Rew v. Jullie, 1 N. & M. 483; 4 B. & Ad. 867; 2 L. J., K. B.

By whom made, ]-The motion for a criminal information must be made by the law officers of the Crown, or by a barrister, and not by a private Rew v. Lancashire J.J., 1 Chit, 602 : 22 R. R. 823.

## b. Affidavits.

Contents.]-An affidavit to found a motion for a criminal information must distinctly negative the charge; and it is usual to do so in the words of the charge. Rew v. Wright, 2 Chit. 162.

If circumstances of suspicion only are stated in affidavits in support of a rule for a criminal information:—Held, to be insufficient, unless the deponents add their belief that the party against whom it is moved acted from corrupt motives. Rew v. Williamson, 3 B. & Ald, 582,

An information on Hen. 5, c. 4, against a person for practising as an attorney whilst he was under-sheriff, was refused because the affidavit did not mention what particular acts he did as an attorney, of which the court should judge. Rew v. Bull, 1 Wils. 93.

If, in the affidavit to found a criminal information, slanderous words on the defendant be introduced, it will be a sufficient ground to introduced, it will be a summent ground to refuse the application. Rew v. Byrne, 2 N. & P. 152; 6 D. P. C. 36; 7 A. & E. 190.

Where a magistrate in answer to a rule for a

Assault. |-- Where a party assaulted gave | was "a shuffling and litigious fellow"; the court censured such language, although they would not reject the affidavit. Row v. Burn, 7 A. & E. 190; 6 D. P. C. 36; 2 N. P. 152; 1 Jur. 659.

In order to obtain leave to file a criminal information, the affidavits must connect the person complained of with the offence by legal evidence. Reg. v. Stanger, 40 L. J., Q. B. 96; L. R. 6 Q. B. 96; 24 L. T. 266; 19 W. R. 640.

When newspaper articles charged the relator with partiality from political motives, in the manner in which he discharged his duties as presiding officer at an election for members of a school board, and mentioned a specific instance where he had rejected the vote of a dulyqualified female voter, who was politically opposed to him, though the relator in his affidavit denied generally the truth of all the charges, and also that he refused any voter on political or improper or illegal considerations, or prevented directly or indirectly any voter who was legally qualified to vote and who observed the prescribed regulations for voting, or put any obstacles in the way, or did anything at any obstacles he way, or that mything at any time, calculated improperly to affect the election of any particular candidate, the court dis-charged a rule nisi for a criminal information which had been obtained against the publisher of the newspaper, because the relator had not negatived specifically the charge made against him as to the rejection of the female voter's vote. Reg. v. Aunger, 28 L. T. 630; 12 Cox, C. C. 407.

On Change of Venue. |- In a criminal information, filed by the attorney-general, the venue was changed at the instance of the traverser, was canniged to the instance of the averses, upon an affidavit by him referring to, but not setting out in detail, facts of such public notoriety as to be "matters of contemporaneous history." Reg. v. Duygen, Ir. R. 7 C. L. 94.

In Mitigation.]—Where a defendant was convicted of a libel, which purported to have been written in consequence of his having seen a written in consequence of his intring seen a statement of facts in different newspapers, an affidavit that he read those statements in such newspapers may be received in mitigation of punishment; but an affidavit that the facts contained in those statements were true, is not admissible. Rev v. Burdett, 4 B. & A. 314.

In Aggravation.]—When a defendant who has been convicted on an indictment comes up to receive judgment, the prosecutor may read affidavits in aggravation, though made by witnesses who were examined at the trial, and which affidavits he is at liberty to answer. v. Sharpness, 1 Term Rep. 228; 1 R. R. 427.

Where a defendant is brought up to receive judgment after conviction, an affidavit by the prosecutor in aggravation, stating that a third person, who refuses to join in the affidavit, had informed him that the defendant, after the trial, had repeated in his hearing the libellous matter for which he was indicted, is not admissible; at least, not without swearing that such third person was under the control or influence of the defendant, Res v. Pinkerton, 2 East, 357. And sec Rew v. Withers, 3 Term Rep. 428; and Rev v. Mawbey, 6 Term Rep. 619; 3 R. R. 282.

Affidavits allowed to be read on a defendant's eriminal information, stated that the applicant | being brought up for judgment, stating that the defendant had made use of expressions aggravating his guilt, in the presence of two persons not give an appeal on a motion for a new trial who related them to the persons making the of an information filed by the attorney-general. affidavits, and the prosecutor swearing that the legs v. Leuthum, 3 Ell. & Bl. 658; 30 L. J., persons who heard the expressions refused to Q. B. 205; 7 Jur. (X.S.) 674; 3 L. T. 777; come forward, and were supposed to be under 9 W. R. 334. the influence of the defendant. Rew v. Archer, 2 Term Rep. 203, n.

Time to Answer.]—Where the party applied for time to send to Triuidad for an affidavit of the truth of certain matters in a libel, in order to shew cause against such a rule, the court would not grant further time. Affidavits abroad, before judges there, and verified, although receivable as attidavits of debt, are not to be received on rules to shew cause, in opposition to affidavits made in the court here. Rev v. Draper, 3 Smith, 391: 8 R. R. 727.

When a defendant who has suffered judgment by default in a criminal prosecution, is brought up for judgment, each party should come prepared with attidavits disclosing his own case (if he means to produce any affidavit at all); but, if in the course of the inquiry the court wishes to have any point further explained, they will give the defendant an opportunity of answering it on a future day. Rev v. Wilson, 4 Term Rep.

### c. Practice Generally.

Description of Prosecutor. ]-A description of the prosecutor in an information or an indertune the prosecutor in an information or an indertunent, as Charles Frederick Augustus William, which the counsel for the defendant snan we meet, as Charles Frederick Augustus William, which the counsel for the defendant snan we had; and, lastly, the counsel for the prosecution of the prosec

Information for offering a bribe to Thomas Dabbs, a custom-house officer. Evidence that his name of baptism was Thomas Tyrrel Dabbs, in which name his commission was made out. but that he was as well or better known at the custom-house and in the trade by the name of Thomas Dabbs, which name he himself generally used :-Held, no variance, as it could not have been pleaded in abatement. Att.-Gen. v. Hawkes, 1 C. & J. 121; 1 Tyr. 3; 9 L. J. (0.8.) Ex. 17.

Service of Rule.]—Service held sufficient on affidavits that rule shewn and read to servant at house of defendant's mother, where he was living. Reg. v. Tempest, 5 W. R. 661.

Interrogatories.]—In a criminal information for the non-repair of a highway, the court has no power, either by common law, or under 1 Will. 4, c. 22, s. 4, upon application by the prosecutor, to order the examination of a witness upon interrogatories. Reg. v. Upton St. Leonard's, 10 Q. B. 827; 17 L. J., M. C. 13; 12 Jur. 11.

Joint Information.] — A joint information against several cannot issue upon distinct rules for one or more information or informations against each. Rev v. Haydon, 3 Burr. 1270.

Conviction. ]—After conviction on a criminal information, to which objections were taken, the defendant must stand committed, pending consideration of judgment, unless the prosecutor expressly consents to bail. Rew v. Waddington, 1 East, 159; 6 R. B. 238.

Appeal. ]-The 17 & 18 Vict. c. 125, s. 35, does

Costs. ]-Under 4 & 5 Will, & M. c. 18, s 2 a defendant in a criminal information which is not tried, or in which a verdict is given for the defendant, is entitled only to such an amount of costs as equals the amount of the prosecutor's recognizance. Reg. v. Savile, 18 O. B. 703.

Semble, that the proper mode of obtaining such costs is for the defendant to take out a side-bar rule for taxing the whole costs; and, upon that being done, he is entitled to so much of them as equals the amount of the recognizance. Ib,

Other Proceedings.]-A party applying for an information must waive his right of action; but if the court, on hearing the whole matter, is of opinion that it is a proper subject for an action, they may give the party leave to bring it. Rex v. Sparrow, 2 Term Rep. 198; 1 R. R.

When any defendant shall be brought up for sentence on any indictment, or information, after verdiet, the affidavits produced on the part of the defendant, if any such be produced, shall be first read, and then any affidavits produced on

information for a libel in the Queen's Bench, is discharged on shewing cause, the applicant may bring an action in another court for publication of the same libel. Walley v. Cooke, 16 M. & W. 822; 4 D. & L. 702; 16 L. J., Ex. 225; 11 Jur.

A rule nisi for a criminal information will not be granted where a former rule for the same matter against the same defendant has been discharged, although the second motion is made upon additional affidavits. Rew v. Smithson, 1 N. & M. 775; 4 B. & Ad. 861.

The rule that when a party has failed in au application to the court, in consequence of not being properly prepared, he shall not be allowed to renew it with new or amended materials, applies to public officers in the discharge of their duties, as well as to private individuals. Reg. v. Pickles, 6 Jur. 1039.

## C. HABEAS CORPUS.

[Crown Office Rules, 1886, 235 to 249,]

- 1. Jurisdiction Generally, 135.
- 2. To Colonies and other Dominions of the
- Croion, 136.
- 3. In Vacation, 137.
- 4. To Liberate what Persons, 137.
- 5. For what Purpose, 138.
- 6. How Applied for, 142.
- 7. Writ and Return.
  - a. Writ. 143. b. Return, 144.

- c. Amendment, 149.
  - d. Discharge of Prisoner, 149. e. Costs and Fees, 150.
- 8. Copy of Commitment, 150.
- 9. Compelling Obedience, 150.
- 10. In Extradition Cuses-Sec Extradition.
- 11. Custody of Infants-See Infant.

#### 1. JURISDICTION GENERALLY.

At Common Law. ]-The right to a habeas corpus is by the common law, and is not created by statute. Besset, Is re, 1 New Sess. Cas. 337; 6 Q. B. 481; 14 L. J., M. C. 17; 9 Jnr. 66.

Record cannot be Contradicted.]—A prisoner was convicted at the Central Criminal Court of unlawfully wounding at Beulah Spa, stated in the indictment to be in Lambeth, which is within the jurisdiction of the court, whereas Beulah Spa is not within it. Affidavit of this being made, the court refused a motion for the writ of habeas corpus, on the ground that the affidavit was in contradiction of the record. Rey. v. Newton, 3 W. R. 419.

In Equity.] — The Court of Chancery, in England, had by its common-law jurisdiction, authority as general as the common law courts have, to issue a writ of habeas corpus. Belson, In rc. 7 Moore, P. C. 114; 14 Jur. 631.

The Court of Chancery had, by its common-law inrisdiction, authority to issue a writ of habeas

corpus in the vacation.

The object of the control which the Court of Chancery has over the ecclesiastical courts by means of the writ of habeas corpus, is to keep those courts within the jurisdiction which the law has assigned to them, and not to correct any error into which they may fall in the exercise of it. Baines, In re, 1 Cr. & Ph. 31.

Rules of Equity.]—In proceedings by habeas corpus, in the Queen's Bench Division, in matters relating to the custody and education of infants, the equitable jurisdiction conferred by s. 28 sub-s. 10, of the Judicature (Ireland) Act, 1877 [which corresponds with the English Judicature Act, 1873, s. 25, sub-s. 10], is ancillary to the legal jurisdiction of the court, and the applicant must still show that he prima facie possesses a legal right to the custody. Harper, In re, [1895] 2 Ir. R. 571.

Appeal.]-An order that a writ of habeas Appeal. j—An order time a wife order, corpus should issue is an "order" within s. 19 of the Judienture Act, 1873, and therefore an appeal lies from such order. The court will not encourage such appeals, or lightly interfere with Encourage such appeals or agatity interfere with the issue of the writ. Burnardo v. Ford, 61 L. J., Q. B. 728; [1892] A. C. 326; 67 L. T. 1; 56 J. P. 629—H. L. S. P. Burnardo v. McHugh, 61 L. J., Q. B. 721—H. L.

Excuse for Non-compliance with Writ — Custody no longer Existing.]—The appellant, without authority from the parent, who had placed her child in his institution, handed over the child to a gentleman to be taken to Canada. This had taken place before the application by the parent for a writ of habeas corpus, and the appellant alleged that it was impossible for him

issue, so that the facts might be further inquired into. Ib.

Semble, the writ of habeas corpus is granted on account of the illegal detention of a person. and this remedy does not lie where such person was not, at the time it was issued, in the custody, power or control of the person upon whom it served. Reg. v. Burnardo, Tye's Case (23 5, infra) disapproved. Ib. Q. B. D. 305, infra) disapproved.

The mere fact that, at the time a writ of habeas corpus is applied for, the person against whom the application is made has not in his possession, custody or power the body of the person said to be detained, is no ground for not issuing the writ, if it appears that the person against whom the application is made has illegally parted with the custody of the person said to be detained. Reg. v. Barnardo (23 Q. B. D. 305) discussed. Reg. v. Barnardo (Gossage's Cuse), 59 L. J., Q. B. 345; 24 Q. B. D. 283; 38 W. R. 315—C. A. Affirming, 62 L. T.

Per Lord Esher, M.R.: - The writ of habeas corpus will not be issued where it appears to be absolutely impossible that it can be obeyede.g. where the person said to be detained is dead, even although there had been a wrongful detention before the death. Per Fry, L.J.:-The writ of habeas corpus will not be issued where obedience to it is absolutely impossible by reason of the person alleged to be detained being out of the eustody or control of the person against whom the writ is applied for, even though the latter has illegally parted with the custody of the person said to be detained, unless such custody was parted with in anticipation of the writ for the purpose of evading the exigence of it when issued. Ib.

To a writ of habeas corpus issued at the instance of the parent of a child, which had been wrongfully defained by the defendant, a return was made by the defendant to the effect that, as he had, before the issuing of the writ, parted with the custody of the child so detained by him to another person who had taken her out of the jurisdiction, it was impossible for him to obey the writ:—Held, that it was no excuse for noncompliance with the writ that the defendant had wrongfully handed over the child to another person, and, therefore, the return was bad, and an attachment must issue against the defendant for disobedience to the writ. Reg. v. Burnurdo (Tyo's Cuse), 58 L. J., Q. B. 553; 23 Q. B. D. 805; 61 L. T. 547; 37 W. R. 789; 54 J. P. 132—C. A.

#### 2. TO COLONIES AND OTHER DOMINIONS OF THE CROWN.

Canada.] — Before the Habeas Corpus Act, 1862, 25 & 26 Vict. c. 20, the superior courts by England had a right to issue a habeas corpus into the colonies, to bring up persons illegally imprisoned, unless their jurisdiction was taken away by statute. The court therefore issued a habeas corpus to Canada, its jurisdiction to do so not being taken away by statute. Anderson, Exp parte, 3 El. & El. 487; 30 L. J., Q. B. 129; 7 Jur. (N.S.) 122; 3 L. T. 622; 9 W. R. 255.

Isle of Man. ]-The Isle of Man, though no part of the realm of England, is a dominion, and not a foreign dominion, of the Crown within this enactment, and a writ of habeas corpus ad subjiciendum will, therefore, run to the island to find the child :- Held, that the writ ought to from the English courts. Brown, Ex parte, 5 B. & S. 280; 33 L. J., Q. B. 193; 10 Jur. (N.S.) the taxation of bills of costs. *Walsh* v. *Wilson*, 945; 10 L. T. 458; 12 W. R. 821. S. P., *Crave-ford*, *Ew parte*, 13 Q. B. 613; 18 L. J., Q. B. Where a person was in the custody of a messenger under an order of the secretary of state, sorger under an order of the secretary of state,

Jersey.]—The writ of habeas corpus ad subjiciendum runs into Jersey. Curus Wilson, In re, 7 Q. B. 984; 14 L. J., Q. B. 105, 201; 9 Jur. 393.

A habeas corpus, issued by the Lord Chancellor and sealed by the chief clerk of the records and writs with the official seal, will run into the island of Jersey; and the royal court there is bound to register such writ, and to aid and assist in its execution. Belson, In re, 7 Moore, P. C. 114: 14 Jur. 641.

Where an inhabitant of Jersey had been imprisoned there for serving upon another inhabitant process in an English action :- Held, that the imprisonment was unlawful, and that he was entitled to be discharged on a habeas corpus. Dodd's Case, 2 De G. & J. 510; 4 Jur. (N.S.) 291;

6 W. R. 207.

Another prisoner, who was detained in custody, not only for the above cause but also for debts under orders purporting to be made by the royal court of Jersey, obtained a habeas corpus on an affidavit stating that the orders were made when without affidavits of debt such as were required by the law of the island. It appeared, however, that he had taken proceedings after the irregularity had occurred :-Held, that the royal court was not shewn to have been insufficiently constituted, and must be assumed to be connectent to judge of its own law, and that the prisoner was not entitled to his discharge. Ib.

#### 3 IN VACATION

Before Judge at Chambers. ] - A judge at chambers has power at common law to issue in vacation a habeas corpus, returnable before himvacation a laboral corpus, returnable before himself immediately. Reg. v. Batcheldor, 1 P. & D. 516; 2 W. W. & H. 19. S. C., nom. Watson's Case, 9 A. & E. 731. S. C., nom. Rew v. Wiwon, 8 L. J., Q. B. 129.

#### 4. To Liberate what Persons.

Alien Enemies.]—No habeas corpus lies for an alien enemy, a prisoner of war, however ill-used or deceived. Anon., 2 W. Bl. 1324; 2 Ld. Ken, 473.

Therefore, a habeas corpus for a prisoner of war, taken on board an enemy's privateer ship, was denied. Rew v. Schiever, 2 Burr, 765.

Other Aliens.]—The court, upon affidavit laid before them, suggesting probable cause to believe that a helpless and an ignorant foreigner was brought into this country and exhibited for money against her consent, by those in whose keeping she was, granted a rule upon her keepers, to shew cause why a writ of habeas corpus should not issue to bring her before the court; and directed an examination to be taken of her in the meantime, before the coroner and attorney of the court, in the presence of proper persons deputed by the persons applying for the writ, and by those against whom it was prayed. Hottentot Venus's Case, 3 East, 195; 12 R. R. 320.

Solicitor. ]-A solicitor being in custody under an attachment, the court granted a writ of habeas corpus directed to the marshal to bring him before the taxing-master, to enable him to attend

senger under an order of the secretary of state, for the purpose of being sent out of the kingdom by virtue of the repealed Alien Act, 43 Geo. 3, c. 155, the court refused to issue a habeas corpus on the application of his bail to bring him up to be rendered, on account of the public inconvenience. and of the probable risk of losing his passage, which had been taken in a ship immediately about to sail to his destined port. Folkein v. Critico, 13 East, 437. S. P., Hodgson v. Temple, 15 R. R. 567, 593,

The court may discharge a foreigner from the custody of a gaoler, returning no legal warrant of detention. Besset, In re, 6 Q. B. 481; I New Sess. Cas. 337; 14 L. J., M. C. 17; 9 Jur. 66.

Lunatics. - See Reg. v. Peacock, 12 Cox. C. C. 21, and Greenwood, In re, 24 L. J., M. C. 137, and LUNATIC.

#### 5. FOR WHAT PURPOSE.

Regularity of Commitment.]-The court will not grant a habeas corpus to discharge out of custody a person who has been convicted of libel, at the commission of over and terminer at the Central Criminal Court, on the ground that when the verdict was returned only one commissioner was present instead of two, as required by law.

New Y. Curlisle, 4 Car. & P. 415.

A. was charged with a felony before three magistrates, who, upon hearing evidence, admitted him to bail, and afterwards, upon additional control of the tional evidence, committed him to gaol :- Held, that A. was not entitled to a habeas corpus to be discharged out of custody. Allen, Ex purte,

3 N. & M. 35.

Before the spring assizes, 1840, A. was committed to take his trial at these assizes for shooting B. The trial was postponed to the summer assizes, on the ground of B.'s illness. Before the summer assizes B. died, and at those assizes a true bill for the murder of B, was found against A., and his trial was postponed at the instance of the prosecutor to the next spring assizes, on account of the illness of a material witness :-Held, that A, was not entitled to his discharge under the 7th section of the Habeas Corpus Act. Reg. v. Bowen, 9 Car. & P. 509.

The court has no power to grant a habeas corpus to bring up a prisoner who has been convicted at the Central Criminal Court, on the ground that the offence charged was committed at a place out of the jurisdiction of that court. Newton, In re, and Exparte, 16 C. B. 97; 24 L. J., C. P. 148; 3 C. L. R. 1122; 1 Jur. (N.S.) 591.

The court refused to grant a habeas corpus in order to discharge a defendant who was detained in custody on a warrant of a judge belonging to a court of competent jurisdiction, which set out an adjudication on which if erroneous a writ of error might be brought. Dunn, Ex parte, 5 D. & L. 345: 5 C. B. 215: 17 L. J., C. P. 105: 12 Jur. 99.

A habeas corpus is not grantable in general where the party is in execution on a criminal charge, after judgment on an indictment, according to the course of the common law. Lees, Ex parte, El. Bl. & El. 828; 27 L. J., Q. B. 403; 5 Jur. (N.S.) 333; 6 W. R. 660.

Where a defendant seeks to be discharged out

of custody, on the ground that the warrant of commitment on which he is detained is illegal, he must be brought before the court by a habens corpus, although it is sworn that he is too poor to bear the expense, as the validity of the warrant will not be discussed in his absence. Martins, Exparte, 9 D. P. C. 194; 1 W. P. C. 6.

Where justices have a statutory power to convict summarily and to commit with or without hard labour, and in the warrant of commitment nothing is said about hard labour, it is to be taken that they did not mean to give hard labour, and the warrant is not objectionable for omitting to state whether the imprisonment is to be with or without hard labour, so as to entitle the prisoner to habeas corpus. Thompson, William, Exparte, 3 L. T. 318.

Where the commitment only is brought before the court upon the return to a habeas corpus, and that is bad, the prisoner is entitled to his discharge whether there was a good conviction or not. Timesu, Ex parts, 99 L. J. M. C. 129; L. R. 5 Ex. 257; 22 L. T. 614; 18 W. R. 849.

The court will grant a rule calling on a committing magistrate to show cause why a hadeas corpus should not issue to bring up a prisoner in order that the validity of the warrant of commitment may be discussed on shewing cause. Cross. Ex. parte, 2 H. & N. 854; 26 L. J., M. C. 201.

By Justices after Disagreement of Jury. ]-At the spring assizes for Shropshire, a prisoner was indicted for murder: the trial began on Wednesday, the 21st March, and was adjourned to the following day. Between one and two in the afternoon of Thursday the jury retired to consider their verdict; at eight in the morning of Friday, the 23rd, they were brought into court, and upon their stating that there was no likelihood of their agreeing, the judge discharged them, and remanded the prisoner. The rest of the business at Shrewsbury was finished, and the commission had been opened in the adjoining county. The prisoner was detained in the custody of the county gaoler under a warrant of commitment by justices of the county, which recited that she was charged with murder, and commanded him to keep her until she should be delivered by due coarse of law :-Held, upon au application for a habeas corpus, that the warrant of commitment remained in force, and therefore the prisoner was not cutitled to be discharged. Newton Ex parte, 13 Q. B. 716; 18 L. J., M. C. 201 ; 13 Jur. 606.

Adjournment to Amend.]—When a prisoner is brought up on a writ of habeas corpus, and the return shows a commitment bad on the face of it, the contribution in the one for the purpose of having the conviction brought up and amending the commitment by it. Timan. In re, 39 L. J., M. C. 120; L. R. 5 Ex. 257; 22 L. T. 614; 18 W. M. 849.

To bring up Prisoner—Appeal.]—When it becomes accessary to bring up a prisoner to be present at the argument of an appeal from the decision of the Queen's Bench Division on a writ of error, application for a writ of habeas corpus should be made to the Queen's Bench Division and not to the Court of Appeal. O'Brien v. Rep., 26 L. R., Ir. 451—O. A.

To conduct Cause.]—The court will not grant a habeas corpus to bring up a prisoner, in order that he may move in person for a new trial, in an action in which lie is a party. Binns v. Massley, 2 C. B. (N.S.) 116; 3 Jur. (N.S.) 694; 5 W. R. 583.

Habeas Corpus ad Testificandum.— Prisoner desiring to argue Case.]—Pending the argument of a case in the Court of Appeal, the appellant, who proposed to appear and argue in person, was sentenced to imprisonment in respect of a charge of Rhel — Hckl, that the court had no-power under the circumstances to award a writ of habeas corpus to bring the appellant before the court with a view to her arguing her appeal, as the provisions of the Habeas Corpus Act, 1804, 44 Geo. 3, c. 102, had no application to such a case. Weldon v. Veul, 54 L. J., Q. B. 399; 15 Q. B. D. 471; 33 W. R. 581.

The court will not grant a habeas corpus to enable the defendant in an information, who is confined in a county goal for a libel, under the sentence of another court, to attend at Westminster, to conduct his defence in person: the application should be made to the court by whom the defendant was sentenced. Att. Gen. v. Hont, 9 Price. 147.

The court will grant a habegs corpus to the warden of the Fleet, to take the body of a prisoner, confined there for delp, before a magistrate, to be examined from day to day respecting a charge of felony or mislemeanor. Griffiths, Expartr, 5 B. & Ald. 780.

It is entirely in the discretion of a judge to grant or refuse a habeas corpus to enable a prisoner to attend to shew cause against a sumnous. *Ford v. Graham*, 10 C. B. 369; 1 L. M. & P. 694.

Where a defendant, charged with selling unstamped papers, was in custody, the court grantest a habeas corpus for the purpose of embling him to defend in person. Att.-Gen. v. Cleare, 2-D. P. C. 668.

The court will not grant a habeas to bring up, a party in custody under an attachment, to cuable him to move in person to set it aside. First v. Aissaus, 9 M. & W. 793; 1 D. (N.S.) 631; 6 Jun. 374; 11 L. J., Kx. 287.

To entitle a prisoner to a habeas, to bring him mp to be present on the argument of a rale in which he is interested, he must satisfy the court that substantial justice cannot be done without his presence. Clark v. Smith, 3 C. B. 984.

The court will not grant a habeas corpus to bring up a defendant under sentence of imprisonment for a mischemenor, to enable him to shew cause in person against a rule for a criminal information. Rev v. Parkyns, 3 B. & Ald. 679, n.; 22 B. R. 519.

Where a plaintiff in an action is in lawful custody for debt, he is not entitled as of right to a habeas corpus to bring him up to conduct his own cause at the trial, though possibly the court would grant him one if a proper case were shewn. Cubbett, Ex purte, and In re, 3 H. & N. 155; 27 L. J., Rx. 199; ± Jur. (N.S.) 145; 6. W. R. 282.

— And give Evidence.]—But if his evidence is necessary at the trial of a cause, he is entitled to a haboas corpus ad testificandum for himself as much as for any other witness. Ib.

Where the plaintiff is thus brought up on a habeas corpus ad testificandum, he may conduct his own cause if he pleases. *Ib*.

not grant an application for a habeas corpus to remove a prisoner from gaol, where he is undergoing sentence, in order to take him before a magistrate in another county, to prefer another charge against him; but will grant a habens corpus to bring him up for trial on a true bill being found against him at the assizes on that charge. Reg. v. Day, 3 F. & F. 526. S. P., Hardwich, In re, W. W. & D. 167.

A prisoner in custody for contempt may be removed by habeas corpus to take his trial for perjury in another county. Wetton, In re, 1 Tyr.

385; 1 C. & J. 459.

The judges of the Central Criminal Court have no power, as such, to issue any habeas corpus, or other process, to bring in a party who is in custody of the sheriff of Middlesex on a civil suit, in order that he may be committed to Newgate, to be tried for a misdemeanor before that court ; and the Central Criminal Court Act, 1834, 4 & 5 Will. 4, c. 36, s. 16, does not apply to such a case. *Rev* v. *Maryan*, 7 Car. & P. 642.

- To Appear before Coroner.] The Queen's Bench will not, on the mere instance of the coroner, and without a strong case of necessity being made out, issue a writ of habeas corpus to bring a prisoner who has been committed for trial on a charge of the murder of A. before a coroner's jury, who is sitting on the body of A. Wahley, Ex parte, 7 Q. B. 653; 14 L. J., M. C. 188; 9 Jur. 869.
- To Vote. -A habens corpus will not lie to bring up a prisoner in a county gaol, for the purpose of voting at the election of a member of parliament. Jones, Ex parte, 4 N. & M. 340; 2 A. & E. 436; 1 H. & W. 7; 4 L. J., K. B. 97.
- To Prove Identity.]—Where there is a question as to the identity of the person of a defendant to an information, who is in prison, the Court of Exchequer will grant a habeas corpus to bring him up, to be present at the trial, upon his paying the costs. Att.-Gen. v. Fudden, 1 Price,

Lunatic.]-When a person was committed for trial by the magistrates to the assizes, but after committal was removed by them to the county huntic asylum, the judge of assize has power to issue a habeas corpus to bring him up for trial. Reg. v. Peacock, 12 Cox, C. C. 21.

If a person is detained under a medical certificate, in a private house licensed for the reception of lunatics, under 16 & 17 Vict. c. 96, Schedule A. No. 2, which is bad in form, as an alleged lunatic, he will be discharged on habeas corpus, on the ground that the detention is illegal, unless it is shewn that it would be injurious to himself or others to set him at liberty. Greenwood, In re, 24 L. J., M. C. 137; 1 Jnr. (N.S.) 522.

Military Officer. ]—The Habeas Corpus Act, 1803, 43 Geo. 3, c. 140, s. 1, applies only to judicial inquiries, and does not authorise the court to grant a habeas corpus for the purpose of bringing a military officer, in prison for debt, before a medical board to report on his health. Galway, In re, 19 L. T. 262.

Improper Confinement. |-The court refused to grant a habeas corpus to a prisoner in custody corpus ad respondendum, to take a prisoner in under process out of the Court of Chancery,

Transfer to Other County, ] - The court will applied for on the ground that the keeper of the Queen's prison had improperly removed him to a part of the prison provided for prisoners of a particular class. Cobbett, Exparte, 5 C. B. 418. S. P., Rogers, Ex parte, 7 Jur. 992.

> Denial of Access.]-The court granted a rule nisi for a habeas corpus to bring up a prisoner (access to whom was denied by the gaoler), on the application of his father. Thompson, In re,

30 L. J., M. C. 19.

A habeas corpus was granted on the applica-tion of a sister of an orphan girl under fourteen to remove her from an asylum, where the applicant was denied access to her. Daley, In re, 2 F. & F. 258.

When under Military Arrest. ] - The court cannot grant a habeas corpus to bring up a debtor for the purpose of charging him in execution, who is in custody under military arrest. Jones v. Danvers, 5 M. & W. 234: 7 D. P. C. 394; 2 H. & H. 84; 8 L. J., Ex. 216.

#### 6. How Applied for.

On Affidavit.]—The writ, whether at common law or under the Habeas Corpus Act, 1679, 31 Car. 2, c. 2, does not issue as a matter of conrse upon application in the first instance; but must be grounded on an affidavit, upon which the court is to exercise its discretion whether the writ shall issue or not. Rew v. Hobbouse, 2 Chit. 207; 3 B. & Ald. 420.

The court will not grant a habeas corpus to bring up a prisoner for the purpose of being discharged, on the ground that he is illegally in custody, imless there is an affidavit from himself, or it is shewn that he is so coerced as to be unable to make one. Parker, In re, 5 M. & W. 32; 7 D. P. C. 208; 2 H. & H. 45.

A rule having been obtained for a habeas corpus to bring up a lunatic confined in an asylum in this country under Irish medical certificates, the court discharged it with costs, there being no affidavit to shew that the party promoting the application was duly authorised by the lunatic. Child, Ex parte, 15 C. B. 238; 2 C. L. R. 1801.

A motion for a habeas corpus to bring up the body of a sheriff (on a return by a coroner of ecpi corpus to an attachment) before a judge at chambers, is of course, and without affidavit, Rew v. Whaley, 1 Chit. 249.

Precedence for Motion. ] - The practice of giving precedence to motions affecting the liberty of the subject holds good only where a person in custody is brought up by habeas corpus, and does not extend to shewing cause against a rule for a habeas corpus. Thompson In re, 6 Jur. (N.S.) 1121.

By Counsel.]—The court declined to allow a motion for a habeas corpus to be made by the father of a prisoner in custody, but required it to be made by counsel. Newton, In re, 16 C. B. 97; 3 C. L. R. 1122; 24 L. J., C. P. 148.

By Married Woman.]—A wife may move for a habeas corpus on behalf of her husband. Cobbett v. Hudson, 15 Q. B. 988.

To whom. - An application for a habeas

answer to another charge of felony, must be Bench, must issue from the Crown side of the made to a judge at chambers, and not to the court. Reg. v. Isaacs, 2 L. M. & P. 255; 20

L. J., Q. B. 395.

The proper mode of obtaining the discharge of a person privileged from arrest on process of the county court for non-attendance on a judgment summons of that court, under the repealed County Courts Act, 1846, 9 & 10 Vict. c. 95, s. 99, held to be not by writ of privilege, but by habeas corpus from one of the superior courts (upon affidavits shewing bis privilege), or by cupin analysis slewing ins privace, i. i., application to the judge of the county court. Dakins, Ex parte, 16 C. B. 77; 3 C. L. E. 602; 24 L. J., C. P. 131; 1 Jur. (N.S.) 378; 3 W. R.

A prisoner who sues out a habeas corpus ad subjiciendum is not bound by the decision of any one court, but is entitled to take the opinion any one court, but is enclude to take the opinion of all the courts as to the propriety of his imprisonment. Partington, Ex parte, 2 D. & L. 650; 13 M. & W. 679; 14 L. J., Ex. 122; 9 Jur. 92.

Conditions on. ]-If a habeas corpus is granted, on the ground that the party has been illegally committed by a magistrate, the judge will not make it a part of the rule for issuing the writ, that the party shall not bring an action against the magistrate. Itill, Ex purte, 3 Car. & P. 225.

Order of Access.]-The physician, apothecary, attorney, relations, nurse and servants, were ordered to have access to a woman too weak in body and mind to be brought up by habeas corpus. Rea v. Wright, 2 Burr. 1099.

Deserter.]—Upon habeas corpus to discharge a prisoner out of custody, who has been committed by virtue of an order of magistrates, under 8 & 9 Vict. c. 8, s. 25 (a Mutiny Act), for assisting to conceal a deserter, notice of the rule should be served upon the secretary at war. Gale, Ex parte, 3 D. & L. 114; 14 L. J., Q. B. 316 ; 10 Jur. 334.

Lawful Warrant after Rule. ]-Where, after a rule for a habeas corpus has been granted, a warrant is issued, which renders the enstody lawful, the court will discharge the rule. Danney, Ex parte, 8 Jur. 829.

Office Copy of Warrant Dispensed with.]-Where a rule is granted for a habeas corpus to bring up a bankrupt in custody, for not answering satisfactorily, the court will, if the warrant is very long, make it a part of the rule, that cause may be shewn without taking an office copy of the warrant. Ib.

Argument.]- Upon the argument of a rule nisi for a habeas corpus, the case is to be treated in the same manner as if the prisoner was brought up upon a habeas granted in the first instance; and the court will look to the whole cause appearing upon the return. Bull, Exparte, I B. C. Rep. 141; 15 L. J., Q. B. 235; 8 Jur. 827.

## 7. WRIT AND RETURN.

## a. Writ.

Signature.]-The writ must be signed by a judge, or it need not be obeyed. Reav. Roddam, Cowp. 672.

Issue of ]-A writ of habeas corpus ad sub- 2 R. R. 546. jioicndum, granted by a judge of the Queen's

court where the prisoner is in custody for a criminal matter. Eastern, In re, 4 P. & D. 558; 12 A. & E. 645; 9 D. P. C. 207; 1 W. P. C. 49; 10 L. J., Q. B. 16; 5 Jur. 116.

Waiving Irregularity.] — Where a party in custody in the Queen's Bench, under a habeas corpus ad satisfaciendum, had removed himself by habeas corpus into a different custody for the purpose of taking the benefit of the Insolvent Act :- Held, that he had thereby waived an irregularity in the first writ. Newton v. Rowe, 7 Scott (N.R.), 543; 13 L. J., C. P. 73; 7 Jur. 1135,

But if the writ is issued out of the plea side, it is irregular only, and the irregularity may be waived by neglect to object to it in due time. Ib.

Filing. — The court will not compel the mar-shal to file of record a writ of habeas corpus cum cansâ, by virtue of which a person is committed to his enstedy in execution. Conper v. Jones, 2 M. & S. 202; 14 R. R. 632.

Issue of Writ against Person who has no longer Custody of Person detained—Illegal Handing over of Person detained.]—On an application by the parent for a writ of habeas corpus in respect of a child, directed to the head of an institution for destitute children in which the child had been placed, it appeared that before the proceedings began he had, without anthority from the parent, handed over the child to another person to be taken to Canada, and he alleged that he did not know the address of such person, or where he or the child was :- Held, but without expressing any opinion as to the circumstances under which the child was sent to Canada), that the writ ought to issue on the ground that the applicant was entitled to require a return to be made to the writ, in order that the facts might be more to the wris, in order that the rates magne belinder fully investigated. Reg. v. Barnarda, Typ's Case (23 Q. B. D. 305), disapproved. Barnardo v. Ford, 61 L. J., Q. B. 728; [1892] A. C. 326; 67 L. T. 1; 56 J. P. 629—H. L. (E.)

#### b. Return.

Time for.]-A writ of habeas corpus ad satisfaciendum et recipiendum may be returnable immediately and before a judge. Bettesworth v. Bell, 3 Burr. 1875.

A habeas corpus issued in vacation, returnable immediately before a judge at chambers, does not expire by the commencement of the term. Rev v. Shebbeare, 1 Burr. 460.

A party may be brought into court in term time, upon a writ issued in the vacation. Rex v. Mead, 1 Barr. 542.

The court will not receive the return of a babeas corpus till the return-day. Mush's Case, 2 W. Bl. 805.

Sufficiency. ]—The return to a habeas corpus, must answer the taking as well as the detaining. Warman's Case, 2 W. Bl. 1204.

A return, in these words, "I had not at the time of receiving this writ, nor have I since had the body of A. B. detained in my custody, so that I could not have her," &c., is a bad return, and an attachment granted against the party who made it. Rew v. Winton, 5 Term Rep. 89;

It seems a sufficient return that the defendant

is in custody under the sentence of a court of affidavits are admissible, raising objections not competent jurisdiction to inquire of the offence, and to pass such a sentence without setting forth the particular circumstances necessary to warrant such a sentence. Rew v. Suddis, 1 East, 306.

Upon a return to a habeas corpus, the court will not give any direction or advice to the gaoler as to the matter of which his return should consist. Flotcher, In re, 1 D. & L. 726; 13 L. J.,

M. C. 16; 8 Jur. 146.

As to the sufficiency of return of a gaoler having in his custody prisoners for the purpose of being conveyed to a penal settlement in pursuance of the terms of their sentence for treason in a colony, see Purker, In re, 5 M. & W. 32; 2 H. & H. 45; and Watson's Case, 9 A. & E. 731; 1 P. & D. 516; 8 L. J., Q. B. 129.

Truth of Impeaching. ]—A return prima facie imports verity, and until it is impeached, need authors versy, and after the imperconst, now not be supported by affidavits or otherwise. Reg. v. Butcheldor, 1 P. & D. 516; 2 W. W. & H. 19. S. C., nom. Watson's Case, 9 A. & E. 731; Reg. v. Wison, 8 L. J., Q. B. 129.

Where Ambiguous. ]-If a return, which on the face of it is ambiguous, is not fortified by affidavit, clearing up all doubt, it will be held evasive and bad. Reg. v. Roberts. 2 F. & F. 272.

Function of Court.]—All that the court can do on the return to a writ of habeas corpus is to see that the party is in custody under an order of some court having anthority to commit. Dimes, In re, 3 Mac. & G. 4.

Affidavits Controverting.]—On motion to discharge a party brought up by a habeas corpus, affidavits suggesting matters which, though not repugnant to the return, shew the custody to be illegal, are not admissible. Douglas, In re, 12 L. J., Q. B. 49; 7 Jnr. 39.

On a habeas corpus bringing up a party committed by justices for not finding sureties of the peace, the court will not hear affidavits controverting the facts alleged in the articles of the peace. Reg. v. Dunu, 12 A. & E. 599; 4 P. & D. 405. Habeas corpus ad subjiciendum. Retnra, a

committal by order of the Vice-Chancellor of England for breach of an injunction ordered by the Lord Chancellor. The order was signed C. C., which, it was suggested, were the initials or Cottenham, chancellor. On motion on behalf of the prisoner for time to file affidavits for the purpose of shewing that Lord Cottenham had a personal interest in the cause, and therefore, as the prisoner contended, that his injunction was void :- Held, that the court will not grant time to file affidavits for the purpose of disclosing matters not apparent on the return to a habeas corpus, unless the nature of the facts to be sworn to is suggested; and it appears such affidavits might be available. Reg. v. Hulton, Dimes's Case, 14 Q. B. 554; 19 L. J., Q. B. 158; 14 Jur. 198.
Where the return to a habeas corpus stated

that the prisoner was brought to the bar of the Court of Chaucery and committed for contempt, the court would not allow the prisoner to use affidavits to shew that he had not been brought to the bar of the court, and so was entitled to his discharge under the Contempt of Court Act, 1830, 11 Geo. 4 & 1 Will. 4, c. 36, s. 15. Clarke, Ex parte, 2 G. & D. 780; 2 Q. B. 619.

Where a warrant of commitment, setting out a conviction, is good on the face of it, it is doubtful whether, on the return to a habeas corpus, the rule. Ib.

appearing upon the warrant; as, for instance, disclosing a former conviction for the same offence. Baker, Ex parte, 2 H. & N. 219; 26 L. J., M. C. 155; 3 Jur. (N.S.) 937; 5 W. R. 661.

Return-Excuse for Non-compliance with Writ-Contempt-Attachment. ]-To a writ of habeas corpus issued at the instance of the parent. of a child, which had been wrongfully detained by the defendant, a return was made by the defendant to the effect that, as he had, before the issuing of the writ, parted with the custody of the child so detained by him to another person, who had taken her out of the jurisdiction, it was impossible for him to obey the writ:—Held, that it was no excuse for non-compliance with the writ that the defendant had wrongfully handed over the child to another person, and, therefore, the return was bad, and an attachment must issue against the defendant for disobedience to the Writ. Reg. v. Barnardo, 58 L. J., Q. B. 553; 23
 Q. B. D. 305; 61 L. T. 547; 37 W. R. 789—C. A.

Adequacy of Adjournment.] - Semble, when the return to a writ of habeas corpus is produced, it should be received and filed; and if the applicant wishes to question the adequacy of the return he should apply for an adjournment, and though the return be filed, the adequacy of it may be questioned and an application for a writ of attachment may be applied for at such adjournment. Ib.

\_\_\_\_ Illegality of Warrant.]—Where a return discloses a legal imprisonment of a person under civil process, it is competent to him to shew by affidavit that the detainer is illegal by reason of his privilege from such arrest. Dukins, Exparte, 16 C. B. 77; 3 C. L. R. 602: 24 L. J., C. P. 131; 1 Jnr. (N.S.) 378; 3 W. R. 369,

Where a return states that a prisoner is detained under civil process, it is competent to him to show by affidavit that he was originally arrested on a Sunday. Egyington, Ev puerte, 2 El. & Bl. 717; 2 C. L. R. 385; 23 L. J., M. C. 41; 18 Jnr. 224; 2 W. R. 10.

Upon a return to a habeas corpus affidavits are not admissible to shew that the offence was not committed within the jurisdiction of the justice. Smith, Ex parte, infra.

Second Warrant.]—A warrant of commitment being bad, a second warrant was allowed to be substituted for it as the return to a habeas corpus. Smith, Ex parte, 3 H. & N. 227; 27 L. J., M. C. 186; 6 W. R. 440.

A rule nisi having been obtained calling on the governor of a house of correction to shew cause why a habeas corpus should not issue to bring up a prisoner in his custody, on the ground that the warrant under which he was committed was not properly sealed, a second warrant was lodged with the governor similar in its terms to the first, and purporting to be signed by justices of the same name, but duly sealed:—Held, first, that if it was material, the court would assume from the facts stated that the second warrant was substituted by the same justices as an amendment of the first. Phipps, In re, 11 W. R. 730.

Held, secondly, that the second warrant, though made after the rule had been obtained. was a sufficient warrant to the governor for the detention of the prisoner, and was an answer to

Where a prisoner has been lodged in gaol under | - Held, first, that affidavits could not be received a bad warrant of commitment, even in the nature for the purpose of shewing that the royal court of a conviction, a good warrant of commitment subsequently delivered to the gaoler, but before a rule for a habeas corpus has been obtained, is a tine 10 if the tines collisions better obtained, is a good answer to the rule. Cross, Expurto, 2 H. & N. 354; 26 L. J., M. C. 201. And see Danacey, Expurte, 8 Jur. 829; Reg. v. Richards, 5 Q. B. 926; Dav. & M. 777; 1 New Sess. Cas. 182; 13 L. J., M. C. 147; 8 Jur. 752.

Hearing Counsel. ]-Objection having been made to the return on behalf of the prisoner, and counsel having been heard against the objection, one counsel was allowed to reply in support of it. Carus Wilson, In re, 7 Q. B. 984; 14 L. J., Q. B. 105, 201 : 9 Jur. 393,

Order on . - When the court decides that return is insufficient, the party making the return is thereby adjudged to be in contempt, and will be ordered to enter into recognizance, himself, and two sureties, to answer personal interrogatories. and to abide any further order the court may make. Mutthews, In re, 12 Ir. C. L. R. 272.

Evidence. - In an action against two, the plaintiff, in proof of the alleged acts of trespass. gave in evidence a return by one to a habcas corpus, in which he stated that he had committed the acts in question in obedience to certain orders made by his co-defendant. The defendants thereupon called in aid the evidence contained in that document in support of certain pleas of justification:-Held, that the return was evidence for the defendants in support of their pleas, and also against them in proof of the trespass. Coblett v. Gray, 4 Ex. 729.

- Law of Jersey. A habeas corpus, directed to the viscount and gaoler of Jersey, commanding them to bring up the body of W. Return, that the viscount and gaoler took and the guoler detained W. by virtue of a sentence of the royal court of Jersey, which was set out, and which stated, that, in a cause depending before them. W., when the court was about to deliver an interlocutory judgment, interrupted, by attering in the most unbecoming tone, a protest against the competency of the court ; and that the court, conformably with an article in the Jersey laws, ordering that all persons who shall have been wanting in respect to the bailiff should be imprisoned until they asked pardon and paid the fine imposed; and considering that the bailiff had, in the course of the cause, ordered W. to be more respectful, condemned W. to a fine of 101., and to ask pardon of the court; and W. having refused to comply, he was sent to prison until he should have obeyed; that the sentence was legal according to the law of Jersey : that by such law the viscount and gaoler were obliged to take and the gaoler detain; that they had not nor by such law could have any warrant other than the sentence; that the court was presided over by the bailiff, assisted by judges called jurats, and had the power of punishing such a contempt in the manner directed by the sentence; that there was such an article as mentioned in the sentence ; that the matters in the sentence were true; that the sentence was read aloud in the hearing of W., and was duly entered in a book, the book of criminal prosecutions, being the proper book for that purpose; and that the sentence was in due form, and a sufficient authority for the taking and detaining :

had acted inconsistently with the law of Jersey, or to impeach the legality of the sentence. Carux Wilson, In re, 7 Q. B. 984; 14 L. J., Q. B. 105, 201 : 9 Jur. 393.

Held, secondly, that the return was not objectionable for want of shewing a warrant for the caption or detainer. Ib.

The return of the governor of the Millbank penitentiary to a habeas corpus set forth a certificate of the greffier of the royal court of Jersey. that the prisoners had been convicted of burglary by that court, and sentenced to be transported, and alleged that it was a court of competent jurisdiction to try and punish for that crime; also an order in council directing the transportation of the convicts from Jersey to Van Diemen's Land; and a warrant of a secretary of state for removing them from Jersey to the prison in order to carry the sentence into effect :- Held. first, that the affidavits filed for the purpose of obtaining the writ were not admissible to contradict the return; and that the court could not enter into an inquiry what the law of Jersey is, Brenan, In re, 10 Q. B. 492; 16 L. J., Q. B. 289; 11 Jur. 775.

Held, secondly, that the court of Jersey having jurisdiction over the offence, the court must assume prima facie that the sentence being unreversed was correct, and could not require the authority of the court to pass the sentence to be set out mon the return.

— Isle of Man.]—The publisher of a newspaper in the Isle of Man was ordered to attend at a chancery court of the island, for publishing an article tending to defame the court; he attended accordingly, and tendered an apology, which the court did not accept, but committed him for contempt. Thereupon J. C. avowed himself to be the author of the article, and the court committed him also to gaol, without a warrant. After some hours the gaoler was furnished with the following warrant, signed by the lieutenant-governor: "At a chancery court, holden, &c. Whereas J. C. voluntarily appeared before the court, and avowed himself to be the author of an article, &c., and whereas the writing and publishing the article is a contempt of the court; it is ordered, that J. C. be, for such his contempt, committed a prisoner to the gaol of C. R., there to remain until further order.' habeas corpus ad subjiciendum having been obtained by J. C., a rule was granted for quashing it, upon affidavits that the lieutenantgovernor of the Isle of Man presided in the chancery court, which was a court of record, having power to punish for contempt, and that the warrant was in the form usually adopted by that court :- Held, first, that it sufficiently appeared that the warrant of commitment was an act of the chancery court. Crawford, In re, 13 Q. B. 613; 18 L. J., Q. B. 225; 13 Jun 955.

Held, secondly, that the chancery court having

authority to commit for contempt, and having adjudged the publication to be a contempt, the

court could not review that adjudication. Ib.

Held, thirdly, that the warrant, being in the form used by the chancery court of the Isle of Man, was lawful, though the commitment was not for a certain time. Ib.

Service of Original Writ—Not making Return—Contempt—Attachment—Waiver.]—Attach-

ment for disobedience in not making a return to a writ of habeas corpus will not be granted against the person to whom the writ is directed unless he has been personally served with the original writ, although he has appeared on several occasions and applied for further time to make the return without taking objection to the service. Reg. v. Rowe, 15 R. 119; 71 L. T. 578,

#### c. Amendment.

In what Cases.]—A writ of habeas corpus sued out by a prisoner, was amended by substituting out by a prisoner, was amended by substituting 7 Will. 4 for 1 Vict. Deview, Ex parts, 4 Bing. (N.C.) 17; 5 Scott, 241; 5 D. P. C. 181.

The court may, in its discretion, allow a return

to be amended after it has been filed. Reg. v. Butchelder, 1 P. & D. 516; 2 W. W. & H. 19; S. C., nom. Watson's Case, 9 A. & E. 731. S. C., nom. Reg. v. Wiwon, 8 L. J., O. B. 129.

The warden of the Fleet might have amended his return by leave of the court, after it was filed, and without the consent of the prisoner. Clarke, In re, 2 Q. B. 619; 2 G. & D. 780; 5 Jur. 757.

#### d. Discharge of Prisoner.

Power of Court to Order Discharge, -Upon an application for a writ of habeas corpus, the court have power, if satisfied upon affidavit that the conviction, in pursuance of which the applicant was imprisoned, was made without jurisdiction, to order him to be discharged. Authors or Anthers, In rc, 58 L. J., M. C. 62; 22 Q. B. D. 345; 60 L. T. 454; 37 W. R. 320; 16 Cox, C. C. 588; 53 J. P. 116.

At what Time.]—It is not necessary to wait till the rising of the court to move the discharge of a prisoner out of custody, on a return to a habeas corpus, where no notice of any opposition to the motion has been given. The court will order him to be discharged forthwith. Howard, In re, 2 D. & L. 586.

Infant.]—Where a person, supposed to be improperly in custody, is brought up on habeas corpus, the court, if there appears no ground for restraint, will order that such person be at liberty to go where he pleases, and will, if necessary, give him the protection of an officer in going, But if the party is a legitimate child, too young to exercise a discretion, the legal custody is that of the father. Rew v. Greenhill, 4 A. & E. 624; 6 N. & M. 244.

Re-arrest, |--- An information at the suit of the attorney-general under 33 Geo. 3, c. 52, s. 62, is in the nature of a criminal charge, and a capias under s. 141, in respect of it, is criminal process : no privilege, therefore, from arrest on such a charge exists to a person reducido, on his discharge exists to a person remendo, on his dis-charge upon habeas corpus from an illegal custody, as such privilege only exists in the case of civil process. *Danglas, Ture*, 12 L. J., Q. B. 49: By 31 Car. 2, c. 2, s. 6, it is provided that no person set at large upon any habeas corpus shall

be again imprisoned or committed for the same offence by any person other than the legal process of the court having jurisdiction of the same :— Held, that this provision only applies when a second arrest is substantially for the same cause second arrest is substantially for the same cause lake v. Ferrers (Eurl), 1 Burr. 551. as the first. Att.-Gen. of Hong Kong v. Kuck-a-Sing, L. R. 5 P. C. 179; 42 L. J., P. C. 64; Service Abroad.]—Where a habcas corpus has 29 L. T. 114; 21 W. R. 825; 12 Cox, C. C. 565.

#### e. Costs and Fees.

Where a defendant already in custody is brought up to be charged in execution on a habeas corpus ad satisfaciendum, and tenders the amount of debt, interest and costs on the judgment against him, he cannot be detained for the court fees payable on the habeas corpus ad

satisfaciendum. Delzill v. Cullen, 7 Jur. 979.

The warden of the Fleet could not demand an additional fee for expedition in returning a habeas corpus. Johnson v. Smith, 1 H. Bl. 105.

The Court of Chancery has authority to give

to the functionary who brings up a prisoner, in obcdience to a habeas corpus at common law, the expenses of so doing, but not his general costs.

Dodd's Case, 2 De G. & J. 510: 4 Jur. (N.S.) 291: 6 W. R. 207.

Power to Order Costs-Proceedings on the Crown Side of the Queen's Bench Division.]-The court has jurisdiction, since the Judicature Act, 1890, to give costs to the successful party Act, 1530, to give costs to the successful party in proceedings for a writ of habeas corpus. Reg. v. Jones, 63 L. J., Q. B. 656; [1894] 2 Q. B. 382; 10 R. 287; 70 L. T. 845; 42 W. R. 607; 58

#### 8. COPY OF COMMITMENT.

Service of Demand. ]-Service of demand of copy of the commitment on the turnkey of a a copy of the communent on the turnery of a prison is not sufficient to support an action against the gaoler for a penalty incurred by him under the Habeas Corpus Act, for not delivering the copy to the prisoner within due time after demand unde, if the gaoler himself was in the prison. Huntley v. Luscombe, 2 Bos. & P. 580; 5 R. R. 697,

Prisoner from Ireland.]—A person sent over from Ireland under a warrant from the secretary of state for Ireland, charged with any offence, and committed to prison until he can be brought before a judge, is entitled to a copy of the warrant after it has been demanded. Sedley v. Arbouin, 3 Esp. 194.

Inspection.]-The court will compel the marshal of the court to permit the attorney of the plaintiff to inspect the writ and return, and committitur indersed thereon. For v. Jones, 7 B. & C. 782; 1 M. & Ry. 570.

Costs.]—A prisoner suing as a party grieved on the Habeas Corpus Act, and having been refused a copy of his warrant of commitment, is entitled to costs if he recovers a penalty. Ward v. Snell, 1 H. Bl. 10,

#### 9. COMPELLING OBEDIENCE.

By Attachment.]—If disregard is shewn to a habeas corpus at common law, an attachment will be immediately granted. Bosen, Ex parte, 2 Ld. Ken. 289.

Peer.]-No peer or lord of parliament has privilege against being compelled by process in the courts of Westminster Hall to pay obedience to a habeas corpus directed to him, because such offence is a contempt; and an attachment may issue if the peer refuses obedience to the writ. Res v. Ferrers (Eurl), 1 Burr, 631,

not been obeyed, the court will not grant a rule absolute in the first instance for an attachment on the ground of his disobedience, although the English proceeding has been recognised and ordered to be obeyed by the French tribunals; nor will the court grant its warrant to apprehend the defendant for his contempt, under 56 Geo. 3, c. 100, s. 2, it appearing that the person was confined in France. Wyatt, Ex parte, 5 D. P. C. 389; W. W. & D. 76.

In Case of Imprisonment. -To compel obedience to a habeas corpus to bring up an impressed man, the party must first search at the Crownoffice for the return, and, if not found, apply, upon affidavit thereof, for an attachment. Harrison, Ee parte, 2 Smith, 408.

Insufficient Return.]—An attachment may be granted for making an insufficient return to the first writ of habeas corpus, without issuing an alias and a pluries writ. Rew v. Winton, 5 Term Rep. 89; 2 R. R. 546.

A rule had been obtained calling upon the defendant, in whose custody the prisoner as a soldier of a regiment was, to shew cause why an attachment should not issue against him for a atmeanners should not issue against him for a contempt in not obeying a habeas corpus to bring him before the court. Upon service of the writ the defendant referred the matter to the Horse Guards, and received directions to discharge the plaintiff, which he obeyed. The affidavit of the defendant stated, that he had no intention of shewing disrespect to the court, but that he supposed that after the discharge of the party he could not make any return to the writ :-Held, that although a return ought to have been made that the defendant had discharged the party; yet, as there appeared to be some improper motive on the part of the applicant, the court refused to issne an attachment, Reg. v. Gavin, 15 Jur. 329, n.

#### D. MANDAMUS.

[Crown Office Rules, 60 to 79.]

# A. PREROGATIVE MANDAMUS.

- 1. General Principles.
  - a. In respect of other Remedy, 152,
  - b. To enforce Equitable Rightsor Trasts.
  - c. To Ministerial or Judicial Officers-Discretion, 156.
    d. Actions for Acts done under Man-
  - damus, 159.
  - e. Granting is Discretionary, 159.
  - f. Refusal to do Act, 159.
  - g. Other Points, 160.
- 2. In Particular Cases.

  - a. To the Privy Council, 163.
  - To Government Officers, 163.
     To Commissioners, &c., 166.

  - d. To Parish Officers, 168.
  - e. To Companies, 169. f. To Municipal Corporations,
    - i. To Insert Name on Burgess Roll, 173.
  - ii. Other Matters, 174.
  - q. To Justices.
    - i. Generally, 175.
    - ii. To Issue Distress Warrants,
      - 178.
    - iii. Practice, 178.

- A. To Quarter Sessions.
- i. When Granted, 179,
- ii. Practice, 183. To Inferior Courts, 183.
- j. To Lords and Stewards of Manors, 184. k. To Admit, Elect or Restore to
  - Offices.
    - i. What Offices, 185. ii. In what Cases Granted, 186,
    - iii. Practice, 190.
- 3. Practice Generally.
  - a. When and how Application made, 191.
  - b. Form of Writ, 191.
  - c. Parties, 194.
  - d. Argument and Rule, 194. e. Rule Absolute in First Instance,
  - 196
    - f. Affidavits, 196.
    - g. Service of Rule, 196.
      h. Amendment of Writ, 147.
  - i. Quashing or superseding Writ, 197.
  - j. Beturn to Writ, 198.
  - i. Generally, 198. ii. Pleadings, 201.
  - h. When Return Quashed, 202. 1. Judgment, 203.
- 4. Peremptorn Mandamus, 203.
- 5. Damages, 204.
- 6. Costs. 204.
- II. MANDAMUS IN CIVIL CASES, AND UNDER JUD. ACT, 1873. See PRACTICE.

## 1. GENERAL PRINCIPLES.

## a. In respect of other Remedy.

When Indictment also lies. ] -It is no objection to granting a mandanus to do a particular act, that an indictment will also lie for the omission to do that act. Row v. Severn and Wye Ry., 2 B. & Ald. 646; 21 R. R. 433.

A mandamus will not be granted to enforce the general law of the land, if an action will lie, although in some cases it will be granted even where an indictment may be preferred. Robins, Ex parte, 7 D. P. C. 566; 1 W. W. & H. 578; 3

Jur. 103. A dock company was required to make and maintain a new channel, with equal depth and breadth at the bottom, and with equal inclination of the sides to the former channel :- Held, first, that a duty was cast upon the company to repair generally the banks of the new course. Bristol Dack Co., 1 G. & D. 286; 2 Q. B. 64; 2 Railw. Cas. 599; 6 Jur. 216.

Held, secondly, that a mandamus would lie to compel the company to repair, although there might be another remedy by indictment. Ib.

The court will not grant a mandamus to compel the repair of a turnpike road. Rew v. Oxford and Witney Turnpike Road Trustees, 12 A. & E. 427; 4 P. & D. 154; 6 Jur. 216, n.

Right to-Specific Legal Right. |- The applicant for a writ of mandamus must shew that he has a specific legal right to the performance of the duty which he asks the court to order to be performed. A sanitary authority has no such specific legal right to apply for a writ of man-damus directed to guardians calling upon them to enforce the Vaccination Acts. Reg. v. Levois-ham Union, 66 L. J., Q. B. 403; [1897] 1 Q. B. 498; 76 L. T. 324; 45 W. R. 346; 61 J. P. 151.

between.]—An action for a mandamus is not such an action wherein, under the Judicature Act or otherwise, a declaration of rights may be made, or a mandamús granted, as a declaration of rights is only made, or a mandamus granted, where the action is such that relief can be given. and the rights claimed, enforced in that action. Buxter v. London County Council, 63 L. T. 767; 55 J. P. 391.

Writ not granted when another Remedy by Action.]—A shareholder in a railway company made a real and absolute transfer of his shares for a nominal consideration to an insolvent person in order to avoid liability for future calls. The company refused to register the transfer. A rule nisi for a prerogative writ of mandamus to compel the company to register the transfer having been granted:—Held, that inasunch as the prosecutor had another specific and sufficient remedy, viz. by action of mandamus, the prerogative writ ought not to issue, and the rule must gative writ ought hot to issue, and Valley Ry,, be discharged. Rey, v. Lambourn Valley Ry,, 58 L. J., Q. B. 136; 22 Q. B. D. 463; 60 L. T. 54; 53 J. P. 248. S. P., Reg. v. East and West India Dock Co., 60 L. T. 232; 53 J. P. 277.

- Statutory Obligation.]—A rule for a prerogative writ of mandamus is not the proper mode for enforcing a statutory obligation which can be made the subject of an action. Reg. v. Lambourn Valley Ry. (58 L. J., Q. B. 136; 22 Q. B. D. 463) followed. Rey. v. L. & N. W. Ry. and G. W. Ry., 65 L. J., Q. B. 516; 74 L. T. 624.

To take up Award-Lands Clauses Act. ]-A prerogative writ of mandamus is the proper remedy for enforcing the taking up of awards rander of dendering the maning in a wards made under the Lands Chauses Act. Reg. v. Lambourn Valley Ry. (22 Q. B. D. 453) distinguished. Reg. v. L. J. N. W. Ry., 63 L. J., Q. 695; [1894] 2 Q. B. 512; 10 R. 359; 58 J. P. 719

Remedy under Local Act Inconvenient and Obsolete. —Where the procedure and remedy under a local act is uncertain, inconvenient and practically obsolete, the procedure by writ of mandamus is applicable and ought to be granted. Reg. v. St. George the Martyr, Southwark, 61 L. J., Q. B. 898; 67 L. T. 412; 56 J. P. 821.

- Case Stated more Convenient. ]- Justices dismissed an information on the ground that it was too late. No case was applied for within seven days. Upon an application for a mandamus :-Held, that an application for a case to be stated was a more convenient remedy, and a rule for a mandamus was refused. Reg. v. Wisbech JJ., 54 J. P. 743.

Maintaining existing Sewers-Complaint to Local Government Board. ]—The proper procedure to compel a local authority to carry out its duties under s. 15 of the Public Health Act. 1875, as to the maintenance of existing sewers is by complaint to the Local Government Board, under s. 299 of the Public Health Act, 1875, and not, as a general rule, by prerogative writ of mandamus. Rep. v. Hastings Corporation, 66 L. J., Q. B. 80; [1897] 1 Q. B. 46; 75 L. T. 377; 45 W. R. 109; 60 J. P. 759.

Alternative Remedy—Remedy equally Convenient and Effectual.]—The remedy of a writ rebuilt under the Building Act, but the paper and

Action for, and Prerogative Writ-Difference of mandamus will not be granted where there is another remedy, equally convenient and effectual, open to the applicant at the time when it becomes necessary to resort to one or other of such remedies. Reg. v. Joint Stock Companies Registrar, 57 L. J., Q. B. 433; 21 Q. B. D. 131; 59-L. T. 67; 36 W. R. 695; 52 J. P. 710.

The court will not grant a prerogative writ of mandamus, commanding a local authority torepair and maintain a sewer vested in them, in a case where another remedy exists which is equally convenient and appropriate. Reg. v. St. Giles, Cumberwell, Vestry, 66 L. J., Q. B. 337; 45 W. R. 335; 61 J. P. 217.

Semble, that a mandamus may be issued against a party for a matter in respect of which he is liable to an action, or to a suit in equity. Reg. v. Southampton Harbour Commissioners, I B. & S. 5; 30 L. J., Q. B. 244; 7 Jur. (N.S.) 990; 9 W. R. 630.

In other Cases.]—A railway act enacted, that the company established by it should, in a given event, pay another company a sum not exceeding: a given amount, by way of compensation for the loss of tolls by the latter company. The given event having happened :-Held, that a mandamus was not the proper mode of compelling the payment of the compensation money, as an action, would lie on the statutory obligation. Reg. v. Hull and Selby Ry, 3 Railw. Cas. 705; 6 Q. B. 70; 13 L. J., Q. B. 257; 8 Jur. 491. S. P., Robins, Ex parte, supra.

A rule nisi having been obtained for a mandamus to a railway company to summon a jury to assess compensation for damage, the following: agreement was entered into by their agent and the claimant :- "We hereby agree to accept of the company, in discharge of our claim against them for injury, &c., 4231, and 81, per week for the future so long as the present damages continue. (Signed) W. E., T. E." This was also signed by the agent of the company. Upon this agreement the proceedings for the mandamus were discontinued. The company paid the 4251., and also the 81. per week for several weeks, and then ceased, whereupon an application was madefor a mandamus to them to pay the money according to the agreement, or to summon a jury to assess compensation, or to revive the former rule :- Held, that, as the agreement was not under the seal of the company, it could not be enforced by action, and the court granted the mandamus. Reg. v. Bristol and Excter Ry,... 3 Railw. Cas. 777.

A mandamus is always granted when there is no other specific legal remedy. Rev. Wyndham, Cowp. 378.

But not where a party has a specific legal remedy. Rex v. Chester (Bishop), 1 Term Rep. 396; 1 R. R. 237.

It is not a writ grantable of right, but by prerogative; and it is the absence or want of a specific legal remedy which gives the court jurisdiction. Rew v. Bristol Dock Co., 12 East, 429; 11 R. R. 440.

Two circumstances must concur to authorisethe issuing of a mandamus—a specific legal right and the absence of an effectual remedy. If it is doubtful whether there is a remedy, the court will issue a mandamus. Rev v. Nattingham Old Waterworks Ch., 1 N. & P. 480; 6 A. & E. 355; W. W. & D. 166; 6 L. J., K. B. 89.

Where a party-wall had been pulled down and



decorations had not been replaced by the defen-dant:—Held, that a mandamus, at the instance of the tenant of the adjoining house, would not lie to replace the paper and decorations, but that the remedy must be by action. Reg. v. Ponsford,
1 D. & L. 116; 12 L. J., Q. B. 313; 7 Jur.

The advowson of a vicarage had been purchased by certain landowners, and conveyed to feoffees. in trust, upon every avoidance to present such person as should be nominated by the majority of the landowners. At a meeting of the landowners for the purpose of nominating a successor to a deceased vicar, a dispute arose as to which of two candidates had the legal majority of votes, and thereupon the trustees refused to concur in presenting:—Held, that a mandamus could not be granted to the landowners, inasmuch as their right, if legal and not equitable, could be enforced by quare impedit. Orton Vicarage, In rc, 14 Q. B. 139; 18 L. J., Q. B. 321; 13 Jur. 1049.

So when a mandamus was applied for against justices in a case in which an appeal lay to quarter sessions, the court refused a mandanns. Reg. v. Smith or Lancashire JJ., 42 L. J., M. C. 46; L. R. 8 Q. B. 146; 28 L. T. 129; 21 W. R.

382

# b. To enforce Equitable Rights or Trusts.

In what Cases.]—Mandamus to churchwardens, to raise a rate to pay principal and interest of money borrowed on the credit of parish and church-rates, under the 58 Geo. 3, c. 45, and 59 Geo. 3, c, 134. A return, that since the security was given, the lender, who was the prosecutor, had become bankrupt. Plea, that the proscentor had lent the money, as a trustee for a party named, out of the money vested in him as trustee, in which he had no interest except as trustee. On demurrer, assigning for eause that the nature of the trust did not appear:—Held good. Rey. v. Brancaster Churchwardens, 7 A. & E. 458; 2 N. & P. 580.

In pursuance of the will of a private person, his executor, by deed, conveyed lands to trustees for the benefit of the poor of a parish. The deed provided that a chest, of which there should be three locks and three keys, should remain in the parish church, for keeping all writings, accounts, &c., and the trust moneys remaining unexpended. One of such keys to be kent by the receiver, the second by the parson, the third by the church-wardens:—Held, that a mandamus lay to the trustees to compel the delivery of one key to the churchwardens, although the application concerned a trust and a mere private endowment. Reg. v. Ottery St. Mary, Devon, 3 G. & D. 382; 4 Q. B. 157; 12 L. J., Q. B. 118; 7 Jur. 129. The advowson of a vicarage had been pur-

chased by certain landowners, and conveyed to feoffees, in trust, upon every avoidance, to present such person as should be nominated by the majority of the landowners. At a meeting of the landowners for the purpose of nominating a successor to a deceased vicar, a dispute arose as to which of two candidates, A. and S., had the legal majority of votes, and thereupon the trustees refused to concur in presenting. Upon an application for a mandamus to the trustees to present A.:—Held, that it could not be made by A., because he had no legal right. Orton Viourage, In re, 14 Q. B. 139; 18 L. J., Q. B. 321; 13 Jur. 1049.

c. To Ministerial or Judicial Officers-Discretion.

Who are.]-The guardians of the poor under an act of parliament ordered the treasurer to pay a sum of money for a purpose different from that mentioned in the act, against which an appeal was entered at the sessions, where that sum was disallowed in the account, and the treasurer who had paid it was ordered to repay it to the succeeding treasurer. The court refused to grant a mandanus to compel the late treasurer to pay over the money according to the order of the sessions, because he was a ministerial officer, and bound to obey the order of the guardians. Rea v. Shaw, 5 Term Rep.

County Treasurer.]—A mandamus will not lie to a ministerial officer, as the treasurer of a county, to obey an order of the court of quarter sessions; the proper remedy in case of his refusal to obey such order is by indictment. Rew v. Bristow, 6 Term Rep. 168; 3 R. R. 144, S. P., Rex v. Surrey Treasurer, 1 Chit. 650. And see Rex v. Johnson, 4 M. & S. 515.

A mandamus will not lie to a treasurer of a borough to compel him to pay costs to witnesses under the order of a judge, founded on 7 Geo. 4, c. 64, the treasurer being a ministerial officer, and subject for his refusal to an indictment. Rev v. Juyes, 5 N. & M. 101; 3 A. & E. 416; 1 H. & W.

Archbishop confirming Election of Bishop. ]-Under 25 Hen. 8, c. 20, s. 5, after an election of a bishop by the dean and chapter of a cathedral, by virtue of a congé d'élire and letters missive, the person so elected is to be reputed and taken by the name of the lord elected of the see, and the king is thereupon to issue letters patent to the archbishop, commanding him to confirm the election, and to invest and consecrate him, and if he fails to do so for twenty days, he is to incur the penalties of a præmmire:—Held, by Lord Denman, C.J., and Erle, J., that the archbishop. acting merely ministerially, is bound to confirm the bishop elect, and that he has no anthority to hear any opposition advanced against the person so elected. Per Patteson, J., and Coleridge, J., that confirmation is a judicial act, which the archbishop is to conduct according to the prineiples of the canon law, and that parties opposing are entitled to appear in his court, and enter their objections. Reg. v. Canterbury (Archbishop), Hampden, In re, 11 Q. B. 483; 17 L. J., Q. B. 252; 12 Jur. 862.

Held, also, per Patteson, J., and Coleridge, J., that the opposers not having been allowed to appear and be heard, there was a declining of jurisdiction by the archbishop, for which a man-

damus would lie. Ib.

Where only Nominal Party. ]-The general rule that an indictment, and not a mandanus, is the proper mode of enforcing obedience by a ministerial officer to an order of sessions, does not prevail where the court sees that the ministerial officer is put forward merely as a nominal party, and that other persons are those who are to be compelled to perform the duty. Heg. v. Wood Ditton Highway Surveyors, 18 L. J., M. C. 218.

Three persons were indicted, at the assizes for a county, for forging the will of D. D. died in a borough, and one of the prisoners took away the deeds, &c., of the deceased to his own house, | The Court of Chancery further expressed an which was in the county, but not in the borough; the forged signatures of the testator and of one of the witnesses were written in the borough, and the offence was completed in another county, where the forged signature of the second witness was written. The borough did not contribute to the county-rate, but had a borough fund of its own :- Held, that the order for payment of all costs and expenses of the prosecution was properly made on the treasurer of the borough, and a mandamus would lie to the treasurer to compel payment. Reg. v. Hayward, 17 L. J., Q. B. 223. S. C., nom, Reg. v. Opposite Research Transacture S. C., nom. Reg. v. Oswestry Borough Treasurer, 12 O. B. 239; 12 Jur. 744.

The court will issue a mandamus to a treasurer of a county, to deposit with the clerk of the peace, in pursuance of 12 Geo, 2, c. 29, ss, 7, 8, books containing entries of the county expenditure, although the receipts, tradesmen's bills, the gaoler's accounts, and copies of the county rate, had been already deposited with the clerk of the peace, and the books contain the discharges of the treasurer, and the discharges of the former treasurer by the justices in session. Rev v. Payne, 1 N. & P. 524; W. W. & D. 142; 6 A. & E. 392; 6 L. J., M. C. 62; 1 Jur. 54.

The rule that the court will not grant a mandamus to a ministerial officer to obey an order of quarter sessions, does not apply where the ministerial officer is a nominal party. Bottom, Ex parte, 13 Jur. 680.

Discretionary.]-By the Clergy Discipline Act, 1840, 3 & 4 Vict. c. 86, s. 3, in every case of a elerk in holy orders who may be charged with any offence against the laws ecclesiastical, or concerning whom there may exist scandal or evil report, as having offended against the said laws, it shall be lawful for the bishop of the diocese, on the application of any party complaining thereof, or, if he shall so think fit, of his own mere motion, to issue a commission of inquiry as to the grounds of such charge or report, bishop having refused to issue a commission to inquire into certain charges against a rector in his diocese, upon an application by a clerk in holy orders, who was a stranger to the parish and diocese, and he having obtained a rule for a mandamns to the bishop commanding him to issue a commission :-Held, by Wightman, J., that under s. 3 the power of the bishop to issue a commission was discretionary; Lord Campbell, C.J., and Erle, J., concurring; Hill, J., doubting as to the construction of s. 3, but holding that the court ought not to issue a mandamus npon the application of a party who was not shewn to be aggrieved, or to have some connection with the parish or diocese. Reg. v. Chichester (Bishop), 2 El. & El. 209; 29 L. J., Q. B. 23; 6 Jur. (N.S.) 120; 7 W. R. 629.

A party applied to the Insolvent Debtors' Court, for an order to vest a surplus in him, under 1 & 2 Vict. c. 110, s. 92, claiming under an alleged assignment to him by the insolvent. That court held that the assignment was invalid as against other claimants of the surplus, and refused to make the order. The court of Queen's Bench, holding that the functions of the Insolvent Debtors' Court were judicial and not merely

opinion that this decree rendered the duty of the Insolvent Debtors' Court in the matter more simply ministerial. The latter court, however, refused, on a renewed application to it, to act upon that opinion and make the order. On a subsequent application by the claimant for a mandamus to the Insolvent Debtors' Court to make the order :--Held, that, after as before the proceedings in Chancery, and notwithstanding the opinion there expressed to the contrary, the Insolvent Debtors' Court retained a judicial discretion whether or not to make the order; and that therefore the mandamus could not issue. Cook, Ex parte, 2 El. & El. 586; 29 L. J., Q. B. 68; 6 Jur. (N.S.) 224; 1 L. T. 369.

The court refused to grant a mandamus requiring the visitors named in the charter of the College of Doctors' Commons to inquire into the mode in which the college, under the Court of Probate Act. 1857, 20 & 21 Vict. c. 77, ss. 116. 117, had exercised their discretion as to the surrender of their charter and the disposition of their property. Lee, Ex parte, El. Bl. & El.

If the visitor of a college refuses to exercise his visitatorial power by hearing an appeal, the conrt will grant a mandamus to set him in motion, but cannot afterwards review his decision. Buller, Ex parte, 1 Jur. (N.S.) 709; 3 W. R. 447.

- Refusal to Issue Summonses.]-Upon an application to justices for summonses against certain persons to answer a charge of conspiracy to break the peace and do grievons bodily harm at a public meeting, evidence was given that a disturbance had arisen at the meeting in which the defendants took part, and that one or other of them had previously offered money to different persons if they would commit acts of violence at the meeting. The justices, after hearing the evidence, declined to issue the summonses, and a rule nisi for a mandamus having been obtained, they stated in their affidavit that upon the facts brought before them they did not feel justified in granting the application, but did not say that they thought the witnesses unworthy of credit :-Held, that the rule must be made absolute, for although under the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42 (Jervis's Act), s. 9, the justices are to issue their summons "if they shall think fit," it was here evident that they had not exercised a discretion. Reg. v. Adamson, 45 L. J., M. C. 46; 1 Q. B. D. 201; 33 L. T. 840; 24 W. R.

Erroneous Belief of Judge that he has no Jurisdiction. - Where a county court judge, after hearing so much of a case as relates to the jurisdiction, declines to hear and determine it, erroneously believing that he has no inrisdiction, an order in the nature of a mandamus will lie to compel him to hear and determine it. Reg. v. Southampton County Court Judge, 65 L.T. 320.

Appearance of Judge to Shew Cause against Rule Nisi.]—Where a rule nisi has been granted calling on a county court judge to shew cause why he should not hear and determine a question ministerial, refused to issue a mandamus commanding that court to make the order. The shee cause against the rule. Reg. v. Conquer applicant then took proceedings in Chancery, or Croydon Doputy Consty Charles, which resulted in a decree in his favour, that the L. J., C. B. 26; 24 Q. B. D. 60; 62 L. T. 583; assignment to him by the insolvent was valid, 18 W. R. 207.

## d. Actions for Acts done under Mandamus,

By Rules of Supreme Court, 1883. Ord, LHI.
r. 12, no action or proceeding shall be commenced
or prosecuted against any person of any thing
done in obedience to writ of mandamus issued by
the Supreme Court or any judge thereof.
The court, if it doubted whether a mandamus

The cont, if it doubted whether a mandamus should or should not be granted, would not direct it to issue merely in order that justices might make a return and be protected by the repealed 6 & 7 Vict. c. 67, s. 8, if a peremptory mandamus should issue and be obeyed. Reg. v. Durtmenth (Eurt), 5 Q. B. 878; 1 D. & M. 126.

The court will not grant a mandamus commanding justices of the peace to do an act which may render them liable to an action. Rev v. Buckinghamshire JJ., 2 D. & R. 689; 5 B. & C. 485. S. P., Rev v. Buckinghamshire JJ., 3 N. & M. 68,

Therefore, the court refused a mandamus to compel a magistrate to enforce a conviction, where it was doubtful whether such conviction was good for want of setting out the evidence on which it was grounded. Rev v. Braderip, 7 D. & R. 861; 5 B. & C. 239; 29 R. R. 229.

Also, to summon a person for not paying poorrates. Anon., 2 Chit. 257; 3 Bos. & P. 220.

Also, to make a warrant of distress for the

Also, to make a warrant of distress for the poor-rate. St. Luke's Purish v. Middlesew JJ., I Wils, 133.

The court will not grant a mandamus to magistrates to order them to issue warrants of distress to levy a poor-rate on certain persons who have refused to pay, unless those persons have been previously summoned by the justices. Heav. J.Bon. 6 Term Ren. 198.

#### e. Granting is Discretionary.

A writ of mandamus is a prerogative writ, and not a writ of right, and the granting of it is, that sense, discretionary. Hey, v. All Saints, Wigan, Chwecheardens, 1 App. Cas. 611; 35 L. T. 381; 25 W. R. 128. S. P. Rep. v. Peterborough Curporation, 44 L. J., Q. B. 85; 23 W. R.

The exercise of this discretion cannot be questioned, but the grant of a peremptory mandamus is a decision upon a right declaring what is and what is not lawful to be done, and such decision is subject to review. In.

## f. Refusal to do Act.

Always Necessary.]—A mandamus will not go, unless it is clear that there has been a direct refusal to do that which it is the object of the mandamus to enforce, either in terms or by circumstances, which districtly shew an intention in the party to withhold from doing the act required. Reav. Brechmoch and Aberqueening Chinal Co., 4 N. & M. 871; 3 A. & E. 217; 1 H. & W. 279.

The court directed a mandamus to go peremptorily in the first instance, commanding a gaoler to give up for burial the body of a debtor dead within the gaol, it being sworn that he refused to do so until a sum, claimed as a debt owing by the deceased for maintenance, was paid, Watheield (Bailiff), La re, 1 G. & D. 566; 5 Jur. 989. S. C., nom. Reg. v. Fisz, 2 Q. B. 246.

The court will not grant a mandamus unless does not lie to give effect to illegality. The it has been preceded by a distinct demand of court will not assist an illegal transaction in any

the specific thing the performance of which is the object of the mandamus, and by a refusal of performance, or conduct equivalent thereto. Rey. v. Bristal and Exeter Ry., 4 Q. B. 162; 3 G. & D. 384; 3 Isailw. Cas. 438; 12 L. J., Q. B. 106; 7 Jur. 233.

It is no ground of objection to a mandamus that a requisition is made on parties in the alternative to do one of three things, if the duty enjoined by act of parliament forms one of them, and there has been a general refusal to comply with such requisition. Rep. v. St. Margaret's, Leicester, Select Veerly, 1 P. & D. 116; S. A., & E., 889; 1 W., W. & H. 673.

A colourable adjoinnment of a question before

A colourable adjuntiment of a question before a vestry, under the pretence of waiting until the churchwardens had furnished estimates of the sum required for the repair of the churches, held to be equivalent to a positive refusal to make a rate. Ib.

See also sub-heads infra.

#### g. Other Points.

Jurisdiction of Queen's Bench Division. —A writ of mandamus under s. 25, sub-s. 8, of the Judicature Act, 1873, can only be obtained in a pending cause or matter; the prerogative write being preserved to the Queen's Bench Division by s. 34. Paris Skating Rink Ch., In vz. 46 L. J., Ch. 831, 6 Ch. D. 731, 25 W. R. 767. A local board, under the Public Health Act

A local board, under the Public Health Act 1875, causing a nuisance by any act which, independently of the statute, would have given a cause of action to any person, may be made liable in damages, or be restrained by injunction, unless they can show a justification under the powers of the statute. But if a local board do not act themselves to cause a nuisance, but neglect to perform their duty of providing a satisfactory and healthy system of drainage, it is no ground of action by an individual for damages or an injunction, but the remedy is by prerogative with of mandamus; and, semble, this jurisdiction, notwithstanding the 25th section of the Judicature Act, 1878, ought not to be excreized except by the Queen's Bench Division. (Bossop v. Reston Leads Bourd, 49 L. J., Ch. 89; 12 Ch. D. 102; 40 L. T. 781; 28 W. L. J., Ch. 885; 20 Ch. D. 595; 46 L. T. 573; 30 W. R. 579.

Second Application after Discharge of First—Fresh Materials.]—Where a rule for a mandamus to compel a corporation to perform a statutory duty has been discharged, on the ground that no demand and refusal have taken place, the court will not grant another rule for a mandamus for the same purpose, although a demand and refusal have taken place since the discharge of the former rule. Thompson, Exparte (§ Q. B. 721), followed. Reg. v. Badimis (Carporation, G. It. J., M. C. 151, [1893] 2 Q. B. 21; 66 L. T. 562; 40 W. R. 606; 56 J. P. 504.

Not Granted to Effect an Illegal Purpose.]—
The process of the court ought not to be made ancillary to a transaction which violates the law. The writ goes to inferior tribunals to oblige them to do such justice as the law enjoins. It is a writ emphatically in subsidium justitiae, and does not lie to give effect to illegality. The court will not assist an illegal transaction in any

way. It punishes the parties to the illegality deputies should be objected to, and notice in by refusing its aid, Reg. v. Littledule, 10 L. R.,

New Right Created by Statute.]-When a new right has been created by act of parliament, the proper method of enforcing it is by mandamus at common law. Simpson v. Scottish Union Fire and Life Insurance Co., 1 H. & M. 618; 32 L. J., Ch. 329; 9 Jur. (N.S.) 711; 8 L. T. 112; 11 W. R. 459.

Under the Building Act, 14 Geo. 3, c. 78, s, 83, a landlord may apply, by mandamus, to a court of common law, before the insurers have settled with the tenant, to have the money secured by a policy of insurance on a house within the bills of mortality, destroyed by fire, applied to the rebuilding of such house. Ib.

Where Option Given !- Where an act of parliament directs that, under certain circumstances, one or other of two things shall be done, the party to do the act has the option of doing which act he pleases; and a mandamus not giving such option, or not stating a sufficient reason why such option no longer exists, is bad in law. Reg. v. S. E. Ry., 4 H. L. Cas, 471: 17 Jur. 901.

Not Granted where Opinion of Court Asked. ] -By agreement between parties, an application was made for a mandamus, merely with a view to obtain the opinion of the court, whether, on the construction of a private act, the proceeding by mandamus was proper; the court stopped the argument, and declined to give any decision, Reg. v. Blackwall Ru., 9 D. P. C. 558.

Extension of Remedy-Parties Waiving Objection.]—The court is not justified in extending the remedy by mandamus to cases to which it does not by law extend, though the parties waive the objection. Reg. v. Treasury (Lords), 16 Q. B. 357; 20 L. J., Q. B. 305; 15 Jur. 767.

Where Writ would be Inoperative and not Beneficial. |-The court will not grant a mandamus, where issuing the writ would necessarily be inoperative, and could not be followed by any beneficial result, although it appears that the parties against whom it is sought had, upon the facts and circumstances before them, wrongfully refused to do the act required; but, in order to induce the court to withhold assistance on this ground, it must be satisfied that no benefit could possibly result from issuing the writ. Reg. v. Bridgeman, 2 New Sess. Cas. 232; 15 L. J., M. C. 44; 10 Jur, 159.

Act Ordered must be Possible. ]-The writ supposes the required act to be possible, and if it is shewn that the party has not the power to do the act commanded, the writ is bad. Reg. v. L. & N. W. Ry., 6 Railw. Cas, 634.

Inability through Want of Funds. ]-The court will not issue a mandamus against a public body when it is clearly shewn that the performance of the duty sought to be enforced is impossible, by reason of want of funds not involving any default on the part of such body. Bristol and North Someract Hy., In re, 47 L. J., Q. B., 48; 3 Q. B. D. 10; 37 L. T. 527; 26 W. R. 236.

Mistake of Law-Declining Jurisdiction.]-

writing should be given or delivered to the party objected to four days before the first meeting, it should be lawful for the deputies assembled at such meeting (exclusive of those objected to). and they were required to inquire into and determine the validity of such disputed election: Where proof was given, that notice of objection had been in due time served on the wife of the party objected to at his dwelling-house, and the meeting decided that personal service was essential, and refused to inquire into the election :-Held, that there had been a mistake of the law, and a declining of jurisdiction, and that consequently, a mandamus to inquire should be issued. Reg. v. Guodrich, 19 L. J., Q. B. 413; 14 Jur., 914; or Reg. v. Leicester Freemen, 15 O. B. 671.

Question of Fact.]—But where evidence was given of personal service of a notice upon the party objected to in due time, but the meeting disbelieved the witness, and decided that the disputed election was valid :-Held, that the deputies having decided upon a question of fact over which they had jurisdiction, their decision was final, and that the court could not interfere.

Application must be bona fide. ]-A general meeting of shareholders of a railway company resolved that the construction of the railway should be deferred, and that 14s, per share of the paid-up capital be returned to each shareholder. In pursuance of this resolution, 10s, per share were returned to and received by the shareholders, and the certificates of the shares were stamped with a statement to that effect. Subsequently, and after the powers of the company for the compulsory purchase of land had expired, A. purchased five shares from a shareholder who had assented to the resolution, and had received 10s, per share in respect of the shares. The father of A. had filed a bill in chancery against the company, to enforce the specific performance of an agreement for taking land for the purposes of the railway. Upon an application by A. for a mandamus for the secretary of the company to register the transfer deed of the shares:— Held, that he was not entitled to the writ. because he was not proceeding bona fide for the purpose of enforcing his rights as a shareholder; and as one of the public he had no interest in ascertaining how the funds of the company were distributed. Rog. v. Liverpool, Manchester and Newcastle-upon-Tyne Ry., 16 Jur. 949.

Order to do More than Statute Requires. ]-By a railway act, the company was required to make proper watering-places for cattle in all cases, where, by means of the railway, the cattle of any person occupying lands adjacent thereto should be deprived of access to their ancient watering-places, and to supply the same at all times with water. The railway was made through and intersected closes of M., in which there were ancient ponds or watering-places for cattle; and by means thereof the cattle, in portions of the closes, had been deprived of access to the ancient watering-places, and a mandamus issued, requiring the company to make proper watering-places in such portions of the closes respectively, which they refused to do:— Held, that the writ was erroneous, in ordering the company to do more than the act required, A statute provided that if the election of certain viz., to make a pond in each of the several

was nothing on the face of the writ to shew that one watering-place would not have been sufficient and proper for the whole of the severed portions, York and North Midland Ry. v. Milner, 15 L. J., Q. B. 379-Ex. Ch.

Mandamus and not Injunction the Remedy for Neglect of Public Duty.]—A local board, under the Public Health Act. 1875, causing a nuisance. by any act which, independently of the statute, would have given a cause of action to any person, may be made liable in damages, or be restrained by injunction, unless they can shew a justification under the powers of the statute. But if a local board do not act themselves to cause a misance, but neglect to perform their daty of providing a satisfactory and healthy system of drainage, it is no ground of action by an individual for damages or an injunction, but the remedy is by prerogative writ of mandamus: and semble, this jurisdiction, notwithstanding the 25th section of the Judicature Act, 1873, ought not to be exercised except by the Queen's Bench Division, Glassop v. Heston Local Board, 49 L. J., Ch. 89; 12 Ch. D. 102; 40 L. T. 736; 28 W. R. 111—C. A.

#### 2. In Particular Cases.

#### a. To the Privy Council.

A mandamus will not lie to the lords of the privy conneil, commanding them to receive a petition praying them to rehear a decision upon a case heard before and determined by them. upon an appeal from an ecclesiastical court to the judicial committee, instead of a court of delegates. Swith, Ex parte, 4 N. & M. 582; 1 H. & W. 282.

Where a case has been brought before the indicial committee of the privy council, on appeal from the Court of Arches, and the indicial committee has decided in favour of the appeal, at the same time retaining the principal cause, and ordering the unsuccessful party to appear absolutely, subject to the approbation of the king in council, which approbation has been afterwards given, the court cannot, on a suggestion of error in the decision, issue a mandamus to a privy council to receive a petition for a rehearing of the appeal. Ib. 3 A. & E. 719; 5 N. & M. 145; 1 H. & W. 417.

#### b. To Government Officers.

Servants of Crown merely or Superincumbent Duty. ]-A mandamus will not lie to the Crown, or its servants strictly as such, commanding it or them to pay over money, in its or their possession, in liquidation of claims on the Crown. De Bode, In re, 6 D. P. C. 776; 1 W. W. & H. 332.

Nor will a mandamns lie to the mere public depositaries of money, commanding the payment

by them of a sum in gross. Ib.

In the half-year ending the 31st of December, 1870, certain prosecutions took place at the assizes and quarter sessions of a county, and the costs were taxed by the proper officers under the orders of the respective courts, and the treasurer of the county paid the bills, and returned the bills, with the usual vouchers, to the treasury. The lords of the treasury had appointed officers

portions of the closes which had been cut off called the examiners of criminal law accounts, from the residue of such closes; and that there and these officers disallowed or reduced in amount and these officers disallowed or reduced in amount fifty-one of the items in the bills returned; and a rule nisi was then obtained for a mandamus to the lords of the treasury, commanding them to issue a treasury minute authorising the paymaster of civil contingencies to pay to the treasurer of the county the sums disallowed:—Held, that a mandamus would not lie, inasmuch as the lords of the treasury received the money, which was granted to her majesty, as servants of the Crown, and no duty was imposed upon them as between them and the persons to whom the money was payable. Reg. v. Treasury Commissioners, 41 L. J., Q. B. 178; L. R. 7 Q. B. 387; 26 L. T. 64; 20 W. R. 336; 12 Cox, C. C. 277.

The court will not grant a mandamus calling upon the lords commissioners of the treasury to pay a debt or claim unless they have admitted that they have received money granted by parliament for that specific purpose. Walmesley, Ex parte, 1 B. & S. 81; 7 Jur. (N.S.) 1010; 4 L. T. 242; 9 W. B. 599.

The lords of the treasury recommended a retired allowance to a public officer, and obtained a vote of parliament for a particular sum, which was received from time to time under the Appropriation Act, by the proper officer. In several letters written by their secretary, these facts were stated, and directions given as to the mode of obtaining payment. The lords of the treasury refused to give an authority to him to pay it over to the individual to whom it was granted, unless upon conditions to which he would not agree :— Held, first, that he had a legal right to the amount so recommended. Row v. Treasury Com-missioners, 5 N. & M. 589; 4 A. & E. 286; 1. H. & W. 533 : 5 L. J., K. B. 20.

Held, secondly, that the court would enforce payment by mandamus, inasmuch as the claimant had no other remedy, and as the writ was demanded not against the king but against officers into whose hands money had been paid under an act of parliament for the use of an individual.

Duty Imposed by Royal Warrant-Secretary of State for War.]—A mandamus will not lie against the Secretary of State for War to compel him to carry out the terms of a royal warrant regulating the pay and retiring allowances of the officers and soldiers of the army, inasmuch as no legal duty in relation to such officers and soldiers is imposed upon the Secretary of State either by statute or by common law. Reg. v. Secretary of State for War, 60 L. J., Q. B. 457; [1891] 2 Q. B. 326; 61 L. T. 764; 40 W. R. 5; 56 J. P. 105-C. A.

Superannuation Allowance or Pension. ]-A party to whom a superannuation allowance had been granted in pursuance of a treasury minute according to 5 Geo. 3, c. 117, in respect of an office held during pleasure, had no vested interest in such allowance; but the minute might be revoked at will by the lords of the treasury. Rew v. Treasury (Lords), 4 A. & E. 976; 6 N. & M.

The lords of the treasury granted, under 3 Geo. 4, c. 113 [repealed], a pension for life to a person whose office had been abolished. They afterwards, thinking they had no power to grant such a pension, revoked their warrant. The amount once appeared in the parliamentary estimates, because the item could not be withdrawn in time.

It was afterwards withdrawn, and no money was assessing compensation to the prosecutor for ever received from parliament on account of the the lands. Rey. v. Woods and Ebrests Commis-pension, the sum which had been once in the sinners, 17 L. J., Q. B. 341; 12 Jur. 915. estimates having been applied to the ways and estimates having been applied to the ways and means:—Held, that no mandamus could go to 9 & 10 Viet. c. 38, s. 15, that they intended to

Deductions having been made from a naval officer's half-pay, in parsuance of a general order from the admiralty, application was made on his behalf to have the amount of such deductious restored; and the lords of the admiralty stated, in answer, that they had given direction for restoring it. Afterwards they retracted their consent, giving as a reason, that it would subject them to many similar applications. After the officer's death, his administratrix moved for a mandamus to the lords of the admiralty to restore the deducted sums, on the ground that they had admitted the right to them, and the possession of applicable funds :- Fleld, that there was no vested right in the half-pay cutitling the administratrix to a mandamus. Ricketts, Ex parte, 6 N. & M. 523; 4 A. & E. 999.

The court will not grant a rule for a mandamus to the commissioners of excise, commanding them to assent to the appropriation of a part of an excise officer's pension, under 1 & 2 Vict. c. 110, s. 56. Reg. v. Excise Commissioners, Hayward, In re, 14 L. J., Q. B. 113: 9 Jur. 257. William the Fourth, in pursuance of 1 & 2

Will, 4, c. 11, granted to trustees for his consort Queen Adelaide an annuity of 100,000l., to commence on his decease, and continue during the life of her majesty, payable out of the Consolidated Fund, on the 13th March, 30th June, 30th September, and 31st December, by equal portions, His majesty died on 20th June, 1837. On 30th June the trustees received a full quarter's payment. This payment was made after consulting the law officers, who advised that the entire sum was due; and her majesty was informed of their advice. The quarterly payments were made up to and on the 30th September, 1849. Her majesty died on 2nd December, 1849. Her trustees applied for a proportionate part of the quarterly payment which would have become due on 31st December, 1849, if she had so long lived. On a rule nisi for a mandamus to the lords of the treasury to issue a warrant for this payment :- Held, that if the annuity had been apportionable and the sum due, mandanus was the proper remedy; and that the court would not, in the exercise of its discretion, make the refunding of what, on that supposition, would have been the overpayment on 30th June, 1837, a condition to the issning of the writ, there being no equity to require her majesty's representatives to restore a sum received under the bona fide belief that it was her own. Reg. v. Treasury Commissioners, 16 Q. B. 357; 20 L. J., Q. B. 305; 15 Jur. 767.

Order to Issue Warrant to Sheriff to Summon Jury.]-By 9 & 10 Vict. c. 38, the commissioners of woods were empowered to take lands for the purpose of forming Battersea Park, which were to be conveyed to the Queen, or to trustees on her behalf, and to form a royal park. The commissioners had given notice of their intention to take lands of the prosecutor, but had not taken them :- Held, that mandamus would lie to the commissioners, commanding them to issue their amounts certified by them to be overpaid. Reg.

the levels of the treasury to enforce payment of take lanks specified in the schedule to that act the pension. For N. Treasury Commissioners, 4 for the purpose of forming Battersea Park. One A. & E. 384 : 6 N. & M. 308 : 2 H. & W. 67. of the landowners obtained a mandamus to the commissioners to cause a jury to be summoned to assess compensation for his laud. On return (stating the proceedings at length, and shewing that the commissioners, in parsuance of the act, and on behalf of the Crown, gave the notices in order to ascertain whether the lands could be purchased for a sun limited by s. I, which, by the claims sent in, it appeared they could not) :-Held, that the commissioners, under the statute, were acting in a public capacity, and that the notice given by them did not constitute a quasi contract enforceable by a mandanus. Budge, En parte, 15 Q. B. 761; 19 L. J., Q. B. 497.

> Order to Pay Poor-rate. ]-The court will not grant a mandamus commanding the commissioners of woods to pay a poor-rate in respect of lands held by them under the Crown. Revee, Ex parte, 5 D. P. C. 668; W. W. & D. 64.

> Order to Customs to deliver up Goods. ]-The commissioners of customs refused to deliver up commissioners of designal retract to desire approximately and appearance of the contract of th damns to compel them to do so, as there was another remedy. Rev v. Customs Commissioners, 1 N. & P. 536; 5 A. & E. 880; 2 H. & W. 247;

> 6 L. J., M. C. 65. Nor will it lie to commissioners of customs to compel the delivery up of goods wrongfully detained by them after payment of the duty. Rew v. Customs Commissioners, 6 N. & M. 828.

## c. To Commissioners, &c.

Commissioners of Inland Revenue. - Sect. 23 of 5 & 6 Viet. c. 79, provides for the return by the commissioners of stamps and taxes of probate duty, on proof by oath and proper vouchers to their satisfaction of the payment of debts of the deceased, whereby the amount of probate duty payable on the estate is reduced below the amount which has been paid. By a subsequent act the commissioners of inland revenue are substituted for the commissioners of stamps and taxes. On an application by an administrator for a mandamus to the commissioners to pay to the applicant the amount of duty overpaid by him, on the ground that he had supplied evidence of overpayment, and had no other legal remedy: -Held, that the mandainns ought not to issue, for the statute created no duty between the commissioners and the applicant, whose remedy, if the decision of the commissioners could be Treasury Commissioners (4 A. & E. 286) disapproved of. Nathan, In re, or Roy, v. Inland therence Commissioners, 53 L. J., Q. B. 229; 12 Q. B. D. 461; 51 L. T. 46; 32 W. R. 543; 48 J. P. 452-C. A.

Income Tax Commissioners.]—Mandamus lies to compel the commissioners for special purposes of income tax to issue orders for repayment of warrant to the sheriff to summon a jury for v. Income Tax Commissioners, 57 L. J., Q. B. 513; 21 Q. B. D. 313; 59 L. T. 455; 36 W. R. | under a local act, neither on the application of a 776-C. A.

Or to grant an allowance in respect of rents and profits vested in trustees for charitable purposes, and to give a certificate for the allowance. with an order for the payment thereof. Income Tax Commissioners v. Pemsel, 61 L. J., Q. B. 265; [1891] A. C. 581; 65 L. T. 621; 55 J. P. 805-H. L. (E.) And see REVENUE.

Registrar of Joint Stock Companies.]—A writ of mandamus will lie against the registrar of joint stock companies, though an official of the Board of Trade, which is a committee of the privy council, if he refuse to perform a mere ministerial act which he is under a statutory obligation to perform—per Wills, J. Reg. v. Joint Stock Companies Registrar, 57 L. J., Q. B. 433; 21 Q. B. D. 131; 59 L. T. 67; 36 W. R. 185. 695 ; 52 J. P. 710.

To East India Company to Pay Officer.]—An officer commanding forces of the Queen and of the East India Company in India has no such legal right, by statute or otherwise, to his pay, as entitles him (in the absence of any specific undertaking or acknowledgment) to a mandamus calling upon the company to discharge arrears, though he has always received his pay from the company, and their practice has been to discharge it monthly. Appier, Exparte, 18 Q. B. 692; 21 L. J., Q. B. 332; 17 Jur. 380.

To Commissioners to Levy Rate. ]-A bill being introduced into parliament for the purpose of more effectually draining a particular district of level through another district, entirely within the jurisdiction of the commissioners of sewers for the county of Norfolk, acting under 3 & 4 Will. 4, c. 42, the commissioners, apprehending that the bill would, if passed, occasion an injury to the land within their jurisdiction, bona fide, and with discretion and prudenec, caused their clerk to take all reasonable and necessary steps for opposing the bill in parliament, and to prevent its passing, or to obtain the adoption of certain clauses, and thereby a considerable amount for costs and expenses had been incurred, and remained due to the clerk, who had since died: -Held, that his legal representatives were entitled to a mandamus directing the commissioners to levy a rate on the land within their jurisdietion, under 4 & 5 Vict. c. 45, and to pay off the amount due for such costs and expenses. Norfolk Sewers Commissioners, 20 L. J., Q. B. 121.

Where B. paid a special rate, erroneously and illegally imposed by a board of health, and five years afterwards, having discovered the mistake, commenced an action against the board for the recovery of the money so paid, obtained judgment, and afterwards sned the board upon the judgment, demanding a mandamus to them to make and levy a rate under the 11 & 12 Viet. c. 63, for the purpose of satisfying the judgment : -Held, that (assuming the sum recovered to be a charge within s. 89) B. was not entitled to a mandamus, masmuch as the action upon which the judgment proceeded was not commenced within six months from the date of the charge. Burland v. Kingston-upon-Hall Local Board, 3 B. & S. 371; 32 L. J., Q. B. 17; 9 Jur. (N.S.) 275; 7 L. T. 316; 11 W. R. 33.

To Execute Works.]—The court will not

eompany, ordering them to perform a contract made with the company, nor on the application of certain ratepayers, ordering them to provide for the execution of the powers under the act, where no inconvenience is being suffered by the inhabitants. Reg. v. Cheltenham Commissioners of Paring, 4 Jur. 1060.

To Arbitrators.]—A mandamus lies to two arbitrators to appoint an ampire under a canal act. Rew v. Goodrich, 2 Smith, 388.

But not to execute first one particular part of a power granted by act of parliament. Rex v. Birmingham Canal Co., 2 W. Bl. 708.

To Trustees of Charity.]—Mandamus refused to the trustees of the Rugby charity to compel the payment of increased alms to claimants on the funds, although the applicants were at an advanced age, and would probably be dead before relief could be had in chancery. Rughy Charity Trustees, Ex parte, 9 D. & R. 214. And see next sub-head.

## d. To Parish Officers.

To Make Rate.]—A mandamus will not be granted to overseers of the poor, to make a rate, without first appealing to the sessions. Rew v. Canterbury, 4 Bnrr. 2290; 1 W. Bl. 667.

Nor to collect a rate. Rew v. Norwich Overseers, Nolan, 28.

The court will grant a mandamus to commissioners, entrusted by act of parliament with the regulation of the expenditure of a parish, to compel them to levy a rate for the purpose of paying off a sum borrowed on the rates by paying on a sam borrowed on the races by former commissioners, without pledging their personal responsibility. Rew v. St. Paul, Shadwell, Commissioners, I M. & Ry. 591.

A local act required a select vestry from time to time to make rates for the relief of the poor, and also for the support and repair of churches, and ratepayers were empowered to appeal to the vestry and also to the quarter sessions. It was also provided, that nothing in the act contained should avoid any ecclesiastical law, or in any manner interfere with persons having ecclesiastical jurisdiction over the parish: -Held, 1. that notwithstanding this saving of ecclesiastical rights, the court had jurisdiction to issue a mandamus to compel the vestry to make such a rate for the repair of the churches. 2. That a general refusal to do any of two things, one of which the vestry was required to do by act of parliament, was sufficient to entitle the churchwardens to a mandamus. 3. That a eolourable adjournment of the question, under the pretence of waiting until the churchwardens had furnished estimates of the sum of money which would be required for the repair of the churches, was equivalent to a positive refusal to make a rate. Reg. v. St. Marguret's, Leicester, Select Vestry, 1 P. & D. 116; 8 A. & E. 889; 4 W. W. & H. 673.

To Inspect Accounts. ]-Where a party applies for a mandamus to compel churchwardens to allow him to inspect their accounts according to the direction of the 17 Geo. 2, c. 38, he must To Execute Works.]—The court will not | see the accounts. Rex v. Clear, 7 D. & H. 393; grant a mandamus to commissioners appointed | 4 B. & C. 899; 4 L. J. (0.8) K. B. 52; 28 R. R. state some special reason for which he wishes to

There is no general unqualified right on the from the churchwardens' books of accounts. To entitle a ratepayer to a mandamns to compel such inspection, some special and public ground must be shewn. *Briggs, Ex. parte*, 1 El. & El. 881; 28 L. J., Q. B. 272; 7 W. R. 445.

To Deliver over Documents.]-A mandamus will lie against the old overseers to compel them to deliver their public books and papers to their successors. Puse v. Clapham, 1 Wils. 305.

But not to churchwardens to deliver a vestry book to the vestry clerk. Anon., 2 Chit. 255.

An assistant overseer, after the expiration of his office, having refused to deliver up the parochial books to the existing overseers, they applied to two instices under the statute, but the justices refused to interfere. The court granted a mandamus to compel the assistant overseer to deliver up the books. Reg. v. Fox, 1 W. W. & H. 4.

To Make Sewer-Discretion of Vestry. ]-A vestry of a parish comprised within the Metropolis Management Act, 1855, 18 & 19 Vict, c. 120, having obtained the necessary approval of the Metropolitan Board of Works to the construction by them of such sewers as may be requisite for the drainage of the parish, has, under that section, a discretion with respect to the exigencies of one portion of the parish as compared with others, and is entitled to a reasonable time for the beginning and completion of the works; and a mandamus ordering the immediate construction of sewers in a particular part of the parish is defective, unless it shews on the part of the vestry a present duty, and a non-compliance therewith. Rey. v. St. Luke's, Chelsea, 1 B. & S. 903; 31 L. J., Q. B. 50; 8 Jur. (N.S.) 308; 5 L. T. 744; 10 W. R. 293.

To Receive Pauper. ]-The court will not grant a mandamus, requiring parish officers to receive a pauper, in obedience to an order of removal. The proper course is by indictment. Dawnton Overseers, Exparte, 8 El. & Bl. 856; 27 L. J., M. C. 281; 6 W. R. 224.

To fix Hours of Vestry Meetings. ]-The viear and churchwardens of a parish have power to fix the hour of holding vestry meetings, and the parishioners cannot by mandanus compel them to after it. Reg. v. Wilson or Tattenham (Teer), 49 L. J., Q. B. 870; 48 L. T. 560; 45 J. P. 140—C. A. Affirning 4 Q. B. D. 357; 27 W. R. 550.

#### e. To Companies.

To Pay Purchase Money into Bank. - Where a local improvement act enabled a company to purchase lands, and contained the usual clauses for a compensation jury; and also enacted, that, in case the person to whom the compensation should be awarded should not be able to make a good title to the premises, it should be lawful for the company to pay the money into the Bank of England in the name of the accountant-general: -Held, that when the company, after an award made (in consequence of a difference as to the purchase-money), had objected to the title of the purchaser, the purchaser was not entitled to a mandamus to the company to pay the purchasemoney into the bank, unless he distinctly shewed to the court that he could not make a good title, Reg. v Deptford Pier Co., 1 P. & D. 128; 8 A. & E. 910.

An award having been made of a sum of money part of ratepayers to inspect and take extracts to be paid to a claimant by a railway company under the Lands Clauses Act, a mandamus will be granted against the company to compel them to deposit the amount awarded into a bank, Barnett v. G. E. Ry., 18 L. T. 408; 16 W. R. 793,

> To Compel Company to Summon Jury to Assess Compensation. —Where a railway company took part of a person's land, and constructed part of a railway on it, and damaged the remainder of his property which adjoined, and then, two years afterwards, after an apparent delay on the part of the company in giving compensation, and summoning a jury to assess compensation, they stated that they were about to do more works, which would further injure the property, the court refused to grant a mandamus to compel the. company to summon a jury to assess compensation, it appearing that the company was acting bona fide, and that the additional works were in actual progress. Parkes, Expurte, 9 D. P. C. 614; 1 W. P. C. 158; 10 L. J., Q. B. 359; 5 Jur. 435, Where an inquisition has been duly held before

> the sheriff to assess damages in pursuance of a precept issued by a railway company under their act, which provided that such verdict should be final, the court refused a mandamus to compel the issning of a new precept, though made on the ground of misdirection, of the improper rejection of evidence, of the verdiet being against evidence, and the damages grossly insufficient. Reg. v. and the damages grossly insumeent. May, V. Eustern Counties Ry, 3 Railw. Cas. 466; 2 D. (N.S.) 945; 12 L. J., Q. B. 271; 7 Jur. 628.
> Where an act constituting a company entitles

> individuals to compensation for injury occasioned by the works of the company, the court will issue a mandamus to the company to cause a jury to be summoned to try the two questions-whether any, and what extent of damage has been done. Reg. v. Birmingham Canal Co., 4 Jur. 193. See Reg. v. North Union Ry., 1 Railw. Cas. 729.

> Where an act constituting a company entitles individuals to compensation for damages sustained by reason of the works anthorised by the act, the court will issue a mandamus to the company to cause a jury to be summoned; and the company may, in their return, deny that the damage has been caused by their works ; whereupon an issue will be directed, or they may contend that the injury is not one for which the act provides compensation. Reg. v. Eastern Counties Ry., 5 Jur. 365.

> Under a railway act, which gave power to divert rivers, watercourses, &c., a company had raised the level of a brook, into which the sough of a coal mine had been accustomed to empty itself, and thereby eaused the water of the brook to flow into the sough, and innudate and stop the coal works. Upon the owner of them applying for a mandamus for a jury to ascertain and compensate him for the injury done to his works by such diverting of the brook, which was opposed by the company on the ground that, on the claimant's remoustrance they had restored the brook to its former level, and that no damage had been done by the alteration, such stoppage having been frequently caused by floods before : -Held, that it was a question for a jury to ascertain whether any damage had been done to the claimant; and that his alleging that he was injured by the diverting (i.e. altering the level) of the brook, was sufficient to induce the court to grant a mandamus. Reg. v. North Midland Ru., 2 Railw. Cas. 1.

To Pay Compensation.]—Where under a com- of certain closes, parts of which, after the underpensation clause in a local act a jury had been summoned, and had assessed the compensation, but the company refused to pay the same or the costs :- Held, that a mandamus lay to enforce the performance, though the statute made the werdlet and judgment records of the quarter sessions. Rew v. Nottingham Old Waterworks Co., 6 A. & E. 355; 1 N. & P. 480; 6 L. J. K. B. See Reg. v. London and Blackwall Ry., 3 D. & L. 899; 4 Railw. Cas. 110; 15 L. J., Q. B. 42.

To do Works. - Where a railway was made under the authority of an act of parliament, by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of the same; the company having afterwards taken up the railway :- Held, that a mandamns might issue to compel the company to reinstate and lay down again the railway. Rew v. Severn and Wye Ry., 2 B. & Ald, 646.

A mandamns will not lie to compel a railway company to construct a bridge in lien of a level crossing pursuant to an order of the Board of Trade where it appears that the company is wholly without funds, and has not the means of providing the money required for that purpose. Bristol and North Somerset Ry., In rc, 47 L.J., Q.B. 48; 3 Q.B. D. 10; 37 L.T. 527; 26 W.R. 236.

Where an act empowers a company to execute works, and prescribes the manner in which they shall be done, a party wishing to enforce the proper execution by mandamus must, after the work is completed, specifically require the company to perform these things which according to his view the act enjoins. Iley. v. Bristal and Exerter Eq., 4 Q. B. 162; 8 (s. E. 284; 8 Railw. Cas. 438; 12 J. J. Q. B. 106; 7 Jur. 233.

Unless such demand is made after completion of the work, and compliance is refused in terms or virtually, a mandamus will not be granted, though the statute has been probably disobeyed, and though it assigned a limited time for the performance, which time has elapsed. Ib.

To Reinstate Railway. |- Mandamus refused to compel railway company to reinstate railway let down by owner of subjacent minerals excavating the same, Reg. v. G. W. Rg., 62 L. J., Q. B. 572; 9 R. 127; 69 L. T. 572.

To Repair Works. ]-A dock company was required by statute to make and maintain a new course for a river, with equal depth and breadth at the bottom, and with equal inclination of the sides, to the former course. The company made the new channel accordingly: - Held, that the company was bound to repair the banks of it generally; and that a mandamus would lie to enforce such repair, although there might be a remedy by indictment. Reg. v. Bristol Dock Co., 2 Q. B. 64; 2 Railw. Cas. 599; 1 G. & D. 286; 6 Jur. 216.

A company was authorised by act of parliament to make, complete, and maintain a new course or channel for a river, the same to be of equal depth and breadth at the bottom, and of equal inclination at the sides, with the old course or channel. They were also required to make compensation to persons interested in any houses and lands injured by means of the execution of that it is a reasonable and proper of the powers thereby granted. The company, for London and St. Katherine Ducks (6) the purpose of their works, purchased the entirety | Q. B. 4; 31 L. T. 588; 23 W. R. 136.

taking was completed, they sold in lots. the conditions of sale was, that a strip of land, lying between the lots and the new channel of the river, should be for ever left open as a public road. This road was afterwards adopted and repaired by the parish; but a portion of it having given way, in consequence of the action of the tide causing a slip in the bank (whereby the inclination of the sides of the new channel became altered), the owners and occupiers of houses built upon the lots since the sale called npon the company to repair the bank, which they refused to do. On an application by the Corporation of Bristol, who are conservators of the river, on affidavits stating these facts, and also stating apprehensions of injury to the navigation, though not shewing any actual impediment caused thereto, the court granted a mandamus to compel the company to repair and maintain the bank. Reg. v. Bristol Dock Co. 1 Railw. Cas. 548.

To Produce Accounts. ]-A mandamus will not lie to a trading corporation, at the instance of one of its members, to compel them to produce their accounts, for the purpose of declaring a dividend of the profits. Rew v. Bank of England, 2 B. & Ald. 620.

To Transfer Stock. ]—Nor to the Bank of England to transfer stock, because there is a remedy by an action if they refuse. Rev v. Bank of England, 2 Doug. 524.

Nor to an insurance company to transfer shares standing in the name of a bankrupt into the names of his assignees. Rev v. London Ansurance Co., 1 D. & R. 510; 5 B. & Ald. 899.

To Company to Register Shareholders, -A prerogative writ of mandamus will not lie to compel a company to register as a holder of shares therein, a person to whom they have issued certificates in respect of such shares where the company have issued prior certificates in respect of such shares to someone else, without clear proof that the person to whom the last certificates were issued had a better title than the person to whom the earlier ones were issued, even though the person holding the earlier certificates has not been entered in the company's register as the holder of such shares. Reg. v. Charmwood Forest Ry., Cab. & E. 419.

To Register Married Woman's Shares. ]-Upon the application of a married woman under s. 4 of the Married Women's Property Act, 1870 (repealed), that shares in a joint-stock company may be registered in her name as a married woman entitled to her separate use, it is the duty of the company to investigate and recognise hertitle, and a mandamus to enforce the performance of this duty will be granted by the court. Reg. v. Carnatic Ry., 42 L. J., Q. B. 169; L. R. 8 Q. B. 299; 28 L. T. 413; 21 W. R. 621.

To Inspect Books of Companies. When the inspection of the books of a company by a shareholder would cause inconvenience to the company, and might injure third parties, the court will not grant a mandamus to compel the production of the books, unless the applicant discloses his object in seeking inspection, and shews that it is a reasonable and proper one. Reg. v. London and St. Katherine Docks (b., 44 L. J.,

To Pay Judgment. ]-By a statute a company was established, with power to make calls and to sue and be sued in the name of their treasurer or any director. An action was brought against the treasurer, and judgment entered up against the company, who appeared to have no assets. The court refused to issue a mandamus commanding the company to pay the sum recovered and costs. Reg. v. Victoria Park Co., 4 P. & D. 639; 1 Q. B. 288.

A company was incorporated by act of parliament, which directed that all actions against the company should be prosecuted against the the company should be prosecuted against the treasurer or a director for the time being; but that the body or goods, lands, &c., of such treasurer or director should not, by reason of his being defendant in such action be liable to execution. An action having been brought by C. against the treasurer as such, and another by the company, in the name of the treasurer, against C., all matters in difference were referred to an arbitrator, who awarded that C. had cause of action against the defendant as such treasurer, for a certain sum, and directed that the treasurer should pay to C, that sum on demand; and as to the other suit, he awarded that the treasurer, as such, had no cause of action, and ordered him, as such treasurer, to pay C, the costs on demand :- Held, that a mandamus would lie to the treasurer and directors, commanding them to pay the sums awarded. Rev. v. St. Katherine Docks Co., 4 B. & Ad. 360; 1 N & M 121

not grant a mandanus commanding a railway company to take the seal off the register of shareholders, on a suggestion that it was affixed without authority, and contrary to the 8 & 9 Viet. c. 16 (the Companies Clauses Act), ss. 9, 66, 75, 90. Nash. Experte, 15 Q. B. 92; 19 L. J., Q. B. 296; 14 Jun. 574.

mandamus was refused to compel a railway company to convey goods along the railway, where they had agreed with some carriers to carry their goods to the exclusion of all others, it not appearing that they were compelled by their act of incorporation to convey all goods offered for. conveyance. Robins, Ex parte, 7 D. P. C. 566;
1 W. W. & H. 578;
3 Jur. 103.

## f. To Municipal Corporations.

## i. To Insert Name on Burgess Roll.

Practice. - A rule calling upon a mayor to shew cause why a mandanins should not issue, commanding him to insert the name of a person on the burgess roll, is nisi only. Reg. v. Hartle-pool Corporation, 2 L. M. & P. 666, n.

The court will make absolute a rule for a mandamus to insert a name on the burgess roll, although the year for which such burgess roll was made has expired since the granting of the rule nisi, and the mayor is dead to whom the rate mas, and the imposs the description of though he was not a corporator. Rec v. in the first instance. Rep. v. Epp. Corporation, Hastings Corporation, 1 D. & B. 148; 5 B. & Ald. 2 P. & D. 348; 9 A. & E. 670; 8 L.J. Q. B. 1.12; 1632, n.; 24 H. B. 657. 8 P. A. Rev. | Havering the state of the state of

Where a company had declined to produce | Where the overseers of one of several parishes any book except the ledger;—Held, that this in a borough omitted to make out the burgess any book except the tedger:—rank, that this borough unitiest to make our the burgess was wrong, but that the shareholder was not like required by the repealed Municipal Gropper burger times Act, 1835, 5 & 6 Will. 4. 6. 76, s. 15, so that his object. Th. list in which the name of a claimant for that parish could be inserted :- Held, that this intermediate defect in his title to be on the general burgess roll, which was made up of the several parish lists, did not preclude the court from issuing a mandamus for the insertion of his name. Reg. v. Liehtfield Corporation, 1 G. & D. 28: 1 Q. B. 453: 10 L. J., Q. B. 171: 5 Jur. 889. Such a mandamus is not peremptory in the first instance. Ib.

> Onus of Proof. - Where a party, whose name has been expunged from the burgess roll by the mayor on revision, applies to the court for a mandamns to replace it, the court is bound to inquire into his title. It is not, therefore, sufficient for him to show that his name was inserted by the overseers, and was expunged by the mayor, on an objection which, for want of legal notice under 5 & 6 Will. 4, c. 76, s. 17 (as the party alleges), ought not to have been heard. Reg. v. Harwish Corporation, 8 A. & E. 919; 1 P. & D. 134; 1 W. W. & H. 611.

> Return. ]-A householder of a borough had his name inserted by the overseers of a parish, within the borough, on the burgess list of the parish, which was signed by the overseers. The mayor struck off his name, without any objection having been made to it, but did not reject the list. A mandanus having issued, commanding the mayor to insert the name on the burgess roll, the return alleged that the burgess list was not signed by the churchwardens, or either of them :

-Held, that the mayor having acted on the list, To take Seal off Register.]—The court will be grant a mandanns commanding a railway of take the seal off the register of Affirmed 11 Q. B. 260; 17 L. J., M. C. 75; 12 Jur. 334-Ex. Ch.

## ii. Other Matters.

User of Guildhall.]-The bailiffs of a borough To compel Company to Convey Goods.]-A had been time immemorial lords of the manor and owners of the guildhall within the borough, and by a charter of Philip & Mary power was granted to them to hold manor courts in the guildhall twice in every year, as of ancient time, and, until 1810, such courts had been immemorially held. In that year commissioners under an inclosure act awarded to Lord H, all the manor with the rights, courts, &c., excepting to the bailiffs and burgesses the guildhall :—Held, that this exception did not exclude the new lord's right to hold his manor courts in the guildhall. Ilew v. Ilchester, 4 D. & R. 324; 2 B. & C. 764; 2 L. J. (0.8.) K. B. 147.

> To hold Court.]—If there are words of permission in a charter, to do an act which is clearly for the public benefit, they are obligatory ; therefore, where a charter declared that the mayor and jurats of an ancient town might hold a court of record for the holding of pleas, but which had been long disused, the court granted a mandamus to compel such court to be held, at the instance of an inhabitant of the town,

B. & Ald. 691; 24 R. R. 532.

Where a charter is granted to a corporation to hold a court for the trial of causes, the disuse of that court for 200 years, and the want of funds to hold it, are no answer to a rule for a mandamus commanding them to hold it. Rew v. Wells Corporation, 4 D. P. C. 562.

To Pay over Money.]-A controversy existing in a corporation between the freemen under an old charter, and the town council under 5 & 6 Will. 4, c. 76, as to the exclusive right of the former to some corporation property to their own private use, a public meeting of the freemen was held, and a resolution was carried at the instance of A., a freeman, that the rents should be paid into the hands of the defendant, to wait nutil the claim of the freemen should be The rents having been so paid, and a rule nisi having been obtained by A., as a freeman and a burgess and an inhabitant of the borough, liable to contribute to the borough rate, for a mandamus to the defendant to pay the money over into the hands of the treasurer of the borough, the court discharged the rule. Reg. v. Frust, 1 P. & D. 75; 8 A. & E. 822; 1 W. W. & H. 664; 2 Jur. 966.

The lords commissioners of the treasury were held to be entitled to a peremptory mandamus compelling a borough treasurer to repay to them the amount of remmeration and allowances out of the borough fund or rate, which had been paid to a barrister who had tried a municipal election petition, and compelling the corporation to order such amount to be levied by a borough rate. Reg. v. Maidenhead Corporation, 51 L. J., Q. B. 444; 9 Q. B. D. 494; 46 J. P. 724—C. A.

To Appoint Deputy.]—A mandamus will not lie to appoint a general deputy under a by-law, although it requires that the under-steward, or his sufficient deputy, shall be attendant at every court to discharge the duties of his office. Rev. v. Gravesend Carporation, 4 D. & R. 117; 2 B. & C. 602; 2 L. J. (o.s.) K. B. 94.

To Deliver up Mace.]—A serjeant of mace to a corporation being discharged from his office, refused to deliver up the mace to his successor : Held, that no mandanus would lie to compel him to do so. Reg. v. Todd, 2 Jur. 365.

To Pharmaceutical Society.]-Mandamus to Pharmaceutical Society to carry out the provisions of the Pharmacy Act, 1852, 15 & 16 Vict. Reg. v. The Pharmaceutical Society. 2 W. R. 220.

## g. To Justices. i. Generally.

Declining Jurisdiction.]—A railway act en-acted that the company shall not be obliged, nor any justice allowed to receive or take notice of any complaint for any loss or injury sustained in consequence of the execution of the powers of the act, unless notice in writing shall have been given by the complainant to the company within six months after the time of such loss or injury. And that, in case of differences between the company and owners of property, as to the amount of damage done thereto by the company, the same shall (when the claim does not exceed 20%) be determined by two justices. A subse-

atte-Bower (Steward), 2 D. & R. 176, n.; 5 company for temporary purposes, enacted that B. & Ald. 691; 24 R. R. 532. tained in like manner by the justices, whatever may be the amount claimed:—Held, that the notice required by the first act did not apply to cases before the justices. And, therefore, where a justice had dismissed a complaint for want of proof of such notice, the court granted a mandamus, calling upon him to hear and determine the complaint. Reg. v. Bingham, 4 Q. B. 877; 3 Railw. Cas. 390.

Mandamus commanding justices to hear and adjudicate on a complaint by overseers that a pauper was chargeable to and ought to be removed from their township. The return shewed that the justices had received and begun to hear the complaint, and that in the course of the investigation it appeared that the pauper was chargeable to the township, and resided continuously in the township for ten years before the application, and during six of these ten years (before the passing of the Poor Removal Act, 1846, 9 & 10 Vict. c. 66), had received parochial relief, and the justices thereupon decided that the pauper was irre-movable:—Held, that the return was a sufficient answer, as it showed that the justices had not declined to exercise their jurisdiction, but had exercised it, though erroneously. Rog. v. Blan-shard, 13 Q. B. 318; 18 L. J., M. C. 110.

Under the Justices Protection Act, 1848, 11 & 12 Vict. e. 44, s. 5, it is only when justices would need protection if they proceeded to do "any act relating to the daties of their office," that a rule, calling upon them to shew cause why such act should not be done, can be granted. Reg. v. Percy, 43 L. J., M. C. 45; L. R. 9 Q. B. 64; 22 W. R. 72.

Therefore, when justices had refused to hear a summons against a person for having a board over his door, stating that he was liceused to retail beer, he not being so licensed, contrary to the Licensing Act, 1872, 35 & 36 Vict. c. 74, s. 11, the court refused a rule against the justices under the Justices Protection Act, 1848, 11 & 12 Vict.

c, 44, but granted a rule for a mandamus. Ib. Au information having been laid against P. under the 51st section of the Highway Act, 1864 (27 & 28 Viet. c. 101), for encroaching on a highway, the justices decided on evidence given that a claim of right set up by P. to the land alleged to have been encroached upon by him was bona fide, and thereupon refused to hear the case on the ground of want of jurisdiction. The complainant having applied under the 5th section of the Justices Protection Act, 1848, 11 & 12 Vict. c. 44, for a rule for the justices to shew cause why they should not hear and determine the case :-Held, that the application was properly made, the statute not being limited to cases in which the justices need protection in the performance of their duties. Reg. v. Phillimore, or Pilling, 51 L. T. 205; 14 Q. B. D. 474, n.; 32 W. R. 593; 48 J. P. 774.

Forcible Entry. ]-The court refused to grant a mandamns to compel the magistrates to hear a complaint and act summarily under the statutes relating to forcible entry and detainer. Dury, Ex parte, 2 D. (N.S.) 24.

Refusal to Issue Summons.]—Where a magistrate has refused a summons on the ground that the information does not disclose an indictable offence, the High Court of Justice has no jurisquent act, in all cases of land occupied by the diction to review his decision, either as to law or

as to fact, and therefore in such a case a rule, considered the question one of fact :- Held, Vict. c. 44, s. 5, calling upon the magistrate to shave cause why he should not hear and determine the ambilication for a small control whether the lane was a "street". mine the application for a summons will not be granted. Leads, En parts 57 L.J., M. C. 108; magistrate could not be compelled to state a 21 Q. B. D. 192; 59 L. 7. 388; 37 W. R. 18; 59 cess. Rey. v. Shell, 50 L. T. 590; 49 J. P. 68 J. P. 773.

Where justices entertain an application for a summons for a criminal offence, and have considered the materials on which the application is based, and refused to hear more, or to grant the summons, the High Court will not interfere by mandamus to order them to hear it again. MucMuhon, Ex Parte, 48 J. P. O. If on application to justices for a summons for

an indictable offence, they have heard and determined the application, and, on the merits, have declined to grant it, the court will not grant a mandamus to compel them to review their decision. Seens, if they have refused to hear the application, or if, after hearing, have refused to grant it from a mistaken view of their duty, amounting to a declining of jurisdiction. Rey. v. Fawcett, 11 Cox. C. C. 305.

- Discretion—Vexatious Indictments Act.] -A mandamus will not be granted to interfere with the discretion of a magistrate who has refused to issue a summons for perjury on an information setting forth facts upon which no jury could convict. The provisions of a 2 of the Vexatious Indictments Act, 1859, 22 & 23 Vict. c. 17, s. 2, requiring a magistrate to bind over the prosecutor to prosecute, only apply where a charge or complaint has been made, and the person charged has been before the magistrate. Reid, Ex parts, 49 J. P. 600.

Refusal to take Recognizance under Vexatious Indictments Act.]—If a justice hear an applica-tion under the Vexatious Indictments Act, and dismiss it for want of evidence, this is equivalent to a refusal to commit the defendant, and a mandamus will be directed, Reg. v. London Corporation, 54 L. T. 646; 50 J. P. 711; 16 Cox.

After Adjudication-Rejection of Admissible Evidence.]—The court will not direct a mandamus to issue to compel justices to hear and determine a case upon which after hearing evidence they have adjudicated, though at the hearing they had rejected certain evidence which was properly admissible. Reg. v. Yorkshire JJ., Gill, Ex parte, 53 L. T. 728; 34 W. R. 108.

Rule or Mandamus.]—A rule under s. 5 of the Justices Protection Act, 1848, and a rule for a mandamns, calling upon justices to shew cause why they should not proceed to hear and determine the matter of an application for a summons are concurrent remedies. A rule under the 5th section of the act is not confined to cases where the justices need protection in doing any act relating to their duties. Reg. v. Biron, 54 L. J., M. C. 77; 14 Q. B. D. 474; 51 L. T. 429; 49 J. P. 68.

To State Case—Question of Fact.]—In pro-ceedings taken by the Fulham Board of Works for the paving of a lane as a "new street," within the meaning of the Metropolis Management Acts, the magistrate held that the lane was not a "street" within the meaning of the acts, and refused to state a case under the Summary Jurisdiction Act, 1857, 20 & 21 Vict. c. 43, as he rule calling upon justices to shew cause why a

#### ii. To Issue Distress Warrants.

It is the constant practice to call upon magistrates by mandamus to grant a distress warrant for levying a poor rate. Reg. v. Cheek. 11 Jur. 86, n.

Refusal to Issue Warrants for Recovery of Rates. - Where an application for a distress warrant for nonpayment of rates is refused by the magistrate on the ground that an appeal is pending from the assessment:-Held, that the application for a mandamus was properly made under the Justices Protection Act, 1848, 11 & 12 Vict. c. 44, s. 5, the issue of the warrant being a merely ministerial and not a judicial act. Reg. v. Marsham, 50 L. T. 142; 32 W. R. 157; 48 J. P. 308—C. A.

It is no objection to a rule for a mandamus to justices, to issue their warrant of distress for the levy of poor rates, that it includes two separate and distinct rates. Reg. v. Ellis, 2 D. (N.S.) 361: 12 L. J., M. C. 20: 7 Jur. 108.

Where there is no appeal given against an order of justices for expenses of a pauper, the justices are bound to enforce it, and in the event of their refusing, the court will grant a mandamus for a distress warrant. Reg. v. North Riding of Yorkshire JJ., 31 L. J., M. C. 189; 6 L. T. 351.

Indemnity. - Where, in an answer to an application for a mandamus against magistrates, commanding them to issue distress warrants to levy a poor rate, it was suggested that the warrants would have to be executed within Hampton Court Palace, and that the officers of the Crown claimed that the property was exempt from the operation of such warrants, and threatened proceedings if they were executed; the court nevertheless granted the writ, and refused to call upon the applicant parish to give the magistrates an indemnity against the consequences of any proceedings which might be taken. Reg. v. Middlesex JJ., 2 D. (N.S.) 385.

So, where the court had decided that certain property was rateable, and the justices nevertheless refused to issue a warrant of distress unless an indemnity was offered, the court granted a mandamus. Rey. v. Middlesev JJ., 12 L. J., mandamus. Reg. v. M. C. 36: 7 Jur. 259.

Discretion of Court. ]-The court has a discretion as to granting a mandamus to justices to issue a warrant of distress or commitment against a person summarily convicted by them.

Thomas, Ex parte, 9 Q. B. 976; 2 New Sess.
Cas. 570; 16 L. J., M. C. 57; 11 Jun. 107.

Legal Act-No other Remedy. |-On motion for a mandamus to justices to issue a warrant to distrain for a poor rate, it must appear clearly to the court that the warrant would be legal, and that the parties applying have no other remedy to enforce the rate. \*\*Rew v. \*\*Hall\*, 1 H. & W. 83.

#### iii. Practice.

Rule to what Court. ]-An application for a

Jurisdiction Act, 1857, 20 & 21 Vict. c. 43, should be made to the Court of Queen's Bench Division. and not to the Divisional Court of Appeal. Ellershaw, In re. Longbottom, Ex parte, 45 L. J., M. C. 163; 1 Q. B. D. 481.

Whether absolute in First Instance. -The rule for a mandamus to justices to bear a charge against a person brought before them is not a rule absolute in the first instance. Reg. v. Inghum, 3 New Sess, Cas. 689.

But a rule for a mandamus to justices to allow a poor rate is absolute in the first instance. Reg. v. Godolphin (Lord), 1 D. & L. 830: 13 L. J., M. C. 57; 8 Jur. 574.

What Justices should be Parties. ]-If certain magistrates, attending at special sessions, do not take part in a decision of the sessions, they ought not to be brought before the court on an application for a mandamus in respect of that decision. Reg. v. Wiltshire JJ., 8 D. P. C. 717; 4 Jur. 460.

Although there are more than two magistrates at petty sessions, all of whom take part in a decision, by which the issuing of a distress warrant to levy poor rates is refused, it is not necessary that upon an application for a mandamus all who were present and took part in the decision, should be included in the rule; but if the court saw that any two had been selected, or that any of the justices so acting had been omitted for any improper purpose, all would be required to be joined. \*\* *Hoy.* v. *Ellis*, 2 D. (N.S.) 361: 12 L. J., M. C. 20: 7 Jur. 108.

Where upon an application for a mandamns to justices, to issue their warrant of distress to levy a poor rate, it appeared that the property, in re-spect of which the rate was sought to be obtained. was trust property, left by a testator for the purpose of a free school, and that one of the justices refusing to grant his warrant was a trustee of the estate :- Held, that, notwithstand-

ing his character as such trustee, he was liable to the mandamus. Ib.

Return. - Where a mandamns is directed to justices, they ought not to make a return instead of obeying the writ, merely to gain the protection of the statute. Roy, v. Dartmouth (Earl), 5 Q. B. 878.

#### h. To Quarter Sessions.

## i. When Granted.

Point of Practice or of Law.]-Where the sessions decide, on a point preliminary to the whole case or to the reception of a particular piece of evidence, that they will not hear the case further, this is conclusive of the point involving matter of fact only : otherwise if it raises a point of practice which the court can perceive to be matter of law. In the latter case the court will grant a mandamns to enter contimanics and hear the appeal. Rg, v. Kesteven JJ, D. & M. 118: 3 Q. B. 810; 1 New Sess. Cas. 151; 13 L. J., M. C. 78. S. P., Reg. v. Flint-skipe JJ, 1 B. C. Rep. 331; 2 New Sess. Cas. 572; 16 La J., M. C. 55; 11 Jur. 185.

Where, on an appeal against a poor rate to the sessions, the justices allow the appellant to act upon the practice which then prevailed, but by which the appeal was put off till the next sessions, and the justices at those sessions, on an objection made to such practice, refuse to hear

case should not be stated under the Summary | the appeal the court will issue a mandamus to them to do so. Row v. Wiltshire JJ., 2 M. & Ry. 401; 8 B. & C. 380; 6 L. J. (o.s.) M. C. 97.

> Next Practicable Sessions. ]—A mandamus to-enter continuances and hear an appeal will not be granted if it clearly appears that the sessions preceding those at which the appeal is entered were the next practicable sessions. Re. Derbushire JJ, 25 L, T, 161: 19 W, R, 876. Reg. v.

> Variance between Notice of Appeal and Conviction. |-Three persons who had been summoned before a magistrate, for unlawful fishing, had been convicted, after a joint hearing, each in a separate penalty, and gave a joint notice of appeal to the sessions, describing the conviction as a joint conviction. Separate convictions were returned to the sessions:—Held, that the variance between the notice of appeal and the conviction was immaterial, because it could not mislead, and the court made a rule absolute for a mandamus to the sessions to hear the appeal. Reg. v. Oxfordshire JJ., 3 G. & D. 348; 4 Q. B. 177; 12 L. J., M. C. 40.

> Case Granted.]—Where the sessions on determining an appeal have granted a case, but none has been stated, the court will, under some eircumstances, direct a mandamus to the instices, who heard the appeal to state a case. But not where it is clear that such a proceeding could lead to no result, as where the chairman, in consequence of his own opinion and that of the court upon the facts, refused to sign any statement but one which would have excluded the point of law relied upon by the party demanding a case. Rew v. Pembrokeshire J.J., 2 B, & Ad. 391; 1 L. J., M. C. 92. S. P., Jarvain, Exparte. 9 D. P. C. 120.

Where the court of quarter sessions dismisses an appeal subject to a case, the court will not grant a mandamus to enter continuances, and hear the appeal. Rev v. Suffolk JJ., 1 N. & P. 306; 6 A. & E. 109; W. W. & D. 7; 6 I. J., M. C. 37.

Grounds of Appeal. ]-The court will issue a mandamus to hear an appeal, if the sessions have refused to hear upon on an erroneous decision as to the sufficiency of the grounds of appeal. Reg. v. Curnaryon JJ., 1 G. & D. 423.

Appeal against Theatre Licence-Mandamus Refused on Ground that Licence would have Expired before Rule could be Argued.]-An appeal against a theatre licence under the Theatres Act, 1843, having been dismissed by the recorder, a mandamus to him to hear the appeal was refused on the ground that the period for which the licence was granted had expired before the rule for the mandanus was applied for. Reg. v. Birmingham Recorder, 3 W. R. 236.

Onus of Proof. ]-So, where the justices were divided, and the sessions, thinking it lay on the respondent parish to establish their case to the satisfaction of a majority of the court, quashed the order of removal, a mandamus was refused, Rex v. Monmouthshire J.J., 7 D. & R. 334; 4 B. & C. 844; 28 R. R. 478.

Not Hearing One Side's Reasons. |-- Where justices at sessions had heard witnesses in an appeal on the one side, and refused to hear those on the other, on the ground that their testimony had been prefaced by observations on the part of the advocate, contrary to their usual practice, the court refused to grant a mandamus to re-hear the appeal. Rev v. Curnarvon JJ., 4 B. & Ald. 86: 22 R.R. 636.

Evidence, Admissibility of .]—A party having been convicted of forcibly passing a tumplice gate without paying toll, the sessions, on append, rejected evidence to shew that the gate had been unlawfully erected; and the court refused a mandamus to compet the sessions to receive such evidence, the admissibility of it being exclusively a question for the justices. Here y. Cambridgeshire JJ., 1 D. & R. 325.

Who to Begin.]—On appeal against a poornre, on the ground that the appellant was overnred, the practice at the sessions requiring the
appellant to begin by proving his case, which the
appellant refusing to do, the appeal was disnissed; the court refused a mandamus to the
sessions to re-hear the appeal on this objection.

Heav. Setfolk JJ., 6 M. & S. 57.

Postponing Hearing.]—An appellant against an order of adfiliation moved the court of quarter sessions for a pastponement of the appeal, on account of the absence of material witnesses, They rejected the application; upon which the appellant declined going into his case, and the order was confirmed. On motion for a unandamus to the justices to hear the appeal, and affidavits tending to show that they had acted unjustly in not granting the postponement, the court refused to interfere, the matter being one peculiarly within the discretion of the sessions. Backe, Exputre, 3 B. & Al. I.44.

Decision on Merits.]—A mandamus to the instress in sessous, to allow an item of clarge in a coroner's account, refused; because the justices were of opinion, under the circumstances, that there was no ground to suppose that the deceased had died any other thun a natural, though a sudden death; and therefore that the inquisition had not been duly taken; and the court saw no reason to interfere with that judgment. Rev. Kort J.J., II Sast, 229; 10 R. R. 484.

When on an appeal against a convertion coming on for hearing at the sessions, objection was taken to the conviction by reason of the omission of certain words alleged to be material, and the justices, after discussion, quashed such conviction, declining either to amend or hear the cythence, the court has no power to interfere by mandamus, there having been a decision on the legal metric. Leg. v. Middlewar JJ., Stade, Lu ret, 46 L. J., M. G. 225; 2 Q. B. D. 516; 36 L. T. 40; 25 W. R. 610.

Reasons for Judgment.]—The court will not issue a maintamax to compel the quarter sessions to give their reasons for their judgments, or make special entries thereof on their records. Rec v. Devon JJ., 1 Chit. 34, 12 R. R. 789.

Judgment Entered by Mistake.]—Or grant a mandamus to the justices at sessions to rehear an appeal against an order of removal, after judgment given by them, and entered by the clerk of the peace for quashing the order; upon the ground that the justices at sessions were divided in opinion, and that the judgment was entered by mistake, instead of an adjournment of the appeal. Here v. Leicestershire JJ<sub>2</sub>, 1 M. & S. 442; 14 R. R. 494.

Erasing Entry in Record —The court of quarter sessions has no power of its own authority to crase an entry from the records of a past sessions. Reg. v. West Riding of Yorkshire JJ., 3 G. & D. 170; 12 L. J., M. C. 148.

But a mandamus will go directing it to be so, where an entry has been made which is manifestly false, and made without invisdiction. Th.

false, and made without jurisdiction. *Ib.*S. was convieted by a metropolitan police magistrate under the Vagrancy Act, 1824, 5 Geo. 4, c. 83, s. 4, which makes punishable as a rogue and vagaboad "every person...ning any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of his majesty's subjects." The conviction described the offence as "undawfully using certain subtle craft, means and device." (omitting the words by pulmistry or otherwise."). Upon appeal to the Middlesex Sessions, the proceedings commenced with an objection from S. that the ordision of the words made the conviction bad. The justices, after hearing the point argued, retired, and on their return the assistant judge gave what purported to be the decision of the sessions, quashing the conviction on the objection taken to

ii. Upon application for a mandaums to the sessions to hear the appeal on the merits, it was proposed to show by affidavits from the justices that the decision given by the assistant judge was contrary to the opinion of the majority of the justices forming the cent, and that after such opinion had been communicated to him, he persisted in giving his decision as that of the sessions:—Held, that the order of sessions having been duly recorded; it was too late to inquire whether it did or did not represent the opinion of the majority of the justices. Heg. v. Middlewer M., Sladde, In re, 44 L. J., M. G. 225; 2 Q. B. D. 516; 36 L. T. 462; 2 5 W. R. 1, 610.

At sessions, the jury gave a special vertilet of not guilty, and it was entered in a book of the clerk of the peace. Afterwards, the chairman told the jury to reconsider their vertilet, and they gave a verilet of guilty generally, but recommended the defendant to mercy on account of his not doing the act with a maliclous intent; and the vertilet was then altered in the book of the clerk of the peace. The court vertueed to interfere by mandamus to cancel the alterations, How. N. Seifull. J.J., 5 N. & M. 130; 1 H. & W. 313; 5 L.J., M. C. 34.

Where quarter sessions, having jurisdiction over an appeal, have directed an entry to be made, that an order of removal has been "quashed not on the merits," the court will not grant a mandamus commanding an crasure of that entry, although it appears that the order in point of fact, was quashed on the merits. Acknowledge, Expanded, 1 D. & L. 718; 1 New Sess. Cas. 64; 3 Q. B. 397; 13 L. J. M. C. 38; 8 Jnn. 24.

Court cannot compel Sessions to Decide in Particular Way.]—On an appeal against a rate under the Middlesex County Act, 3 Goo. 4, c. cvil., the justices confirmed the rate, subject to the opinion of the Court of Queen's Bench on a case. The certicard directed the justices to send up an order of sessions. "with all things tonehing the same;" and the court quashed the order of sessions. The sessions, after such order, were applied to to quash the rate, but refused, as the rate had not been removed into the court, and there was no longer any appeal against it. The court-refused to grant a manchama to compel them to enter continuances, and quash the rate; first,

because, by so doing, the parties who had been proceeding; but, when it has acted, its judgment engaged in collecting the rate might be exposed to an action; secondly, because the court could not compel the sessions to decide in a particular way. Reg. v. Middlesex JJ., 1 P. & D. 402; 9 A. & E. 540; 2 W. W. & H. 100; 8 L. J., M. C. 85.

To Issue Process. ]—The court refused to grant a mandamus to the chairman of the Middlesex sessions, requiring him to issue process for the apprehension of two persons against whom a bill of indictment had been found at those sessions a year previously for keeping a common gaming-house, upon the ground that an applica-tion for such process had been rejected at sessions. Reg. v. Russell, 1 D. (N.S.) 544; 6 Jur. 221.

## ii. Practice.

When Application made. ]-Any application for a writ of mandamns to justices, to enter con-tinuances, and hear an appeal, shall be made not later than in the term following the sessions at which the refusal was made, unless special -circumstances appear by affidavit to account for the delay to the satisfaction of the court. Reg. v. Richmond Recorder, El. Bl. & El. 253; 27 L. J., M. C. 197; 4 Jnr. (N.S.) 456; 6 W. R. 521.

The general rule that an application for a writ of mandanus to the quarter sessions to enter continuances and hear an appeal must be made not later than the term following the sessions at which the refusal was made, does not apply to an application to remove an order of sessions for the purpose of getting it quashed. Rey. v. Breek-workshire JJ., 42 L. J., M. C. 135.

A mandamus to the sessions to hear an appeal must be applied for promptly. Reg. v. West Riding JJ., 1 G. & D. 706; 2 Q. B. 505; 11 L. J., M. C. 80; 6 Jur. 506.

Where, at a sessions, held in January, the court confirmed an order in bastardy, subject to a case for the opinion of the court, or to a mandamus to hear the appeal, at the option of the appellant, who decided upon not bringing up the case, but applied for a mandamus in Easter Term :—Held. that the application was not made too late. Reg. v. Cheshire J.J., 1 B. C. Rep. 164; 2 New Sess, Cas. 420; 4 D. & L. 94; 15 L. J., M. C. 114; 10 Jur. 808.

Affidavits.]-The affidavits on motion for a mandamus to sessions to hear an appeal should state all the material facts that occurred at the sessions. Reg. v. West Itiding J.J., 2 New Sess. Cas. 1.

To Central Criminal Court. ]-Mandamus does not lie to the judges and justices of the Central Criminal Court, which is a superior court. Reg. v. Central Criminal Court JJ., 52 L. J., M. C. 121; 11 Q. B. D. 479; 15 Cox, C. C. 324.

#### i. To Inferior Courts.

When Mandamus, not Rule, Granted. Where an inferior court has a special jurisdiction given to it by some local act and refuses to exercise that jurisdiction, a mandamus is the proper course to be pursued; a rule or order under 19 & 20 Vict. c. 108, s. 43, is only employed where the matter is within the ordinary jurisdiction of the court. Brighton Sewers Act. In re. 9 Q. B. D. 723,

When Granted.]-Where an inferior court declines to exercise a jurisdiction imposed on it

can only be reversed in that court on a case stated for its opinion. Reg. v. W. R. JJ., 1 New Sess. Cas. 247.

No Certiorari Possible.]-Where a statute does not allow a removal of proceedings by certiorari, the court will not indirectly bring them under review by a mandamus. Rew v. Yorkshire (W. R.) J.J., I A. & E. 563; 3 N. & M. 802.

Court-leet and Court-baron. -A mandamus will go to a lord to hold a court-baron, and to the homage to present conveyances of burgage tenures, whether those conveyances are legal or not. Rew v. Montacute (Lord), 1 W. Bl. 60. S. P., Rew v. Midhurst, 1 Wils. 283.

So, to permit a court-lect and a court-baron to be held in the accustomed place. Rew v. Granthum Corporation, 2 W. Bl. 716, and Rex

v. Colebrooke, 2 Ld. Ken. 163.

But a mandamus to the mayor of Wigan to give the key of the town hall to the lord of the manor to hold his leet there was refused, although the leet had been usually held in that place. Rev v. Wigan Corporation, 1 Wils. 76. And see Rev v. Ilchester, 2 D. & R. 724; 4 D. & R. 324; 2 B. & C. 764.

A mandamus was granted commanding the lord of the manor to hold a court-leet for the purpose of appointing a high constable of a hundred, though the day on which the court had been usually held for sixty years past had gone by, it not being distinctly sworn that the court was v. Milverton (Lord), 3 A. & E. 284; 1 H. & W. 282; 4 L. J., M. C. 88.

A mandamus to summon specific jurors upon a court-leet was refused. Rew v. Bunkes, 1 W. Bl.

452: 3 Burr, 1452.

- To Inrol Instrument.]-The court will never grant a mandamus commanding the involment in an inferior court of an instrument which, though in part valid, would, in its terms, give power to commit unlawful acts. Reg. v. Convers. 8 Q. B. 981; 15 L. J., Q. B. 300; 10 Jur. 899.
- To Enforce Process.]-Nor will the court by mandamus enforce the process of an inferior court, the judge of which has power to compel obedience to its process. Ib.

County Court.]—Where, before 19 & 20 Viet. c. 108, s. 43, the judge of a county court, upon an interpleader summons, erroneously decided against a claimant, on the ground that the notice of claim was insufficient, the court issued a mandamus to him to adjudicate upon the claim. Reg. v. Richards, 2 L. M. & P. 263; 20 L. J., Q. B. 351.

But when a judge of a county court entered upon the hearing of a plaint, and from the evidence adduced before him decided that he had no jurisdiction to adjudicate between the parties, a mandamas would not lie commanding him to hear and determine it, even although he might be wrong in point of law. Milner, Ex parte, 15 Jur. 1037.

Rule for mandamus to hear after non-suit refused. Vernot v. Bailey, 4 W. R. 608. And see COUNTY COURT.

#### i. To Lords and Stewards of Manors.

A mandamus will not be granted commanding by law, the court will, by mandamus, enforce its the steward of a manor to accept a surrender custom, unless the lord is made party to the rule. Rey. v. Erans. I Q. B. 355. S. C., nom. Reg. v. Witchford, 7 D. P. C. 709.

A mandamus will not lie to compel the admission of a customary tenant to a royal manor. Reg. v. Powell, 4 P. & D. 719; 1 Q. B. 352; 10

L. J., Q. B. 148; 5 Jur. 605. A mandamus to admit to a copyhold tenement must not be directed to the steward only, the lord must be joined. Ib.

A mandamus was granted to the steward of the manor of Midhurst and to the homage, to hold a court, and present certain conveyances to purchasers of burgage tenements, whereby they were cutitled to be sworn in burgesses of the corporation, and to vote for members of parliament. Rev v. Midhurst, 1 Wils. 283.

In applying for a mandamus to the steward of a manor to inrol a deed of disposition, pursuant to the Fines and Recoveries Act, 1833, 3 & 4 Will, 4, c. 74, s. 53, it is not necessary to annex a copy of the deed itself, if the contents are stated in an affidavit, Crosby v. Fortescue, 5 D. P. C. 273. S. P., Rev v. Lunn, 2 H. & W. 314,

## k. To Admit, Elect, or Restore to Offices.

#### i What Othices

Permanent Interest.]—A magistrate's clerk has no permanent interest in his office, and if he is dismissed without cause no mandamus lies to restore him. Sandys, Ex parte, 1 N. & M. 591; 4 B. & Ad. 863.

As a mandamus to reinstate a person in an office only lies where the office, and its tenure, are of a permanent nature, it is not an available remedy for the secretary of a benefit society, who has been dismissed by a resolution of a meeting of the society. Evans v. Hearts of Oak Benefit Society, 12 Jur. (N.S.) 163.

A mandamus to the Lord Mayor of London to admit a person to the office of auditor of the chamberlain's and bridgemaster's accounts, who had served them three years successively, and been elected again the fourth by the livery, refused; because the custom of the city appeared to be, that no person should be elected to or serve the office for more than two years successively.

Rev v. London Corporation, 1 Term Rep. 423.

A mandamus will not lie to compel the high steward of a corporation to admit a commoner, unless the person claiming to be so admitted shews that he has a good title in omnibus. Reg. v. Malmesbury High Steward, 4 Jur. 222.

A mandamus will not lie to the vicar, churchwardens, and inhabitants of a parish to elect an organist to the parish church, though there has always been such an office beyond the time of living memory, and a yearly salary has been in-variably paid him out of the church rates, as it is optional with the parishioners whether the organ should be played. Reg. v. St. Stephen's, Chleman Street (Vicer, Sa., 2 D. & L. 571; 14 L. J., Q. B. 34; 9 Jur. 255.

A mandamus does not lie to admit a vestry

clerk. Rew v. Croydon Churchwardens, 5 Term Rep. 713; 2 R. R. 688.

Nor to restore the clerk and treasurer of the guardians of the poor of St. Nicholas, Rochester. Rew v. St. Nicholas, Rochester, 4 M. & S. 324.

A mandamus will not lie to admit an inhabitant of a borough by prescription to be a free full, a mandamus did not lie. Hill v. Reg., burgess, unless it appears, first, that he had an 8 Moore, P. C. 139.

into the hands of the lord according to the inchante right to be a free burgess; and secondly, that such office is a corporate office by prescrip tion. Rew v. West Loov Corporation, 2 D. & R. 178; 5 D. & R. 590; 3 B. & C. 677; 1 L. J. (o.s.) K. B. 44.

A mandamus lies to restore a man to the office of master of a free school. Anon., Lofft, 148.

Inspection of Corporation Documents. - Where a corporator claims to be elected to an office in the corporation on the ground of an invariable custom to elect the person who, at the time of a vacancy, fills the position which he then occupies, and the corporation admits the general prestice, but says that it is not invariable, the court, at the instance of the corporator, will grant a mandamus to allow him to inspect the minutes of the corporation as to former elections, to assist him in stating his case, even though the court entertains great doubt whether the custom, if proved, could contradict the charter, which prescribes that there is to be a free election. Burton and Saddlers' Co., In re, 31 L. J., Q. B. 62; 10 W. R. 87.

The court will not grant an application by members of a corporate body for a mandamus to inspect the documents of the corporation, unless it is shewn that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested; and the inspection will then only be granted to such extent as may be necessary for the particular occasion. Rex v. Merchant Tuylors' Co., 2 B. & Ad. 115; 9 L. J. (0.s.) K. B., 146.

#### ii. In what Cases Granted.

Jurisdiction, whether Excluded ]-The claim of cognizance as to the election of aldermen by the court of mayor and aldermen of London does not exclude the jurisdiction of the court to issue a mandamus. Rew v. London Corporation, 4 M. & Ry. 36,

Where Office Full. - A mandamus lies after an election merely colonrable and clearly void, Rew v. Cumbridge Corporation, 4 Burr. 2008.

The court will not in general grant a man-

damus to elect another upon non-residence, unless the non-resident party has been previously removed. Rex v. Truro Corporation, 3 B. & Ald. 590; 2 Chit. 257.

When a corporate office is full, the title theretocannot be tried by mandamus, but it must be questioned by quo warranto. Reg. v. Chester questioned by quo warranto. Reg. v. Chester Corporation, 5 El. & Bl. 531; 25 L. J., Q. B. 61; 2 Jur. (N.S.) 114.

The court refused a mandamus to a board of guardians to admit a person as their clerk, who complained that the person filling the office had been unduly elected by the votes of guardians been untuly elected by the votes of guardians, who were themselves not properly elected. Reg. v. Dolgelly Union Guardians, 3 N. & P. 542; 8 A. & 5. 561; 1 W. W. & H. 513; 7 I. J., M. C. 99. S. P., Reg. v. Derby Connecillors, 2 N. & P. 589; 7 A. & E. 419; W. W. & D. 671, Rez. v. Colchester Corporation, 2 Term Rep. 259; 1 R. R. 480.

The office of surgeon of the district prison of St. Catherine, in Jamaica, created by local acts of the legislature of that island, is a public office, and on a mandamus to question the title of an occupant :- Held, that the office being

The remedy was by quo warranto against the occupant of the office. Ih.

The office of clerk to the guardians of a union. created by statute, and where such office is full n quo warranto, and not a mandamus, is the proper remedy to try the validity of the election. Reg. v. St. Martin-in-the-Field's Guardians, 17 Q. B. 149; 20 L. J., Q. B. 423; 15 Jar. 800.

But when the office is full by a void election, and the right to appoint to it cannot be tried in any other way, the court will grant a mandamus

to try the right. Ib.

Where, by a custom of a parish, one church-warden was elected annually by the parishioners. and the other annually by the rector, and the latter appointed as his churchwarden a person who was not a parishioner, or an inhabitant of or occupier of property in the parish :- Held, that a mandamus to the rector to appoint a churchwarden is the proper process by which to question the validity of the appointment. Burlow, In re, 30 L. J., Q. B. 271; 5 L. T. 289.

At an election of churchwardens the votes of tenants of small tenements, the owners of which were rated to the poor and highway rates, by virtue of the repealed Small Tenements Act, 13 & 14 Vict., e. 99, tendered on behalf of one of the candidates, were rejected :-Held, that a mandamus to convene a vestry for the election of churchwardens would not lie to try the question whether such tenants were entitled to vote, it not being shown that the result of the election would have been different if their votes had been received. Jagee, En parte, 3 El. & Bl. 718; 23 L. J., M. C. 153; 18 Jur. 906; 2 W. R. 473. See also Ecclesiastical Law, Church-WARDENS.

If it appeared with sufficient certainty to the court, that a person had been elected mayor of a borough on the day appointed by the usage, who was not qualified to accept the office, by reason of his not having previously taken the sacrament within the time limited by law, they would grant a mandamus to the electors to proceed to a new election under 11 Geo. 1, c. 4, s. 2, as if no election had in fact been made. Res v. Bedford Corporation, 1 East, 79.

The court, however, expressed great doubt whether they could with propriety grant the

writ in this case. Ib.

Where Office Void. ]-Where an election to the office of mayor became void within the year, the court had power, under the repealed 7 Will. 4 & I Vict, c. 78, s. 26, to issue a mandamus commanding a new election. Reg. v. Pembroke Corporation, 8 D. P. C. 302; 4 Jur. 317.

Quo Warranto Pending.] - Where, on disputed immicipal election, two of the candidates obtain a rule nisi for a mandamus to admit, and afterwards a rule nisi for a quo warranto against the parties admitted, the rule for the mandamus will not be, as a matter of course, discharged. Rew v. Winchester Corpora-tion, 2 N. & P. 274; 7 A. & E. 215; W. W. & D. 525; 6 L. J., K. B. 213; 1 Jur. 738.

Where other Remedy.]-Upon an application for a mandamus to restore to an office, a prima facie title must be shewn, the party having, if properly admitted, another remedy; secus on a mandamus to admit. Rev v. Jotham, 3 Term the first was admitted and sworn into the office;

Where an office is full by the appointment of the person who prima facie has the right of appointment, and where there are means of tryappointed under the Foor Law Amendment Act, its properties of the court will not grant 1834, 4 & 5 Will, 4 & 76, 8, 46, is a public office a mandanus against the party filling the office. in order to try the title. Rese v. Stoke Damerel. (Minister, &c.), 1 N. & P. 56; 5 A. & E. 584; 2 H. & W. 346; 6 L. J., M. C. 14.

When a person was appointed sexton of a parish by the minister, in whom the right to appoint prima facie was, and the clinrehwardens refused to call a vestry meeting of the parishioners (who also claimed the appointment) to elect one, and it appeared that there was another method of trying the right; the court refused to grant a mandamus to the minister and churchwardens to call the vestry meeting. Ib.

A mandamus commanding the dean and chapter of a cathedral to restore a chorister, alleged that the office was a freehold in their gift, paid by salary out of their land revenues, and conferring a right to vote on the election of members of parliament, and that the chorister had been wrongfully amoved. Return, that by ordinances of the founder for the government of the enthe-dral, it was provided that if any of the officers of the cathedral, including choristers, commit a small fault, he may be punished by the dean, but that " if his crime be of a blacker dye (if it be judged equitable), he may be expelled by whom he was admitted"; and that the bishop of the diocese should be the visitor of the cathedral, to take special care that all its ordinances should be inviolably preserved, to punish and correct all offences committed by officers of the cathedral, and to do all things that are judged lawfully to appertain to the office of visitor; and that the chorister had not appealed to the bishop :-Held, that a mandamns did not lie, as the remedy for the wrongful amotion complained of was by application to the visitor, who had sufficient exclusive jurisdiction, although the foundation was spiritual and not eleemosynary, and the office was a freehold office; and that it was not necessary to return the cause of amotion. Rey. v. Chester (Dean and Chapter), 15 Q. B. 513; 19 L. J., Q. B. 485; 15 Jur. 10. S. P., Reg. v. Rochester (Dean and Chapter), 17 Q. B. 1.

Where a charter of Hen. 7 granted to the citizens and commonalty in these words: "Quod ipsi, et successores sui, in perpetuum, singulis annis successivis, 24 concives civitatis in aldermannos, ucenon 40 alios cives ejusdem civitatis pro communi concilio civitatis illius, eligere, facere, et creare possint"; and it appeared that, in 1693, and the two following years, successive elections of the forty common councilmen had been made, since which time the usage had been not to elect the aldermen or common conneilmen annually; the court refused a mandamus, which was applied for in order to raise the question against the usage, whether the election of those officers ought to be annual, there being another remedy open to the parties making the application. Res v. Chester Corporation, 1 M. & S. 101.

No other Mode of Trying Right so Convenient, Upon athidavit that one of two candidates for an office had a majority only by means of illegal votes, the court granted a mandamus to the corporation to admit and swear in the other, who appeared upon the attidavits to have had the greater number of legal votes; and this, although there being no other specific, or, at least, no other such convenient mode of trying the right, merely colourable, a mandamus will go to permit Rev v. Beiford Level Corporation, 6 East, 356; the ousted party to exercise his office, but not to 2 Smith, 535.

Where Jurisdiction Exercised. ]-A fellow of King's College, Cambridge, had been expelled the college and deprived of his fellowship, by the provost and fellows, upon a charge of fraud and perjury, the proceedings being conducted partly in the absence of the accused, and the charge being alone supported by a comparison of his letters with an answer which he had filed in a suit in Chancery. Upon appeal to the visitor, the decision of the provost and fellows was affirmed :-Held, that the court had no power to grant a mandamus to restore to the fellowship. Buller, Ex parte, 1 Jur. (N.S.) 709.

Where the founder of an eleemosynary corporation directed that the bishop, dean, and archdeacon of Worcester should be visitors, and should correct, punish, and reform all abuses and offences to be committed by the master and brethren, and see that his ordinance was truly executed according to its meaning; and afterwards the heir of the founder, upon a vacancy of one of the brethren, appointed a person to succeed, who was a soldier, not belonging to either of the towns or lordships, to the inhabitants of which a preference was to be given, against which appointment three persons appealed to the visitors, on the ground that the appointee was incligible, and that there were others, besides themselves, who were eligible:-Held, that such an appeal lay, and therefore the court granted a mandamus to the visitors, who had heard the evidence in such appeal, but declined to act therein to proceed and determine the appeal Rex v. Worvester (Bishop), 4 M. & S. 415; 16 R. R. 512.

The registrars of a diocese were authorised by their patent of office (under the bishop's hand and seal) to appoint a deputy, to be "approved of and allowed by the bishop": who, if he should not approve of and allow the deputy named and proposed to him, was empowered to nominate another, with a salary payable out of the profits of the registrarship. The registrars appointed a deputy, subject to the approbation and consent of the bishop, who on being informed of it, answered that "for good and sufficient reasons" he disapproved of the party nominated, but declined specifying his reasons. The court refused a rule nisi for a mandamus to the bishop to admit the deputy. Rev v. Glucester (Bishap), 2 B. & Ad. 158; 9 L. J. (o.s.) K. B. 228.

By the Medical Act, 1858, 21 & 22 Viet. c. 98,

s. 29, if a medical practitioner shall, after due inquiry, be adjudged by the General Council of Medical Education and Registration of the United Kingdom to have been guilty of infamous conduct in any professional respect, they may, if they see fit, erase his name from the register and where a medical officer has been so adjudged guilty by the general council, and his name gandy by the general connent and his mane erased from the register, a mandamus will not lie to restore it. La Mert, Exparte, 4 B. & S. 582; 33 L. J., Q. B. 69; 12 W. R. 201.

Restoring to Office. ]-The court will not grant a mandamns to restore a person to an office, where it is confessed that he was rightly removed, although without notice. Reav. Asbridge Corporation, Cowp. 523.

restore him to the office. Row v. O. ford Corporation, 6 A. & E. 349; 1 N. & P. 474; 6 L. J., K. B.

A mandamus refused to restore to the office of clerk of the Bridge-house estates in London, though the party was irregularly suspended; it appearing, on his own shewing, that there was good ground for the suspension, if the proceedings had been regular. Rev v. London Corporation, 2 Term Rep. 177; 8 R. R. 641, n.

But granted to restore to office a clerk or a surveyor of the city works, which was an office for life, and on appointment, an oath adminis-tered. Rev v. London Corporation, 2 Term Rep.

- Other Remedy.]-Where a corporator, who was entitled to divide a certain share of the profits of a fishery, which the corporators worked and enjoyed in partnership, was suspended from the perception of his profits until he paid a certain fine imposed by a by-law, with the breach of which he was charged, the court refused a mandamus to restore him to his office; he being still an officer, and having a remedy by an action for the tort against any who disturbed him in the lawful perception of his profits (if the bylaw was illegal, or he was not guilty of a breach of it, or had been unlawfully suspended), or, considering the corporators as partners in the considering the corporators as partners in the fishery, he having a remedy in equity for his share of the partnership funds unjustly withheld from him. Rex v. Whitstable Fishery Co., 7 East, 353; 3 Smith, 319; 8 L. R. 639.

## iii. Practice.

To whom Writ Directed. ]-A local statute, after providing for the appointment of governors and guardians of the poor of a parish, and for the filling up of vacancies by the remaining governors and gnardians, enacted, that after the first year "the inhabitants of the parish in vestry assembled" are to nominate and choose twelve persons in lieu of those retiring each year — Held, that the meeting was to be called by the governors and guardians, and, therefore, the writ governors and guardinas, and therefore, the whould be directed to them; notwithstanding 58 Geo. 3, e. 69, s. 1, and 1 Vict. c. 45, s. 3, Heg. v. 88, Mary, Navington, Guernors, Se., 6 D. & L. 162; 2 B. C. Rep. 303; 17 L. J., Q. B. 220 ; 12 Jur. 918.

Return.]-To a mandamus to a mayor to convene a meeting to proceed to an election, in order to fill up five vacancies in a select body, consisting of fifteen chief burgesses, he returned (after stating objections to the title of several of the remaining burgesses), that there were not then within the borough eight legally elected chief burgesses, by whom the election of others could be made, and that, for the several seasons before mentioned, he could not proceed to such elec-tion:—Held, an insufficient return. Rew v. Monmonth Corporation, 4 B. & Ald. 496.

A return stating generally that the body was duly assembled to amove, is sufficient. Rex v. Doncaster Corporation, 2 Ld. Ken. 391; 2 Burr. 738.

In a return by a corporation to restore a member, who has been removed, it should appear If a councillor of a corporation is ousted, and that the body removing had proved the charge another elected in his stead, and such election is for which the member was removed: it is not sufficient to state merely that he was present writ for any defect in substance. Reg. v. Powell, when the charge was made, and did not deny it. 1 Q. B. 352. S. C. nom. Reg. v. Richmond. Res. v. Faversham Fishermen's Ch., 8 Term Rep. (Steward, Sc.), 10 L. J., Q. B. 148; 5 Jur. 605. 352; 4 R. R. 691. And see Rev v. Carmarthen Corporation, 1 M. & S. 697.

Ground for Refusing-Similar Mandamus not Granted.]-It is no ground for refusing a mandamus to admit a party to an office to which he has been elected, that to a similar mandamus granted in respect of a former election of the same party a return was made, shewing an excuse, valid in point of law for not admitting him. Rew v. London Corporation, 1 N. & M. 285; 3 B. & Ad. 255,

# 3. PRACTICE GENERALLY.

# a. When and How Application Made

Application to Q. B. D.]-The proper remedy where there is a neglect of a public duty is to apply for a mandamus, and the application for such a mandamus, being the prerogative writ of mandamus, should still, notwithstanding the Judicature Act, 1873, s. 25, sub-s. 8, be made to the Queen's Bench Division. Per Brett, L.J., in Glossop v. Heston Local Board, 49 L. J., Ch. 89; 12 Ch. D. 102; 40 L. T. 736; 28 W. R. 111; 44 J. P. 36. S. P., Paris Shating Rink Co., In re, 46 L. J., Ch. 831; 6 Ch. D. 731; 25 W. R.

By Counsel, or in Person.]—A motion for a mandamus cannot be made by an applicant in person unless he is a member of the bar. Wason, Ex parte, 10 B, & S, 580. S. C., L. R. 4 Q. B. 573; 38 L. J., Q. B. 302; 17 W. R. 881.

Connsel must be instructed to discharge a rule nisi for a mandamus either in the Divisional Court or Court of Appeal. Reg. v. Liverpool

Corporation, 55 J. P. 823-C. A. A prerogative writ of mandamus can only be moved by counsel. Reg. v. Eardley, 49 J. P. 551. Quære, whether a rule in the nature of a

mandamus, under the Justices Protection Act, 1848, 11 & 12 Vict. c. 44, s. 5, can be moved for in person. Ib. A rule under s. 5 of the Justices Protection

A rme namer 8, 5 of the district 170cco 170cc Act, 1848, may be moved by an applicant in person. Reg. v. Biron, 54 L. J., M. C. 77; 14 Q. B. D. 474; 51 L. T. 429; 49 J. P. 68.

Delay in Application-Crown Office Rules. -The transfer of a licence was refused, and on appeal the quarter sessions, on 16th October, refused to hear the appeal on the ground that the appellant was not aggrieved. A rule nisi for mandamus was moved for and obtained on 20th February, no special eircumstances being stated for the delay :- Held, on the objection being taken, that the application was too late, not having been made within the time limited by r. 79 of the Crown Office Rules, 1886. Reg. v. Glouecstershire JJ., 54 J. P. 519.

## b. Form of Writ.

Objection to, when Taken.]-After a return has been made, the defendant cannot make any objection to the writ itself. Rew v. York Corporation, 5 Term Rep. 66.

After a return to a writ which is set down in the Crown paper to be argued upon a concilium, it is competent to the defendant to object to the then ordered them to produce the accounts which

A mandamus directed to a corporation, commanding them to pay a poor-rate to the over-seers, omitted to state that the corporation had no effects on which a distress could be levied :-Held, a fatal objection in substance to the writ, and might be taken after the return, or at any time before a peremptory mandamus issued. Rex v. Margate Pier Co., 3 B. & Ald. 220: 2 Chit. 256; 22 R. R. 356.

The court had given judgment for a defendant upon a demurrer to a return to a mandamus :-Held, that an objection to the sufficiency of the writ might be taken at any time before issuing the peremptory mandanus. Clarkev Leicestershire and Northamptonshire Canal Co., 6 Q. B. 898: 3 Railw. Cas. 730; 9 Jur. 215—Ex. Ch.

Curing Defect, by Return.]—A writ, which omits a necessary fact, cannot be cured by the return. Reg. v. S. E. Ry., 4 H. L. Cas. 471; 17 Jur. 901.

Attorneys of the superior courts are entitled, by virtue of 6 & 7 Vict. c. 73, s. 27, to be admitted to inferior courts of law. Where, therefore, a writ of mandamus was directed to the presiding officers of the Lord Mayor's Court to admit A., and described it as an inferior court, without stating it to be a court of law :-Held, that such writ was bad, and that the defect was not oured by such court being described in the return as a court of law. London Corporation v. Reg., 13 Q. B. 30; 17 L. J., Q. B. 330; 13 Jur. 33—Ex. Ch.

A mandamus commanded a person to deliver up to the clerk of a court of requests papers relating to the office. The writ did not shew any claim by the person detaining to hold them under any right :- Held, that the writ was therefore bad, and that the defect could not be supplied by the return, on which it appeared that he claimed to be the lawful clerk of the court, and to retain the papers as such. Reg. v. Hapkins, 4 P. & D. 550; 1 Q. B. 160; 10 L. J., Q. B. 63.

- By Verdict.]-If there is in a writ of mandamus a defective statement of a valid claim, but that statement renders it necessary to establish facts which, if established, would support the claim in the writ, the defectiveness, though the eanin in the writ the deficiences, though it might be fatal on demurrer, is circl by the verdict. Delamere (Lord) v. Reg., 36 L. J., Q. B. 313; L. R. 2 H. L. ±19; 17 L. T. 1.

No Specific Alteration in Works asked for. A mandamus commanded "the directors of the Bristol Dock Company to make such alterations and amendments in the sewers as were necessary in consequence of the floating of the harbour" -Held, that this was in the proper form, and that it was neither requisite nor proper to call upon the company to make any specific alteration, the mode of remedying the evil being left to their discretion by the act of parliament. Hex v. Bristol Dock Co., 6 B. & C. 181; 9 D. & R. 309; 5 L. J. (o.s.) M. C. 51; 30 R. R. 280.

More Comprehensive than Warrantable.]---A mandamns recited that it was the duty of the church trustees of St. Paneras parish, who had been required to produce accounts (in the terms of the Vestries Act, 1831, 1 and 2 Will. 4, c. 60, s. 35), and that they had refused to do so, and they were ordered to keep by the local acts :- | office in respect of which the claims arise. Scott, Held, that the mandamus was bad, in ordering Expurte, 8 D. P. C. 328; 4 Jur. 579. more than was warranted, either by the grievance recited or by the General Vestry Act. Rew v. St. Pancrus Church Trustees, 1 N. & P. 507; 6 A. & E. 314.

Construction. ]—A direction in a mandamus to take measures for "obtaining and recovering payment" does not necessarily mean to bring an action, and such a direction therefore, though not accompanied by a tender of indemnity, does not make the mandanus invalid. Reg. v. Southamp-ton Harbour Commissioners, 39 L. J., Q. B. 253; L. R. 4 H. L. 449; 23 L. T. 111; 18 W. R. 1171.

Necessity of Rate. ]-A mandamus to churchwardens and overseers to make a poor-rate recited that no rate had been made for the necessary relief of the poor, pursuing the form given by the Crown office:—Held, that the writ was good, and that it sufficiently appeared that a rate had become necessary. Row v. Edlaston Occaseov. 1 N. & P. 20; W. W. & D. 163; 6 L. J., M. C. 36; I Jur. 53. S. P., Rox v. Gadsby, 1 N. & P. 572.

Bad in Part. ]-A writ which is bad in respect of one of the matters commanded is bad in toto. and a peremptory mandamus cannot be awarded. Reg. v. Tithe Commissioners for England and Wales, 19 L. J., Q. B. 177; 14 Jur. 290.

Where a company had given notice of requiring a part of premises, and a mandamus had been obtained, commanding the company to issue a precept for summoning a jury to assess compensation for the whole, the writ cannot go for part. Reg. v. L. & S. W. Ry., 13 Q. B. 775; 17 L. J., Q. B. 326; 12 Jur. 978.

#### c. Parties.

# See R. S. C., Ord. LIII. rr. 13, 14.

Interest of Applicant for Writ. |-The court in the exercise of its discretion as to issuing of a mandamus requires that the application should be made by one who has a real interest in requiring the duties to be performed. Reg. v. Peterborough Corporation, 44 L. J., Q. B. 85; 23 W. R. 343.

When commissioners are, by an act of parliament, authorised to receive certain moneys, and at the same time directed to pay a portion of those moneys to another body of persons, the gross snin received is to be deemed the income of the commissioners, and the persons to whom the payment is to be made have an interest in that portion, and are entitled to enforce payment. Reg. v. Southampton Harbour Commissioners, 39 L. J., Q. B. 253; L. R. 4 H. L. 449; 23 L. T. 111; 18 W. R. 1171.

By and against Whom. ]-If one parish officer applies for a mandamus against another to concur in a rate, the writ must be as well against the applicant as the other. Anon., 2 Chit. 254.

In a rule for a mandamus to cleet a mayor, a subsisting mayor de facto must always be a party. Rev v. Bankes, 3 Burr. 1452; 1 W. Bl. 445. A mandamus against churchwardens and

overseers may be sued out by one of their own body. Rea v. Edlaston Overscers, 1 N. & P. 20; W. W. & D. 163; 6 L. J., M. C. 36; 1 Jur. 53. One writ cannot issue at the instance of two

persons, for the enforcement of separate claims, although they have been successors in the same

A company gave notice to B., G. & D., trading in co-partnership, of their intention to take the premises occupied by them for the purposes of their railway under the powers of their special act. A mandamus having been granted to the company commanding them to issue their precept for summoning a jury to assess the amount of compensation to be paid to B., G. & D., the court refused to quash the writ, although it was alleged to have been obtained without the knowledge or consent of D., one of the co-partners, but left the company to make a return of the facts, if they should think

. Reg. v L. & S. W. Ry., 13 Jur. 10. Mandamus to churchwardens and overseers to produce the parish rate books at a scrutiny of the polls taken at the election of churchwardens and overseers. The writ stated the refusal of the defendants to be to the damage of the parishioners, and the complaint to be by them. The return denied facts stated in the inducement respecting the polls. Two parishioners, for themselves and the other parishioners, traversed these denials, on which issues were joined, and found for the Crown :- Held, that it sufficiently appeared that the two parishioners were the prosecutors of the mandamus. Reg. v. Full, 1 Q. B. 686 ; 2 G. & D. 803 ; 13 L. J., Q. B. 187— Ex. Ch. See also sub-heads supra.

Successors in Office.]-The 19th section of the repealed Municipal Corporations Act, 1835, 5 & 6 Will. 4, c. 76, had to be read with reference to the power of the court of Queen's Bench to compel the performance of a public duty by public officers, although the time prescribed by statute for the performance of it had passed; so that if the public officer to whom belonged the per-formance of the duty had in the meantime quitted his office, and had been succeeded by another, it became the duty of the successor to obey the writ, and to do the acts, when required, which his predecessor omitted to perform. Backester Corporation Reg. (in error), El. Bl. & El. 1024; 27 L. J., Q. B. 431; 4 Jur. (N.S.) 1227; 6 W. R. 838-Ex. Ch.

## d. Argument and Rule.

Argument.]-After the determination of the court upon a rule nisi for a mandamus, the question decided cannot be again discussed, as a special case, until there is a return made to the writ. Rex v. Leicester JJ., 7 D. & R. 708. And see 7 D. & R. 370; 4 B. & C. 891.

When eause is shewn against a rule for a mandamus, the objection that no sufficient demand and refusal appear must be taken before the merits are discussed. Reg. v. Eustern Counties Ry., 10 A. & E. 531; 2 P. & D. 648; I Railw. Cas. 509; 8 L. J., Q. B. 340.

Effect of Misrepresentations in Affidavits. ]-The court will make a rule for a mandamus absolute, although the affidavits on which the rule nisi was obtained contain misrepresentations and suppress facts, if sufficient remains unanswered to warrant the court in issuing the writ. Rex v Payn, 1 N. & P. 524; 6 A. & E. 392 ; W. W. & D. 142.

Rule Form of .] The court will not grant a rule in the alternative for a mandamus or a quo warranto. Reg. v. Leeds Corporation, 11 A. & E. | grant a provisional licence for a railway refresh-512 : 5 Jur. 548.

A rule to shew cause why one or more writs of mandamus should not issue is an improper form of vule. Reg. v. Bridgnorth Corporation, 2 P. & D. 317; 10 A. & E. 66; 8 L. J., M. C. 86; 3 Jur. 384.

Amendment of Rule. ]-A mandamus to a company to summon a jury was obtained on affidavits, shewing that the applicant had a claim for the value of land in his occupation taken by the company, and likewise for damage done to his remaining land by severance. By mistake, the rule was drawn up for a mandamus to summon a jury who should assess the value of the laud, and omitted to mention damages for severance. mandamus was drawn including both, and was quashed, as varying from the rule. The court refused to amend the rule, so as to make it agree with the writ; but afterwards, on the original affidavits, and on counsel's statement of the mistake, granted a mandamus, including both objects. Reg. v. East Lancashire Ry., 9 Q. B. 980 ; 16 L. J., Q. B. 127 ; 11 Jur. 169.

On an application to quash a mandamus for not being drawn up in conformity with the rule, the court will not amend the rule to support the mandamus : the party ought, if there is a mistake, to apply to amend his rule before the mandamus Rew v. Water Eaton Corporation, 2 Smith, 54. And see Rev v. Tucker, 5 D. & R.

434 : 3 B. & C. 545.

Previous Demand and Refusal.]-When no demand has been made on the officer of a corporation to do an act, the performance of which is sought to be enforced by mandamus, the court will not allow the writ to go, as a previous demand and refusal are necessary. Reg. v. Sealey, 8 Jur. 496.

A rule for a mandamus was discharged, upon a preliminary objection that there had been no demand upon and refusal by the party against whom it was prayed to do that which the mandamus directed; the court refused a second rule for the mandamus, founded on affidavits shewing a demand and a refusal subsequently to the discharge of the former rule. Thompson, Ev parte,

6 Q. B. 721; 14 L. J., Q. B. 176.

If a local board of health, upon a claim being made against them for compensation, denies all liability, the claimant will be immediately entitled to a mandamus to enjoin them in general terms to cause compensation to be made; and it will not be necessary for him to claim any specific amount before applying for the writ. Reg. v. Burstem Local Board, 1 El. & El. 1077; 29 L. J., Q. B. 242; 6 Jur. (N.S.) 696; 8 W. R. 584 —Ex. Ch.

Special Case-Agreement that Mandamus may Issue. - When a special case is stated for the opinion of the court, and the parties agree that, in the event of the court giving judgment for the plaintiff, a mandamus may issue against the defendant :- Held, that this must be understood to mean, if the court thinks fit that it shall do so. Nicholl v. Allen, 1 B, & S, 916; 31 L. J., Q. B. 283; 6 L. T. 699; 10 W, R. 741—Ex. Ch.

So if the agreement had been that a mandamus shall issue. Ib.

Rule Absolute-Costs-Not to be drawn up without Leave. |- Licensing justices agreed to was served without shewing the original, the

ment room, according to plans shewn, though they directed a change of site, which the applicant agreed to. There never was any further assent of justices to the alteration. At the application for the final order the eight justices were equally divided. No adjournment was granted or asked for. A rule nisi for a mandamus being granted, the instices thereafter met again and agreed by a majority to make the final order :- Held, that the rule for a mandamus might be made absolute, but without costs, and was not to be drawn up till further application. Reg. v. Cox, 48 J. P. 441.

## e. Rule Absolute in the First Instance.

In what Cases. ]-A rule for a mandamus to an archdeacon to administer the oath of office to a churchwarden was absolute in the first instance, where there was no rival candidate, and no reason assigned for the refusal to administer the oath.

Rew v. Lichfield and Coventry (Archdeacon), 5 N. & M. 42; 1 H. & W. 463.

The rule is absolute in the first instance for a mandamus to swear in a chapelwarden, where, on the vacancy of a living, there is a dispute between the curate and the sequestrator who should appoint, and each has appointed one. Penruddock, Expurte, 1 H. & W. 347.

A rule for a mandamus to churchwardens to wear in overseers of the poor, was granted absolute in the first instance. Reg. v. Manchester Churchwardens, 7 D. P. C. 707.

See also sub-heads supra.

#### f Affidavits.

Form of, ]-Affidavits in answer to a rule for a maudamus sworn before a commissioner must contain the place where sworn, otherwise they cannot be read. Rew v. W. R. Yorkshire J.J., 3 M. & S. 493.

Where a rule to pay the costs of a mandamus has been discharged, on the ground that an affidavit on which it was moved is defectively intitled, the court will hear a fresh application, but not where the defect of form is in the body of the affidavit. Reg. v. G. W. Ry, D. & M. 471; 5 Q. B. 597; 1 D. & L. 742; 13 L. J., Q. B. 129; 8 Jur. 107.

Fresh Affidavits.]-When a rule for a mandamus, obtained by churchwardens, had been discharged, with costs, on the ground that their affidavits were imperfect, and a subsequent rule was obtained by the same parties, on the same ground, on amended affidavits, the court refused to hear the second application upon the merits, and discharged the second rule also, with costs. Reg. v. Pichles, 12 L. J., Q. B. 40.

## g. Service of Bule.

Upon Whom. - Service of a rule nisi for a mandamus to the sessions to hear an appeal against the determination of the petty sessions need not be upon the clerk of the peace; it is sufficient if it is served on the justices whose decision is complained against. Rev v. Tucker, 5 D. & R. 434 : 4 B. & C. 545.

Shewing Original. ]-Where a copy of the writ

court refused to set aside the service. Reg. v. | was quashed as varying from the rule. Reg. v. Rivaniagham and Oxford Junction Ry, 1 El. & Bl. East Lancathire Ry, 9 Q. B. 980; 16 L. J., 2015; 22 L. J., Q. B. 195; 17 Jur. 24. | Q. B. 127; 17 Jur. 169.

#### h. Amendment of Writ.

When Allowed. ]-A mandamus to a company incorporated by the name of "The D., S. and W Junction Railway," was directed to them as "The D., S. and W. Junction Railway Company." Upon return, the court amended the writ by Reg. v. striking out the word "company." Derhyshire, Staffordshire, and Warcestershire Junction Ry., 2 C. L. R. 1653; 23 L. J., Q. B. 333; 18 Jur. 1054.

A mandamus cannot be amended after a return has been made to it. Rer v. Stafford Corporation, 4 Term Rep. 689.

Where a mandanus had, under the direction of a special pleader, been drawn with a teste out of term, and so issued, and a return had been made and demurred to, wherenpon the defendant objected that the writ was wrongly tested, the court, by its general authority, may amend; for the mistake was that of the officer, not the party, the officer being bound to see that a proper teste was affixed and not to adopt an irregular one given by the prosecutor. Reg. v. Conyers, 8 Q. B. 981; 15 L. J., Q. B. 300; 10 Jur. 899.

#### i. Quashing or Superseding Writ.

Grounds for.]-After a mandamus has been granted, a return made, and an issue thereon tried, the court will not quash the writ on grounds which were or might have been diseassed on shewing cause against the application for it : as, that a suggestion on which the motion was made is untrue. Reg. v. Stamford Corporation, 6 Q. B. 433.

A college may interpose to stop a mandamus to a visitor. Rev v. Ely (Bishop), 1 W. Bl. 52.
Where a writ has been obtained for a man-

damus to issue, and the mandamus taken out in other terms than are warranted by the rule, and differing not merely by adding things incidental to a mandamus, but materially enlarging the terms, the court will quash the mandamus; notwithstanding, perhaps, they would have granted a rule as large if it had been applied for upon the same affidavits; and they will not, upon a motion to quash it, amend the rule to support the mandamns: the party ought, if there is a mistake, to apply to amend his rule before the mandanns issues. Rew v. Water Euton Corporation, 2 Smith, 54. And see Rew v. Tucker, 5 D. & R. 484 : 3 B. & C. 545.

Practice.]-A notice of a motion to quash or supersede a mandanus or any other writ whatever must always be given. Anon., 1 Wils. 30.

The mandamus required the corporation, by its corporate style, to assess compensation (instead of requiring the counsel to assess compensation, and the corporation to execute a bond) after return and issue in fact tried :- Held, that assuming the writ to be materially defective in form, the court ought not to quash it on motion. Reg. v. Stamford Corporation, 6 Q. B. 433.

A rule for a mandamus was granted on affi-

davits shewing two grounds, but by mistake the rule was drawn up only including one ground. The mandamus was drawn including both, and

#### j. Return to Writ.

#### i. Generally.

Parties to Make. ]-The court had a discretion under s. 4 of the repealed 1 Will. 4, c. 21, whether it would allow a return to a mandamus to be made and joined on behalf of a third person, claiming a right or an interest in or to the matter of the writ. Reg. v. Cheek, 9 Q. B. 943; 16 L. J., M. C. 65; 11 Jur. 86.

After demurrer to return by the party to whom it is delivered, the court will let in the party really interested to make a return. Rey. v. Payater, 14 L. J., M. C. 182; 9 Jur. 926.

When Inconsistent. - When several causes returned are inconsistent, the whole is bad, Rew v. Cambridge Corporation, 2 Term Rep. 456.

That B. was not a bargess, that he was not eligible to the office of common councilman, and that he was not elected, are not inconsistent returns, Ib.

A return to a mandamus to admit, or shew cause to the contrary, may shew one or more or any number of causes, provided they are consistent. Wright v. Faucett, 4 Burr. 2041.

Mandamus to a lord and the steward of a manor to hear a plaint. Return that in 1885. the plaint was set aside and annulled for certain errors; that afterwards (in 1838), in obedience to the writ, the defendants heard the plaint again, when, for the same errors and others, it. was adjudged that the plaint had been rightly set aside in 1835, and that they could not take further cognisance of the plaint; that therefore they could not proceed in the plaint, as by the writ commanded :—Held, first, that the return was not contradictory, on the ground that it stated both that the plaint had been proceeded with in obedience to the writ, and that it could not be so proceeded with; and secondly, that the return showed that judgment had been given, and that the court could not review it.

Rey. v. Old Hall (Lord of Manor), 2 P. & D.

515; 10 A. & E. 248; W. W. & D. 650; 3 Jur.

Validity of. ]-The mandatory part of the writ may be very general, but the return must be very minute in shewing why the party did not do what he was commanded to do. Reg. v. Southampton Harbour Commissioners, 1 B. & S. 5: 30 L. J., Q. B. 244; 7 Jur. (N.S.) 990; 9 W. R. 630.

A return that C. was not duly elected sexton according to ancient custom, that there is a custom for the inhabitants to remove at pleasure, and that C. was removed pursuant to such custom, is good. Rex v. Taunton Churchwardens, Cowp. 113.

To a mandamus requiring A., a waywarden, to deliver to the churchwardens certain books of account, assessments, &c., in his custody, power or possession, it is a good return to say, that on and since the teste of the writ, A. had not nor has had the books, &c. or any of them, in his custody, power or possession. Rex v. Round, 5 N. & M. 427; 4 A. & E. 139; 1 H. & W.

A statute directed that a sum of money should

be paid to commissioners who were therewith to | that the plea was good, as it must be taken to for putting certain banks and bridges in a permanent state of stability and security, and for constructing the forelands and slopes of the banks, as far as practicable, upon one uniform system. By a mandamus, reciting this clause. and that the money had been paid to the commissioners, they were ordered to proceed to put the banks forthwith in a permanent state of stability and security, and to construct the forelands and slopes of the banks, as far as practicable, upon one uniform system. Return, that the commissioners had from time to time, at all times from the passing of the act, hitherto proceeded to execute all such works as should be or were from time to time deemed necessary, proper or expedient for putting the banks in a permanent state of stability and security, and for constructing the forelands and slopes of the banks, as far as practicable, upon one uniform system:—Held, an insufficient return, and a peremptory mandamus awarded. Rev v. Ouse Bunk Commissioners, 3 A. & E. 544.

Mandamus to the officers of a parish included in a union, reciting the due appointment of certain persons to be guardians of the poor of the union, and directing them to pay a sum out of the poor-rates collected by them to the treasurer of the union. Return, that the supposed gnardians were not nor were any of them duly appointed under the provisions of the act, and that at the issuing of the writ guardians therein mentioned were not, nor were any of them, guardians of the poor of the union:— Held, that the return was insufficient for not distinctly setting forth any defect in the appointment. Rey. v. St. Andrew and St. George's (Governors), 10 A. & E. 736.

Expiration of Time Limited for Recovery of Penalty.]-A statute provided for the recovery of penalties within three months of the com-mission of an offence against it. To a mandamus directing justices to hear and determine an information for a penalty under the statute, the justices returned that they had heard the information and dismissed it on the ground that more than three months had elapsed :- Held, that the return shewed that they had obeyed the writ, and was therefore good. Reg. v. Main-nearing, El Bl & El. 474; 27 L. J., M. C. 278; 4 Jur. (N.S.) 928,

Return of Unconditional Compliance. - The practice which allowed a plea to a return of unconditional compliance to a writ of mandamus is in no way affected by the provisions contained is in no way anceced by the photosoms contained in Ord, LHIL r. 9 of the Rules of the Supreme Court, 1883. Rey. v. Staffordshire J.I. or Pirehill North JJ., 54 L. J., M. C. 17; 14 Q. B. D. 13; 51 L. T. 534; 33 W. R. 205; 49 J. P. 36-C. A.

Return of Obedience.]-Upon a mandanus to justices to hear and determine an application for a certificate to sell wine to be consumed on the premises, they made a return of unconditional compliance with the writ. Plea, that the justices were only entitled to refuse the application upon one or more of the four grounds specified in s. 8 of the Wine and Beerhouse Act, 1869, but that they refused the application on

second all such works as shall from time to time be deemed necessary, proper or expedient, from the properties of the pr which they did not possess, and that they had therefore not substantially heard and determined the matter submitted to them. Reg. v. King, 57 L. J., M. C. 20; 20 Q. B. D. 430; 58 L. T. 607; 36 W. R. 600; 52 J. P. 164—C. A.

> Return to Mandamus—Evidence of Pretended Rehearing.]-Licensing justices were ordered by mandamus to hear an application to renew a beer-house licence and made a return that they duly heard and determined it. The prosecutor pleaded to the return by traversing the return, and after issue a jury found that it was a mere pretended rehearing and gave a verdict for the prosecutor. The justices had decided the case on the question whether the applicant was the real resident occupier, and the jury acted chiefly on evidence that one of the justices was overheard to say he would hear but would decide against the applicant :--Held, that there was no evidence to justify the finding of the jury that the justices did not hear and decide the case, and verdict set aside accordingly, and judgment entered for the justices. Reg. v. Pirehill JJ.,

Amendment of.]—The court would not allow the defendants in a traverse to amend the return to a mandamus by setting forth a different constitution, where the application was after verdict. Rev. v. Grampound Corporation, 7 Term Rep. 699.

A clerical mistake may be amended in the return after the return has been filed. Rew v. Lyme Regis Corporation, 1 Dougl. 125.

The court will not direct in what manner justices shall make their return to a mandamus ; but if the return made to it is insufficient to raise the question intended to be agitated, the court will, at the instance of the party interested, make a rule, giving the justices liberty to amend in the manner required, if they wish to do so. Res v. Marriott, 1 D. & R. 166.

A rule for a mandamus to a magistrate commanding him to issue a warrant of distress upon the goods of A., who shewed cause against the rule, was made absolute, and a return was subsequently made. The court allowed A, to amend the return, no loss of time or other injury being occasioned thereby, but not to file a separate return. Reg. v. Paynter, 14 L. J., M. C. 182; 9

Withdrawing.]—Leave may be given to with-draw a return by consent. Rew v. Burker, 3 Burr. 1379.

Inspection of Documents referred to.] - A. mandamus, the object of which is to enforce a civil right, is a proceeding, in aid of which, under the Evidence Act, 1851, 14 & 15 Vict. c. 99, s. 6. a judge may grant an order for the inspection of documents by either of the litigant parties, when the return to such writ is traversed. Reg. v. Ambergate Ry., 17 Q. B. 957; 16 Jur. 777.

False Return.]—An action will lie for a suppressio veri in a return as well as for an allegatio pressio veri in a return as well falsi. Rev v. Lyme Regis Corporation, 1 Dougl.

Though by 9 Anne, c. 20, s. 2, the prosecutor other grounds contrary to the statute :-Held, of a mandamus, to which there is a return, and issue taken on the facts therein, had an option; course had in those parts thereof which had not he might have brought an action for a false county, though he might originally have alleged the facts there and have there brought his action for a false return. Rev v. Newcastle-upon-Tyne Corporation, 1 East, 114.

#### ii. Pleadings.

Sufficiency of . To a mandamus, suggesting that trustees of a turnpike-road had carried the road over the private grounds of C., but had not (as directed by the Turnpike Act, 1823, 4 Geo. 4. c. 95, s. 66) fenced them on cach side, and commanded them to do so, a return was made:

1. Denying that the land belonged to C. 2. Alleging that the trustees had made satisfaction to C. (under the Turupike Act, 1822, 3 Geo. 4 c. 126, s. 83) for the damage done by so carrying the road, which satisfaction C, had accepted. had taken security for the amount, and had pro-ceeded to enforce the security. 3. Alleging that the trustees had no funds enabling them to execute the required work. C. pleaded, tendering issue on the denial of property, and leaving the other allegations unanswered. Issue was joined, and a verdict found for the Crown :-Held, that the unanswered allegations were no valid return; that the want of funds was no excuse after the road had been made; and that the prosecutor, having succeeded on the plea, was entitled to a peremptory mandamus. Reg. v. Luton Roads Trustees, 1 Q. B. 860; 10 L. J., Q. B. 263.

Mandamus to the defendant, as vicar of a parish, to restore the prosecutor to the office of clerk and sexton of the parish. The return, after alleging the right of the defendant, as vicar, to remove for lawful cause, and upon any vacancy legally arising to nominate, appoint and admit a legal and discreet person, stated the dismissal of the prosecutor by the defendant for various acts of misconduct, alleging them to have been done by the prosecutor in the presence and hearing of the defendant, and also the appointment of another person by the defendant in his place. The prosecutor in his first plea admitted the right, as alleged by the vicar, and the appointment of another person as clerk in his place, but pleaded de injuria as to the residue of the return; and pleaded, secondly, that he was not, before the removal from his office, summoned by the defendant to answer or explain the charges and cause of dismissal :- Held, first, that the return was bad, for not shewing that the prosecutor had had an opportunity of answering the charges made against him before dismissal. Rea. Smith, D. & M. 564; 5 Q. B. 614; 13 L. J., Q. B. 166.

Held, secondly, that the second plea only admitted the truth of the charges for the purpose of that plea, and that the whole record shewed no such admission, as the truth of the charge was put in issue by de injuriâ. Ib.

Traversing Matter of Law. ]-By a dock act persons were formed into a company for improv-

to try the question in the same county in which been excavated or embanked, or as near as circamstances would admit, except in such parts of return : vet, if all the material facts are alleged the new course as should be cut through rock or in one county, and issue taken thereon there, he atom. A mandamus issued to the company, cannot issue the venire facias into another stating in the inducement that the company had made and completed a new channel, but that parts of the south bank or side not cut through rock or stone had since become and were broken down and out of repair, and the inclination of the side was thereby greatly altered, to the danger of obstruction of the navigation. And the company was commanded to repair and maintain the parts of the south bank. Heturn, that the company was not required by the statute, nor otherwise liable, to repair and maintain the said parts ; and that, as near as circumstances had admitted or did admit, they had maintained the new course of equal depth and breadth at the bottom, and with equal inclination of the sides as the river course at the time of the act passing had in those parts which had not been excavated or embanked, and except such parts of the new course as had been cut through rock or stone :-Held, that the first part of the return was bad, as traversing matter of law, and also because a legal liability appeared. Reg. v. Bristol Dock Co., 2 Q. B. 64; 2 Railw, Cas, 599; 6 Jur. 216.

Held, also, that the second part was also bad, as not answering the mandatory part of the writ, but applying only to matter stated in the writ as a consequence of the omission to repair. Ib. Although the return may be in the nature of a

demurrer, the counsel for the Crown is entitled to demurrer, the counsel for the Crown is entitled to begin. Rev v. St. Paneras Church Trustees, 1 N. & P. 507; 6 A. & E. 314. The party demurring to a return is entitled to

be first heard as in an ordinary demurrer. Reg. v. Smith, D. & M. 564; 5 Q. B. 614; 13 L. J., Q. B. 166.

#### k. When Return Quashed.

On what Grounds. ]-The court will not quash a return to a mandamus (which directed an inferior court to give judgment on an indictment) merely because it states an erroneous judgment given below; but a writ of error must be brought to reverse that jndgment. Rev. v. Yorkshire (W. R.) JJ., 7 Term Rep. 467.

Practice.]—A rule for quashing a return to a mandamus need not go into the Crown paper. Rex v. St. Katherine's Dock Co., 1 N. & M. 121; 4 B. & Ad. 360.

It is discretionary in the court either to determine the validity of a return to a mandamus on motion or to order the cause to be set down in the Crown paper for argument. Ib.

In shewing cause against a rule for quashing a return, the defendant may object that the writ

was improperly issued. Ib.

When a return is not frivolous on the face of it, its validity must be urged on a concilium and not on a rule for quashing the return. Reg. v. St. Saviour's, Southwark, Wardens, &c., 3 N. & P. 126.

As to Part. ]- If a return consists of several independent matters, not inconsistent with each persons were formed into a company for improving a port, and made proprietors of the works, and were authorised and required to make, complete and maintain a new course or channel for a river, the same to be of equal depth and breadth at the bottom, and with equal inclinations of the sides, as the them present river [Comparation, 2 Term Rep. 456; 4 Bur. 2008. S. P., Rev. Y. Ork Corporation, 5 Term Rep. 65.

## 1. Judgment.

Under 9 Anne, c. 20, and 1 Will. 4, c. 21, s. 3, judgment non obstante veredicto may be given for the party making return to a mandamus. Reg. v. Darlington School Governors, 6 Q. B. 682; 14 L. J., Q. B. 67.

When a mandamus had been issued, which ought not to have issued, against a railway company for making a road, and the return merely traversed a part, and the issue then raised had been found against the company and a peremptory mandamus had been awarded :-Held, that on a writ of error, the court being satisfied that the mandamus itself ought not to have issued, had properly reversed the whole judgment, Reg. v. S. E. Ry., 4 H. L. Cas. 471; 17 Jur. 931.

# 4. PEREMPTORY MANDAMUS.

By Rules of the Supreme Court, 1883, Ord. LIII. r. 6, the court or a judge may, if they or he think fit, order that any writ of mandamus shall be peremptory in the first instance.

In what Cases.]—When a mandamus is addressed to churchwardens during their year of office, and disobeyed by them during that period, it is no reason for refusing a peremptory writ that their year of office has expired. Allen, 42 L. J., Q. B. 37; L. R. 8 Q. B. 69; 27 L. T. 707; 21 W. R. 190.

A party, whose right to an office has been established by a verdict, cannot have a peremptory mandamus to restore him to his office until he has signed judgment in the action. Neale v. Bowles, 1 H. & W. 584.

A peremptory mandamus will not be awarded until the proceedings on the first mandamns are complete. Reg. v. Baldwin, 8 A. & E. 947; 3 P. & D. 124; 1 W. W. & H. 681.

The court will not grant a peremptory man-Ames to reinstate a person in a corporate office dams to reinstate a person in a corporate office though the return made may be objectionable or defective in point of form, if the fact's stated on that return justify the court in refusing the mandamus as matter of discretion, such as to compel the corporation to restore an officer whom they would be bound immediately to remove in a more would be count influentately to remove it a more formal manner. Rese v. Bristol Corporation, 1 D. & R. 389. S. C. 1001. Rese v. Griffiths, 5 B. & Ald, 731. And see Rese v. Bank of England, 2 B. & Ald. 620.

It is established law that if there be a writ of mandamus commanding several things, the prosecutor is not entitled thereto in the peremptory form unless he prove that he is entitled to the whole. Reg. v. East and West India Docks the whole. Arey. v. Law and west Incut Locks and Birmingham Junction Ry., 2 E. & B. 466; 22 L. J., Q. B. 380; 17 Jur. 1181; 1 W. R. 409.

Return, inadmissible.]-A return stating an excuse for non-compliance with a peremptory writ, is inadmissible. Reg. v. Poole Corporation, 1 G. & D. 728. S. C. nom. Reg. v. Ledgard, 1 Q. B. 616.

There cannot be a return to a peremptory mandamus. Reg. v. Hudson, 9 Jur. 345.

Quashing when Unnecessary.]—After judgment for the Crown on a return to a mandamus, the defendants having voluntarily, and with the court will quash a peremptory writ of mandamus them. Ib.

as unnecessary and an abuse of the process of the court. Reg. v. Saddlers' Co., 4 B. & S. 570; 33 L. J., O. B. 68.

Error on. |- Upon the award of a peremptory mandamus error will not lie, there being no plea to it, and therefore not in the nature of a judgment. Dublin (Dean, &c.) v. Rex, 1 Bro. P. C. 73.

The grant of a peremptory mandamus is not a matter of discretion but is a decision upon a right, declaring what is or what is not lawful to be done; and such decision is subject to review.

Reg. v. All Saints (Wigon), I App. Cass 611; 35
L, T. 381; 25 W. R. 128—H. L. (E.)

Attachment.] — An attachment cannot be granted against the mayor, aldermen and burgesses of a borough, for disobedience to a peremptory writ requiring them to pay a sum of money secured by a compensation bond under the corporation seal, but the particular indi-viduals who had been concerned in disobeying the writ must be named in the rule for the attachment. Reg. v. Poole Corporation, 1 G. & D. 728. S. C. nom. Reg. v. Ledgard, 1 Q. B. 616.

An attachment was ordered against the mayor of a corporation, for not making a return to a peremptory mandamus within the time prescribed by the writ, though there was no personal service. Res v. Forcey Corporation, 5 D. & R. 614; 2 B. & C. 584.

## 5. Damages,

Who Entitled to I—All prosecutors of a mandanns are, by 1 Will. 4, c. 21, entitled to damages and costs, whether an action for a false return can be sustained by them or not. Reg. v. Fall, 1 Q. B. 636; 2 G. & D. 803; 13 L. J., Q. B. 187-Ex. Ch.

#### 6. Costs.

Against Whom. ]-Where a return to a mainlamus, shewing cause for disobedience to the writ, is made by the inhabitants of a parish, if the return is quashed, the court, in granting costs, will ascertain which of the inhabitants joined in making the return, and make the rule for costs alsolute against them. Reg. v. St. Saximor's, Southwark, 3 N. & P. 845; 7 A. & E. 925; 1 W. W. & H. 244; 7 L. J., M. C. 59; 2 Jur. 565.
Where magistrates are present, but take no

part in the proceedings, the application against them will be discharged with costs. Reg. v. Radnor (Earl), 8 D. P. C. 717; 4 Jur. 460,

In what Cases Granted. ]-The rule that a party who unsuccessfully opposes a rule for a mandanus to set right the decision of an inferior court, must pay the costs occasioned by the mandamus, applies to a party shewing cause in the first instance. Reg. v. Derby Reworder, 2 L. M.

The court, in the exercise of its discretion, will grant costs to the prosecutors, although there may have been doubtful questions of law raised and have been doubted questions of new raised on the return. Reg. v. St. Sarionr's, Southwark, 3 N. & P. 345; 7 A. & E. 925; 1 W. W. & H. 234; 7 L. J., M. C. 59; 2 Jur. 565.

Where public functionaries, such as a clergyman or a schoolmaster, endowed under an act of parliament, are obliged to come before the court prosecutor's consent, done the act enjoined, the act of parliament, the court will award costs to

When a party required by law to pronounce a The court, in the exercise of its discretion, will decision on certain points is brought before the generally order that the costs of a mandamus application fails. Rev v. Bridgmoth Corporation, 10 A. & E. 66; 2 P. & D. 317; 8 L. J., M. C. 86.

After argument and judgment on return to a manuataus, the court will give costs to the party succeeding, unless a very strong ground of exemption is shewn on the other side, Reg. v. Newbury Corporation, 1 Q. B. 751; 2 G. & D. 109; 11 L. J., Q. B. 149; 6 Jur. 821. S. P., Rey. v. Eastern Counties Ry., 3 Railw. Cas. 186.

Upon a rule for mandamus to inspect the register of a company by one of its proprietors, the company opposed on the ground that the applicant was prompted by improper motives.
Although the majority made the rule absolute, one of the court expressed his opinion that the object of the application was not justifiable and dissented from the decision :- Held, that this was no ground for setting aside the ordinary rule, was acground for secting using the ordinary Fide, by which costs are given to the successful party, Rey, v. Wilts and Berks Canal Navigation, 30 L.T. 408. When a writ of mandanus is opposed, the

court will in all cases grant costs against the party so opposing it, even when the opposition is withdrawn before the time for argument of the rule arrives. Ludlow Union v. Birmingham Union, 44 L. J., M. C. 48; 31 L. T. 587.

When no cause is shewn, a different rule may

be adopted. Ib.

Judgment of ouster having been given in a quo warranto against a person exercising the office of an alderman of a borough, and the town council having failed to fill up the vacancy within ten days, and having subsequently declined to do so, the relator obtained a mandamus commanding them to hold an election for that purpose, which was obeyed. The court ordered the defendants to pay the cost of the mandamus to the prosecutor. Reg. v. Cumbridge Corporation, 4 Q. B. 801; 14 L. J., Q. B. 82; 9 Jur. 11.

Although the costs of obtaining a writ of mandamas, where cause is shewn, are in the discretion of the court, yet they ought to be given to the or the court, yet they ought to be given to the successful party, unless there are strong grounds to the contrary. Rog. v. Harden, 1 B. O. C. 214; 23 L. J., Q. B. 127; 18 Jur. 147; 2 W. R. 164.

Where cause is shewn against a rule for a mandanus, the court, in the exercise of its discretion, will in general order costs to be paid by that party to the application who ultimately fails to that party who ultimately succeeds, but the rule is not invariable. Reg. v. Surrey JJ., 9 Q. B. 37; 15 L. J., M. C. 117; 10 Jur. 432.

Where a mandamus has been applied for to justices at sessions, to compel them to perform an act they erroneously supposed they had no power to do, if the party, in whose favour such decision is given, opposes the application for the writunsuccessfully, the general rule, that an unsuccossful party must pay all the costs, is applicable. Reg. v. Cumberland JJ., and Reg. v. Luneashire JJ., 3 New Sess. Cas. 202; 2 B. C. Rep. 287; 5 D. & L. 430; 17 L. J., M. C. 133; 12 Jur. 1048.

The rule is, that where an application for a mandamus is made and opposed, the unsuccessful party pays costs, except under very particular circumstances. Reg. v. Surrey JJ., 14 Q. B. 684; 2 New Sess. Cas. 377; 19 L. J., M. C. 171; 14

Jur. 457,

The court, in the exercise of its discretion, will court by a motion impugning such decision, the shall be paid to the successful party. This rule general rule is that he shall have costs if the applies when, on the one hand, there has been a wrongful refusal to do the act which the court afterwards compels the party to do; or when, on the other hand, the party applying for the writ fails on a discussion of the merits. In either case, however, it is essential that no blame should have attached to the successful party. Reg. v. Langridge, 3 C. L. R. 361; 24 L. J., Q. B. 73; 1 Jur. (N.S.) 64; 3 W. R. 165.

A rule had been obtained calling upon B. and certain justices of the county of Suffolk to shew cause why the justices should not issue a distress warrant against B, to levy the amount of a poorrate. B. shewed cause against the rule, upon the ground that the premises in respect of which he refused to pay the rate were not within the juris-diction of the magistrates, as they were in the county of Norfolk and not in the county of Suffolk. The rule was made absolute in order that the fact might be determined in some other way. A warrant was accordingly issued, and a levy made mon B.'s goods, which he repleyed. and the cause went down for trial at the assizes, the issue being whether or not the premises were in the county of Suffolk. The jury found in favour of B., and thereupon he applied for the costs incurred in resisting the original rule — Held, that he was entitled to such costs. Reg. v. Great Yarmouth JJ., 1 Jnr. (N.S.) 476; 3 W. R.

Where through delay of plaintiff defendants had become obliged to have the authority of a mandamus to justify them in paying a sum of money, the court refused to make absolute a rule calling on them to pay the costs of the manda-

mus. Reg. v. Burleigh Bourd of Health, I.L. T. 92.
The right to the costs of a mandamus to sessious to hear an appeal does not depend upon whether or not cause has been vexatiously shewn against the rule for the writ, but whether cause has been unsuccessfully shewn. Rea. v. Middlesew J.J., 20 L. J., M. C. 42; 15 Jur. 907.

A sheriff, on a compensation case under a railway act, directed the jury that the claimant's case was not within the act, and they so found. A rule was afterwards made absolute for a mandamus to the sheriff to execute the inquiry, upon the ground that he was mistaken:—Held, that the parties opposing a rule for a mandamus should not pay the costs of the other side in moving and making that rule absolute, as the necessity for the rule arose from the mistake of the judge. Rey. v. Middlesex Sheriff, 5 Q. B. 365; 3 Railw. Cas. 396; 13 L. J., Q. B. 14.

Where a party unsuccessfully opposes a rule for a mandamus to set right the sessions, who have wrongly decided a matter in his favour, he will in general be made to pay the costs of the mandamus, unless, perhaps, the matter is wrongly decided by the court itself, uninfluenced by any improper objection on his part. Reg. v. Cheshire. JJ, 5 D. & L. 426; 2 B. C. Rep. 186; 12 Jur. 161.

It is a general rule that unsuccessful applications against magistrates are discharged with costs. Reg. v. Rudner (Earl), 8 D. P. C. 717; 4 Jur. 460.

The court had power, under the repealed The court had power, that we have a like it will 4, c 21, s 6, to give the costs to the defendant as well as to the prosecutor of a mandamus. Reg. v. Dartmonth Corporation, 2 D. (N.S.) 980; 12 L. J., M. C. 83; 7 Jur. 629.

Where the prosecutor omitted to proceed with will be made for costs at the time the rule is a mandamus after a return had been made, the made absolute, the court will make it absolute court compelled him to elect either to proceed or pay the costs of the mandamus. Ib.

What Costs Included. !- The costs of a writ of mandamus, whether such writ shall be granted or refused, and also if the writ is issued or obeyed, are not alone the costs in applying for and of the writ itself, but also include the costs of the return and subsequent proceedings. Reg. v. St. Punerus Churchwardens, 2 D. (N.S.) 955; 7 Jnr. 1060. S. P., Reg. v. Scott, 1 D. & L. 212: 7 Jur. 993.

By a drainage act commissioners were ordered to administer an oath to new commissioners elected. On a mandamus requiring a commissioner to swear in a person alleged to be elected, the defendant returned that the party was not elected; and on a traverse taken on the return, the defendant had the verdict and judgment :-Held, that the defendant was entitled to costs of shewing cause upon the rule as part of costs of snewing cause upon the rule as part of the general costs, without special application and order under I Will. 4, c, 21, s, 6. \*\*Reg. v. \*\*Kelk\*, I Q. B. 660; 4 P. & D. 185; 10 L. J., Q. B. 188.

Fees for Entering Rule.]-Schedule 52 of the Order as to Supreme Court Fees, 1884, which provides for the payment of a fee of 2l. on entering or setting down " a cause or matter for trial or hearing in any court in London or Middlesex or at any assizes," is not confined to cases where the matter for hearing arises in an action. Such fee is therefore payable to the Crown office on entering a rule nisi against a police magistrate ordering him to hear an application for a summons. Husker, Ex parte, 54 L. J., M. C. 94; 14 Q. B. D. 82.

Upon Award of a Peremptory Mandamus.]-Upon a judgment awarding a peremptory mandamus, the costs are not those awarded at the discretion of the court, under the repealed 1 Will, 4, e. 21, s. 6, but are the general costs, under s. 4. Reg. v. S. E. Ry., 4 H. L. Cas. 471; 17 Jur. 901.

Application—When and How Made.]—Application for costs of a mandamus shall be made within two terms of the obeying of the writ. Reg. v. Keat JJ., 36 L. J., M. C. 130; 16 L. T.

The general practice npon making absolute a rule for a mandamus is not to give costs, but to require a separate motion to be made for them; yet where, upon making such rule absolute, it appears that the litigation is at an eud, the appears that the Haganton is at the end, the court will not require a separate motion to be made for the costs, but will give them as a part of the rule. Reg. v. L. B. S. S. C. Ry., 10 L. T.

Where no cause was shewn against a rule for a mandamus, and it appeared from affidavits that the litigation was substantially at an end, the court made the rule absolute, with costs, and did not require a separate application for costs. Reg. v. East Anglian Ry., 2 El. & Bl. 475; 18

- Materials on which Made. ]-The court will not grant costs on making a rule for a mandamus absolute upon a mere affidavit of service, but on affidavits shewing ground for believing with costs. Reg. v. East Anglian Ry., 2 El. & Bl. 475; 18 Jur. 69.

A rule nisi was obtained for a mandamus commanding a magistrate to hear a claim against a maining a magnetate to near a caum against a milway company for compensation under their milway act, which rule was opposed by the company only and made absolute. A mandamus issued thereon. Afterwards the prosecutor applied for the costs of his application for the mandamus and of the writ, but did not shew what had been done since the mandamus issued, or account for not stating the proceedings further, and costs were refused. Reg. v. Bingham, 4 Q. B. 877; 3 Railw. Cas. 390.

Upon a motion by the prosecutor of a mandamus for his costs under 1 Will. 4, c, 21, s, 6, the rule should be drawn up on reading all the affi-dayits upon which he obtained the mandamus, dayts upon winen ne optained the manatana, and which he intends to use; unless so drawn up, the court will not refer for the gaidance of their discretion to the affidavits filed in support of the application for the mandamus. Reg. v. Peterhouse (Muster), 1 Q. B. 314; 5 Jur. 408.

Security for Costs.]-The court will not compel a relator to give security for costs, he being interested in the matter in question, on the ground of his poverty, or that other persons had induced him to apply for the writ. Reg. v. Malmeshury Corporation, 9 D. P. C. 359; 10 L. J., Q. B. 129; 5 Jur. 366.

On an application by ratepayers of a borough for a mandamus to the corporation to obtain payment of moneys due to them under certain local acts, the rule was discharged, upon the terms that the applicants should be at liberty to take legal proceedings in the name of the corporation, on giving them an indemnity to the satisfaction of the coroner and attorney of the court, who fixed the amount at 200%. A mandamus having issued accordingly on the prosecution of the corporation, and judgment having been given for the Crown, which was reversed in the Exchequer Chamber, and a writ of error to the House of Lords being pending, and the expenses of the mandamus having exceeded 2001, the court made a rule absolute to increase the security to such sum as the coroner and attorney of the court should think reasonable. Reg. v. Southampton Hurbour Commissioners, 6 B. & S. 407; 34 L. J., O. B. 164

# E. PROHIBITION.

Crown Office Rules, 1886, 81 and 82.

1. When the Writ Lies.

a: Generally, 208. b. To and by what Courts, 213. e. To County Court - See County COURT.

2. Practice, Pleadings and Costs, 214.

# 1. WHEN THE WRIT LIES.

# a. Generally.

Object of.]-Prohibition is the common-law proceeding by which any of the superior temthat the Higheston is at a end, and that the Bench only) are enabled to restmin, amongst defendant has had notice that the application others, the courts ecclesiastical from acting in

excess of their jurisdiction, but it does not enable the suit of the king prohibition lies though the the temporal court to act as a court of appeal defendant has pleaded. If a prohibition has from the court ecclesiastical so as to correct any been granted, the court will grant a supersedeas from the court ecclesiastical so as to correct any irregularity or even injustice which may have been done by the ecclesiastical court, if done in the exercise of their jurisdiction. Muckonochie v. Penzauce (Lord), 50 L. J., Q. B. 611; 6 App. Cas. 443; 44 L. T. 479; 29 W. R. 633; 45 J. P. 584-H. L. (E.)

Where an inferior court proceeds in a cause properly within its jurisdiction, no prohibition ann be awarded till the pleadings raise some issue which the court is incompetent to try. London Corporation v. Cox, 36 L. J., Ex. 225; L. R. 2 H. L. 239; 16 W. R. 44.

But where the foundation for the jurisdiction is itself defective, a prohibition may be applied for at once, Ib.

My view of the power of prohibition at the present day is that the court should not be charv of exercising it, and that wherever the legislature entrusts to any body of persons other than to the superior courts the power of imposing an obligation upon individuals the courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by act of parliament. Reg. v. Local Government Board, 52 L. J., M. C. 4; 10 Q. B. D. 321; 48 L. T. 181-per Brett, L.J.

Appearance of Prohibited Judge-Costs.]judge is entitled to appear when it is attempted to obtain a prohibition to his court, and the superior court cannot refuse to allow his costs if successful. Combe v. De lu Bere, 22 Ch. D. 348; 48 L. T. 303.

Want of Jurisdiction apparent on Face of Proceedings—Acquiescence by Applicant—Discretion.]—Where total absence of jurisdiction is apparent on the face of the proceedings in an inferior court, the High Court is bound to grant a prohibition although the applicant has acqui-esced in the proceedings of such inferior court. Farquharson v. Margan, 63 L. J., Q. B. 474; [1894] 1 Q. B. 552; 9 R. 202; 70 L. T. 152; 42 W. R. 306; 58 J. P. 495-C. A.

Acquiescence - Effect of.]-Except on the application of the Crown, the court will refuse to grant a writ of prohibition where the defect in jurisdiction depends upon some fact in the knowledge of the applicant, which he has neglected without excuse to bring forward in the court below, since the writ, though of right, is not of course. *Broad v. Perkins*, 57 L. J. Q. B. 638; 21 Q. B. D. 533; 60 L. T. 8; 37 W. R. 44: 53 J. P. 39—C. A.
Waiver of objection to jurisdiction by taking

step in cause. Jones v. James, In re, 19 L. J., Q. B. 257.

Action Commenced in Mayor's Court-Want of Jurisdiction-Appearance by Defendant-Waiver. ]-Where an action has been commenced in the Mayor's Court, the defendant does not, by entering appearance, not under protest, and taking other steps, waive his right to object to

if there is an affidavit that the cause arose within the jurisdiction. Anon., 1 Vern. 301.

Part within and Part without Jurisdiction. —Where part of a decision of the court sought to be prohibited is within its jurisdiction and part not, a prohibition is awarded against doing what is in excess of jurisdiction and a consultation as to the rest. Mackenochie v. Penzance (Lord), col. 209, supra.

Where the subject of a suit in an inferior court is within its jurisdiction, though in the proceed-ings a matter is stated which is out of its jurisdiction, yet unless it is going on to try such matter, a prohibition will not lie. Dutens v. Robson, I H. Bl. 100. See Gould v. Gapper, 7 R. R. 766.

It is no objection to a rule for a prohibition before verdict that a part of the cause of action arose within the jurisdiction of the inferior court.

William V. Allan, 44 L. J., C. P. 351; L. R. 10 C. P. 607; 32 L. T. 830; 23 W. R. 703. Where the inferior court has only jurisdiction over part of the matter, and not of the rest, the Queen's Bench has a discretion after judgment delivered Carslake v. Mapledoram, 2 Term Rep. 473.

Severable Claims - Part Good.] - Where a plaint contains two claims, one of which is within and the other without the jurisdiction of the county court, a prohibition may be granted as to one only. Reg. v. Westmoreland County Court Judge, 58 L. T. 417; 36 W. R. 477.

To Government Department-Local Government Board. ]-The court will not grant prohibition to a tribunal like the Local Government Board on the ground that in an appeal to them they will perhaps take into consideration upon that appeal matters which do not properly arise before them. Rey. v. Local Government Board, 52 L. J., M. C. 4; 10 Q. B. D. 300; 48 L. T. 173; 31 W. R. 72; 47 J. P. 228—C. A.

Semble, the Local Government Board in exercising its functions as to provisional orders is not a "court," nor are purely legislative powers, or powers of promoting legislation on principle, subject to prohibition; but a usurpation of jurisdiction of a judicial character by the board might be prohibited. Kingstown Commissioners, Ex parte, 18 L. R. Ir. 509-C. A.

Woods, Commissioners of ]—Under 9 & 10 Vict. c. 38, empowering the Commissioners of Woods and Forests to form a royal park in woods and Forests to form a royal park in Battersea-fields, a jury was impannelled before the sheriff of Surrey to ascertain what recom-pense should be made to a claimant for the value of lands required for the purposes of the act, and found a verdict for 750/l, which the sheriff gave judgment for and ordered to be paid to the claimant. Thereupon the claimant applied for a prohibition to prohibit the shcriff and the commissioners from entering and recording the ver-dict and judgment, and further acting upon or Catching disperamec, not under protest, and the protest stating other steps, ware his right to object to the parisdiction so soon as he ascerdain search what the instance of the plantiffs calain is Zeev.Chen, 71.L.T.824-O.A. and the production of the plantiffs calain is Zeev.Chen, 71.L.T.824-O.A. and the production is soon to an inferior court, after the defendant has pleaded there, for, by plending, but at least the recording of them, nor the proceeding which the commissioners were embedded that a purisdiction. But at powered to take, were acts in respect of which the prohibition could be granted. Chalmt v. (54 L. J., Q. B. 896; 14 Q. B. D. 855; 52 L. T. Morpeth (Lord), 15 Q. B. 446; 19 L. J., Q. B. 877. | 949—C. A.

Whether Prohibition or Appeal the Proper Remedy. - It is no objection to a motion for a prohibition that the party moving has appealed to the court to which prohibition is to issue. Chesterton v. Farlar, 7 Ad. & E. 713. See Barker v. Palmer, 51 L. J., Q. B. 110, tit. COUNTY

What constitutes a Judicial Proceeding. ]-The governing body of a university may lawfully issue a decree that every tradesman, with whom a person in statu pupillari within the university contracts a debt exceeding 51., shall make the same known to the tutor of such person's college, on pain of being discommuned if he omits doing so; and, in case of disobedience, they may enforce such decree by ordering that no person in stata pupillari shall deal with the tradesman for a given period. If the vicechancellor, attended, on summons, by the heads of collèges, makes an order to discommune in pursuance of such decree this is not a judicial proceeding which the superior courts can restrain by prohibition. Death, Ex parte, 18 Q. B. 647; 21 L. J., Q. B. 337; 17 Jur. 112.

After Sentence. ]—After sentence, prohibition will not go unless want of jurisdiction below appears upon the face of the proceedings. Buggin v. Bennet, 4 Burr. 2035.

glie V. Beinert, 4 Burr. 2035.

Where a matter is properly triable at common law, prelibition lies before sentence, but if a party salanit to trial it is afterwards too late, Full V. Hatchins, Cowp. 424, 432, And see Stainbank V. Braitsbare, 10 East, 449, n.

When the want of jurisdiction of an inferior court appears on the face of the process, the court will grant a prohibition after sentence. Roberts v. Humby, 3 M. & W. 120; M. & H. 331; 6 D. P. C. 82.

After Appeal.]—Though, semble, that a prohibition can be moved for though an appeal be pending. *Hurrington (Earl)* v. *Rumsay*, 8 Ex. 879; 22 L. J., Ex. 826; 1 W. R. 456.

When it may be Applied for Before Execution completed. Where in an action in an inferior court, upon the facts disclosed at the trial and relied on by the plaintiff, a clear want of jurisdiction over the cause is for the first time made apparent, the defendant has a right, at any time before execution has been completed, to claim a prohibition to restrain all further proceedings and to prohibit any further excess of jurisdiction. Prohibition will not go to an inferior court if such court had in fact jurisdiction over the cause, although the facts in evidence at the trial in the inferior court were not such as to give that court jurisdiction. Heyworth v. London Corporation, Cab. & E. 312. Affirmed

After Judgment, —A defendant in an action in the Salford Hundred Court who has not commissioners acting under a local act from ground of want of jurisdiction. Oran v. Brearey where the alleged of (col. 213, infra) overruled. Chadwick v. Balt, In re, 15 O. B. 743.

A prohibition will not be granted after judgment, unless it is perfectly clear that there has been an excess of jurisdiction. Rivardo v. Maidenhead Local Board, 2 H. & N. 257; 27 L. J., M. C. 73 : 5 W. R. 691.

Against Judgment.]-Prohibition will not begranted against a judgment merely because of a lefect. Enrught v. Penzance (Lord), 51 L. J., defect. Q. B. 506; 7 App. Cas. 240; 46 L. T. 779; 30 W. B. 753; 46 J. P. 644—H. L. (E.)

Not Verified by Affidavit. ]—Prohibition denied where the matter of suggestion was dehors the where the matter or suggestion was denote the proceedings and not verified by affidiavit. Caton v. Burton, Cowp. 330. S. P., Paxton v. Knight, I Burr, 307, 314; 2 Ld. Ken. 14.

Point need not have been taken in Court below. ]-Where an inferior court has no jurisdiction to entertain a cause, it is not necessary, to entitle a party to a prohibition, that the objection to the want of jurisdiction should have objection to the want of juristiction should interested in the inferior court and overraled. *Haber* v. *Portugal* (Queen), 17 Q. B. 171; 20 L. J., Q. B. 488; 16 Jur. 164.

Must be Material. ]-A prohibition will not be granted where it is not material. Butterworth v. Walker, 3 Burr. 1689.

For Non-reception of Evidence. - Where justices had convicted a party of unlawfully taking fish in a private fishery, the court refused to issue a prohibition against their proceeding to enforce it, on the ground that the defendant claimed a right of fishing before the justices; and they refused to require the informant to produce his title-deeds. Higgins, Ex parte, 10 Jur. 838.

Winding up of Building Society—Compulsory Reference—Discharging a Final Order—Judge functus officio.]—In the winding-up of a building society under the Building Societies Act, 1874, under the supervision of the City of London Court, the judge, without the consent and against the wishes of both parties to the application before him, ordered the reference of an issue to a layman, imposed terms as a condition precedent to the hearing of such reference, and subsequently discharged his own order of reference altogether, owing to the refusal of either party to comply with the condition :- Held, that, inasmuch as the judge of the City of London Court, acting under the Building Societies Act, 1874, had no power to order a reference without the consent of parties, and also that, as he could not of his own motion vary or discharge any final order of his own, the judge had acted in excess of jurisdiction, and that a writ of prohibition ought to issue. London Scotlish Permanent Building Society, In re, 63 L. J., Q. B. 112; 42 W. R. 464

objected to the jurisdiction of that court in his defence, as provided by s. 7 of the Salford Hundred Court of Record Act, 186s, cannot after judgment has been recovered against him in the proceeding to enforce a penalty for an offence against the act he must distinctly show that they are acting without jurisdiction. It is not account of the process they are acting without parasite on. 16 is not enough to show that it is doubtful, upon the act, whether the jurisdiction extends to the place where the alleged offence was committed. Birch,

## b. To and by What Courts.

To Courts of Appeal. ]-A prohibition will be granted to a court of appeal, where it appears that they have no jurisdiction over the subjectmatter, even after they have remitted the suit to the court below, and awarded costs against the appellant, and though the party applying for a prohibition appealed to that court. Durby v. Cosens, 1 Term Rep. 552.

Semble, that the courts of common law have power to issue a writ of prohibition to the judicial committee of the privy council, if it exceeds its jurisdiction; but it cannot issue for that which is a subject of appeal. Smyth, Reparte, 2 C. M. & R. 748; 1 Gale, 274. S. P. and S. C., 3 A. & E. 719.

To Coroner.]—A prohibition lies to a coroner to prevent him from holding an inquest. Reg. v. Herford, 3 El. & El. 115; 29 L. J., Q. B. 249; 6 Jur. (N.S.) 750; 2 L. T. 459; 8 W. R. 579.

To Mayor's Court of London-Not Grantable where Claim does not exceed £50.]-The effect of the 12th section of the Mayor's Court of London Procedure Act, 1857, by which no plea to the jurisdiction is allowed in certain cases where the claim does not exceed 50%, and of the 15th section of the same act, by which no defendant may object to the jurisdiction except by plea, is that no prohibition can issue to prohibit an action in the Mayor's Court in those cases for less than 50l. Hawes v. Parely, 46 L. J., C. P. 18; 1 C. P. D. 418—C. A. And see MAYOR'S COURT.

# To County Court. ]-See County Courts.

To Salford Hundred Court of Record. ]-By the Sulford Hundred Court of Record Act, 1868 (31 & 32 Viet. c. exxx.), no defendant shall be permitted to object to the jurisdiction of the court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the court shall have jurisdiction for all purposes :- Held, that the section did not oust the jurisdiction of the superior courts to restrain by prohibition, and that a defendant who was sued in the Salford court, for a matter over which that court had no jurisdiction, might himself apply to a superior court for a writ of prohibition. Oran v. Brearny, 46 L. J., Ex. 481; 2 Ex. D. 346; 36 L. T. 476; 25 W. R. 695. Overruled in Chadwiek v. Ball, cols. 211 and 212, supra.

To Justices, where Jurisdiction over Subjectmatter. ]-If justices have jurisdiction over the subject-matter of the proceedings before them, a prohibition cannot be issued upon the ground that they may make a mistake in law in excreisthat they may make a missake in may it exceeds ing their jurisdiction. Hey. v. Krut. JJ. or Bramley JJ., 59 L. J., M. C. 51; 24 Q. B. D. 181; 62 L. T. 114; 88 W. R. 253; 17 Cox, C. C.

61; 54 J. P. 453—Coleridge (Lord), C.J.
The Summary Procedure Act, 1857, 20 & 21 Vict. c. 43, s. 2, provides that, after the hearing and determination by justices of any information or complaint which they have power to determine in a summary way, either party may apply to the justices to state a case for the opinion of one of the superior courts of common law; and by s. 6, the decision of the superior court on such special case shall be "final and conclusive on all To a declaration in prohibition, the

special case stated by justices, on his application raising a question as to their jurisdiction; and that that court had decided against him, affirming the jurisdiction of the justices :- Held, that as the finality of the decision of the Queen's Bench depended on the fact of the justices having jurisdiction to determine the complaint in a summary way, and as the Court of Chancery was of opinion that they had no such jurisdiction, the demurrer should be allowed. Deconshire (Duke) v. Foott, Ir. R. 5 Eq. 314.

To Courts-Martial.]—A prohibition cannot be issued to a court-martial after sentence pronounced by the court and ratified by the sovereign, and execution by dismissal from the army in pursuance of such sentence. Poe, In re. 5 B, & Ad, 681; 2 N, & M, 636; 3 L, J., K, B, 33,

To Admiralty Court. ]-The Court of Admiralty, although it possessed by statute in certain cases some of the powers of a superior court, was, before the Judicature Acts, an inferior court, to which prohibition lay. James v. L. & S. W. Ry., L. R. 7 Ex. 287: 27 L. T. 382; 41 L. J., Ex. 186; 21 W. R. 25.—Ex. Ch.

Prohibition to Admiralty Court refused in a question arising upon international and maritime law. *Charkich*, *In re*, 42 L. J., Q. B. 75; L. R. 8 Q. B. 197; 2 L. T. 190; 21 W. R. 437.

To Ecclesiastical Courts.]—A representation under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), against a clergymau, was sent to the Bishop of Rochester, and was by him duly transmitted to the Archbishop of Canterbury. The archbishop thereupon, by his requisition, required the judge to hear the matters of the required the judge to near the matters of the representation, "at any place in Loudon or West-minster, or within the diocese of Rochester, as you may think fit." The judge heard the case in their public library int Lambeth Palace, which, though in the province of Canterbury, is neither in London nor in Westminster, nor in the diocese of Rochester, and gave indement against the clergyman, who did not appear, although he had notice of the proceedings. A monition issued against him, and, on his non-compliance therewith, he was pronounced guilty of contempt and imprisoned. On his applying for a prohibition to the Arches Court on the ground that the judge had no jurisdiction:—Held, that a prohibition must issue, for that the judge had no power to hear the case at any place outside, the limits defined by the requisition, and that by hearing the case at Lumbeth he had exceeded his authority, and the whole proceedings were on that account void and coram non judice. Hudson v. Tooth, 47 L. J., Q. B. 18; 3 Q. B. D. 46; 37 L. T. 462; 26 W. R. 95.

A prohibition will not be granted to restrain a petition in the Ecclesiastical Court where it is within the jurisdiction of the court to grant some of the privileges prayed for, especially where the applicant has no special interest in the proceedings. Reg. v. Twiss, 10 B. & S. 208; 38 L. J., Q. B. 228; L. R. 4 Q. B. 407; 20 L. T. 522; 17 W. R. 765. See also cases under ECCLESIASTICAL LAW.

# 2. PRACTICE, PLEADINGS AND COSTS.

Application for Writ.]—A prohibition may be moved for by a defendant himself, where the court is satisfied that an inferior court is prodefendant pleaded that the plaintiff had already coding without jurisdiction. Bridge v. Branch, taken the opinion of the Queen's Bench on a 1 C. P. D. 633; 34 L. T. 905. ton, the court is coming to interfere by prohibi-tion upon the application of a stranger, as well as of the defendant himself, Haber v. Portugal (Queen), 17 Q. B. 171; 20 L. J., Q. B. 488; 16 Jun. 164.

The court is bound to grant a prohibition where a court has no jurisdiction, upon the application of a stranger, as well as of a party to the proceedings. Ib.

The granting of a prohibition on the application of a stranger is discretionary. Reg. v. Treiss, 10 B. & S. 298; 38 L. J., Q. B. 228; L. R. 4 Q. B. 407; 20 L. T. 522; 17 W. R. 765.
When a superior court is clearly of opinion, both with reference to the facts and the law,

that an inferior court is exceeding its jurisdiction, it is bound to grant a writ of prohibition, whether the applicant is the defendant or a stranger. Worthington v. Jeffries, 44 L. J., C. P. 200; L. R. 10 C. P. 379; 32 L. T. 606; 23 W. R. 750.

In such a case neither the smallness of the claim in the suit nor delay on the part of the applicant is a reason for refusing the writ. Ib.

The plaintiff in the inferior court has in no case an absolute right to have the plaintiff in prohibition put to declare in prohibition, Ib.

When it is clear on the facts and the law that an inferior court is exceeding its inrisdiction, the granting a prohibition is in the discretion of the superior court, where the applicant for the pro-hibition is a stranger. Chambers v. Green, 44 L. J., Ch. 600; L. R. 20 Eq. 552.

Decision as to Jurisdiction Reviewable on Rule.]—The decision of a court on facts going to its jurisdiction is reviewable on a rule for a writ of prohibition: Liverpool United Cas Light Co. V. Everlon Correservs, 40 L. J., M. C. 104; L. R. 6 C. P. 414; 23 L. T. 813; 19 W. R. 412.

Abandonment of Part of Claim. - When a plaintiff's claim, in an action in the Mayor's Court, London, is composed of several items, some whereof relate to business done within, and others to business done without, the city of Loudon, a superior court, upon an application for a prohibition, has a discretion to allow the plaintiff finally to abandon the causes of action Mayor's Court for those accruing within the city, and to proceed in the Mayor's Court for those accruing within the city, Ellis v. Fleming, 45 L. J., C. P. 512; 1 C. P. D.

When Injunction granted instead of Prohibition.]—Where the legislature has pointed out a special tribunal for determining a question, as a general rule no other court ought to restrain the proceedings before it; but where the question has come before another court in an independent proceeding in which it is necessary to decide the whole matter between the parties, the court may restrain the proceedings elsewhere by injunction in order to save expense. Stannard v. St. Giles, Camberwell, 51 L. J., Ch. 629; 20 Ch. D. 190; 46 L. T. 243; 30 W. R. 693—C. A.

A dispute having arisen between the defendants, who were a local authority and the plaintiff about a drain which the plaintiff had interfered with, the defendants gave notice to the plaintiff that they would enter on his land and reinstate the drain; but they afterwards abandoned their intention, and instead took pro-ceedings against him before the magistrate. The

Where an inferior court exceeds its jurisdic-plaintiff then sued the defendants, and claimed tion, the court is bound to interfere by prohibi- an injunction to restrain them from trespassing on his land, and from proceeding against him before the magistrate. In the statement of claim the plaintiff did not in terms allege that the defendants threatened and intended to trespass on the land :-Held, that as no intention to commit a trespass was proved or alleged, the plaintiff had not made out his case for an injunction against the trespass; and that being so, the court had no jurisdiction to restrain the proeeedings before the magistrate. Ib.

The jurisdiction to grant prohibition is now conferred by the Judicature Act upon every judge of the High Court; but, inasmuch as one plange of the right court; but, insaminen is one of the main objects of the acts (Judicature Act, 1873, s. 24, sub-s. 7) is to enable the court to decide, if possible, in one proceeding, all the questions in dispute, in the same matter and between the same parties, and (Judicature Act. 1873, s. 25, sub-s. 8) to grant an injunction in all cases in which it shall appear to the court "just and convenient" so to do, the court may, in any ease in which it has power to grant prohibition grant an injunction to restrain the proceedings in the inferior court. Hedley v. Butes, 49 L. J., Ch. 170; 13 Ch. D. 498; 42 L. T. 41; 28 W. R. 365.

Prohibition or Appeal—County Court. ]—In an action of ejectment properly brought in the the bailiff forty clear days at least before the return day under Ord, VIII, r. 7 of the County Court Rules, 1875, and the judge of the county court has no power to waive this condition even where, though the bailiff has not received the summons forty days, he has yet served it on the defendant thirty-five days before the return day as required by the latter part of the same rule. If under such circumstances the judge proceeds to hear the case, the defendant not consenting, the High Court, on appeal by the defendant, will set aside the judgment. Semble, such a case is not matter of prohibition. Burker v. Pulmer, 51 L. J., Q. B. 110; 8 Q. B. D. 9; 45 L. T. 480; 30 W. R. 59.

\_\_\_\_ Divorce Court.]—A petitioner filed a petition, in the court for divorce, for dissolution of the marriage between him and his wife, celebrated in the East Indies, according to the rites of the Church of England, on the ground of her adultery with the co-respondent, and claiming damages against him; to which the respondent and co-respondent entered an absolute appearance, but afterwards applied to be allowed to appear under protest, on the ground that the court had no jurisdiction, by reason of the petitioner and respondent never having been domiciled within its jurisdiction; which application was refused. On the trial of the issues the jury found that the adultery was proved, and assessed the damages to be paid by the co-respondent at 5,000%; and thereupon the judge ordinary pronounced a decree nisi for the dissolution of the nonlegal it degree has nor any ensumment of the marriage, and ordered him to pay all the costs of and incident to the petition. Upon application by the co-respondent for a prohibition to the judge ordinary:—Held, that the co-respondent was only aggrieved by the order for payment of the cost of the costs, which, if wrong, was ground for appeal, and therefore a prohibition ought not to issue.

Berridge, In re, Fuster v. Fuster, 4 B. & S. 187;

32 L. J., Q. B. 312; 10 Jur. (N.S.) 254; 8 L. T.

661; 11 W. R. 799.

Bar by Delay and Acquiescence.]—Where an prohibition, because the same application may action is brought in an inferior court, and the be made to the other courts. Lindo v. Rodney. defendant appears at the trial, and makes no objection to the jurisdiction of the court whilst the case is proceeding, but suffers the court to act without protest or objection as if it had jurisdiction, down to actual payment of damages and costs, it is too late to apply for a prohibition. even though the party had no opportunity of applying earlier to the superior court, unless the want of jurisdiction appears upon the face of the proceedings. Yates v. Palmer, 6 D. & L. 283

Material delay will be a bar to the writ. Denton, In re, 1 H. & C. 654; 32 L. J., Ex. 89; 9 Jur. (N.S.) 337; 7 L. T. 689; 11 W. R. 268.

Affidavit, Form of.]—It is no objection to an affidavit for a rule nisi in prohibition that it is stated to be "In the matter of an action commenced" in the inferior court. Wallace v. Allan, 44 L. J., C. P. 351; L. R. 10 C. P. 607; 32 L. T. 830 : 23 W. R. 703.

Affidavits in support of an application for a prohibition must be entitled simply in the court, and not in any cause. Evans, Ex parte, 2 D. (N.S.) 410; 12 L. J., Q. B. 68; 7 Jur. 281.

But when it was objected to affidavits in answer to a rule nisi that they were entitled "In the Queen's Bench, between M. A. B., plain-"In the Queen's Benich, bowers as A. D., paratiff, and W. P., defendant, in problibition," and not in the Queen's Bench only, the court allowed them to be read. Breedon v. Capp, 9 Jur. 781. When a rule nist for a prohibition has been discharged, the court will not allow the motion

to be renewed, upon affidavits stating matter not before presented to the court, but existing at the time of the original application. Bodenham v. Richetts, 6 N. & M. 537.

Affidavits used in support of an application on the Crown side for a prohibition must be intituled "In the High Court of Justice, Queen's Bench Division," as directed by r. 7 of the Crown Office Rules, 1886, and if they are not so intituled the court may refuse to hear the application. Rev. Plymouth and Dartmoor Ry., 37 W. R. 334. Reg.

Setting Aside-Jurisdiction of Judge at Chambers. -A writ of prohibition, directed to the judge of a county court, had been issued out of the Petty Bag Office, as of course, upon a formal affidavit that the cause of action did not arise within the jurisdiction:—Held, that a judge at chambers had jurisdiction to set aside the writ. Amstell v. Lesser, 55 L. J., Q. B. 114; 16 Q. B. D. 187; 53 L. T. 759; 34 W. lt. 230.

Declaring in.]—Where a prohibition is applied for, the court will always, on the demand of the party against whom the application is made, put the party applying to declare. Reministra v. Dobloy, 90, 81, 766; 14 L. J., Q. B. S. See Thompson v. Ingham, 14 Q. B. 710; 19 L. J., Q. B. 189; Stephenson v. Raines, 2 El. & Bl. 744; Mossup v. L. & N. W. Ry, 16 C. B. 580.

After sentence in the ecclestastical court, in a

After sentence in the ecclesiastical court, in a matter where the question turned upon the con-struction of an act of parliament, upon a doubt raised whether that court had not misconstrued the act, the court directed the plaintiff to declare for the more solemn adjudication of the question, Gure v. Gapper, 3 East, 472. S. P., White v. Steel, 31 L. J., C. P. 265; 5 L. T. 449.

But the court will not put the party to declare it is clearly of opinion against granting the in his defence to the suit in the inferior court.

2 Dougl. 613, n.

Pleas. 1—Defendant allowed to plead several pleas. *Hall* v. *Maule*, 5 N. & M. 455; 4 A. & E. 283; 5 L. J., K. B. 6.

Restitution.]—The court will not award restitution in prohibition when the subject-matter of a suit is no longer within the control of the inferior court. Denton, In re, 1 H. & C. 654; 32 L. J., Ex. 89; 9 Jur. (N.S.) 337; 7 L. T. 689; 11 W. B. 268.

Costs-Jurisdiction to Grant. ] - Where the Queen's Beuch Division grants a writ of prohibition on motion, it has jurisdiction to grant it with costs. Reg. v. County of London JJ. and London County Council, 63 L. J., Q. B. 801; [1894] I Q. B. 453; 9 R. 148; 70 L. T. 148; 42: W. R. 225: 58 J. P. 380-C. A.

Taxation of Costs-Certificate of Judge-Mayor's Court. |-- Where the judge of the Mayor's Court has granted a certificate for the taxation of the costs of an action in that court upon a higher scale than the scale which would otherwise be applicable, without stating any ground for granting such a certificate, it is a mere irregularity, and no prohibition will lie. Reg. v. London Corporation and Stock, 62 L. J., Q. B. 589; 5 R. 544; 69 L. T. 721.

Costs Generally.]—Where a rule is made absolute for issuing a prohibition, the costs of the rule could not be granted to the successful party under s. 1 of the repealed 1 Will. 4, c. 21; that statute only applying to cases where there have been pleadings in prohibition. Rev v. Kealing, 1 D. P. C. 440.

1 Will. 4, c. 21, did not enable the court, where a party has declared in prohibition and succeeded, to grant him his costs incurred in the ceclesiastical court. Tessimond v. Yurdley, 5 B. & Ad. 458.

I Will. 4, c. 21, s. 1, did not entitle an applicant for a prohibition to his costs where the rule is made absolute in the first instance without pleadings, as in such ease there is no judgment within the meaning of the section. Everton Overseers, Ex parte, 40 L. J., C. P. 201; L. R. 6 C. P. 245; 24 L. T. 361; 19 W. R. 927.

Where a rule for a prohibition was enlarged on condition that the party applying should declare, and he did declare, and the defendant, instead of pleading, obtained a judge's order staying the precedings upon payment of costs incurred since the rule to declare. Upon motion to set aside that order:—Held, that the plaintiff in prohibi-tion was not entitled to any further costs. Peo-tress v. Harvey, 1 B. & Ad. 154; 8 L. J. (0.8.) K. B. 375.

The rule that where a new trial is granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeeds on the second, applies to issues in prohibition. Craren

v. Sanderson, 7 A. & E. 897, n.
A party in whose favour judgment is given in prohibition is entitled to the costs of the application for the writ, without obtaining a rule for such costs. Tucker, Ex parte, 4 Man. & G. 1079.

without pleadings, may grant the costs. Wallace v. Allan, 44 L. J., C. P. 351; L. R. 10 C. P. 607; 32 L. T. 830; 23 W. R. 703.

In pursuance of the intimation given by the court in Robinson v. Emanuel (43 L. J., C.P. 244; L. R. 9 C. P. 414; 30 L. T. 50), that the court would in future, in virtue of its general jurisdiction over its officers, order the costs of a rule for a prohibition to be paid by the plaintiff's attorney in every case in which the action had been improperly brought in the Lord Mayor's Court, in respect of a cause of action not arising within the jurisdiction of that court, the costs were, on the 12th July, 1874, ordered to be paid by the respective atterneys for the plaintiffs in several cases. *Mem.*, L. R. 9 C. P. 751, n.

The order for costs of a prohibition will not be

made against the plaintiff's solicitor personally, unless the rule has been moved for in that form. and the solicitor has had an opportunity of shewing cause. Rogers v. L. C. & D. Ry., 26 W. R.

199

#### F. OUO WARRANTO.

Crown Office Rules, 1886, 51 to 59.

1. General Principles, 219.

2. Against Whom and for What Offices.

- u. Generally, 223.
  b. Parochial Offices, 226.
  c. Corporate and Municipal Offices, 226.
- d. Incompatible Offices, 227.
- Whether Remedy by Quo Warranto or Mandamus, 227.
- 4. On whose Application, 228.
- 5. Within what Time, 230.
  a. Municipal Offices, 230. b. In other Cases, 231.
- 6. Practice, 231.
  - a. Generally, 231.
  - b. Affidavits, 232. c. Statement of Objections to Title.
  - d. Quashing Information, 233.
  - e. Costs of Rule, 233,
  - f. Change of Relator or Solicitor, 233. g. Consolidation of Informations, 234.
  - Costs on Disclaimer or Resignation. 934
- 7. What Title put in Issue, 235.
- 8. Judgment and Costs, 235.

#### 1. GENERAL PRINCIPLES,

Discretion. - It is discretionary in the court to grant or withhold a quo warranto information, person was appointed under s. 21 of the repealed even where a good objection to the title is shewn. Public Health Act, 1848, 11 & 12 Vict. c. 63, to

Heav. Parry, 6 A, & E. 810; 2 N. & P. 414. It is in the discretion of the court to grant a que warrante information er not. Res v. Tre-venen, 2 B. & Ald., 479; 21 R. R. 364. S. P., Reg. v. Cousins, 42 L. J., Q. B. 124; 28 L. T. 116.

To Try Collateral Matter. ] — The court will not rant it against an officer of a corporation esta-

are not recoverable as damages. White v. Steel, c. 78, s. 49, if it appears that the object in prosecting the information is to try the legality of (n.s.) 648; 7 L. T. 275; 11 W. R. 8.

Court, in making rule absolute for prohibition P. & D. 652.

Where a quo warranto was moved for on the ground of a disputed mode of election, which alone was in controversy at the time of the defendant's election, and which ground was afterwards answered on shewing cause, the court would not, in its discretion, make the rule absolute to try another incidental and secondary question, as to whether there was a sufficient interval of time allowed between the nomination and election of the defendant: no person's right having been set aside by means of such acceleration of the election, if it was accelerated. Res v. Osbourne, 4 East. 327.

Friendly Proceeding. ]-It is no objection that it is a friendly proceeding, in order that the party may disclaim. Rea v. Marshall, 2 Chit. 370.

No Civil Right in Controversy. ]-Where a corporation was dissolved, and no corporate body existed in fact at the time, the court refused to grant it against an individual for an importinent claim to be returning officer at an election of members to serve in parliment, by virtue of his having been elected an alderman while the corporation existed in fact; there being no civil right in controversy, but it being rather the ground of a proceeding in poenam by the attorney-general. Ree v. Saunders, 3 East, 119.

Doubtful Questions.]—It will be granted where the right depends upon a matter of doubtful law. in order to its being finally determined. Rew v.

Carter, Cowp. 58; Lofft, 516.

The court will not decide on the validity of the election of a corporate officer, if the question is new or doubtful, on a rule for a quo warranto. Res v. Godwin, 1 Dougl. 397.

Where Result of Election unaffected. I-A rule for a quo warranto, in respect of an annual office of guardians of the poor, the election to which was on the 14th of May, on the ground that the mode of election adopted was not a proper one, was not applied for till the 18th of January following, and it was then not shewn that any ratepayer had been prevented from voting, or that the result of the election was affected by the mode adopted. In the exercise of its discretion the court discharged the rule. I 42 L. J., Q. B. 124; 28 L. T. 116, Reg. v. Cousins.

The court will not allow a quo warranto to be filed to try the title to an office merely because there has been an irregularity in the election, in the absence of bad faith, and where the result of the election has not been affected. Reg. v. Ward, 42 L. J., Q. B. 126; L. R. 8 Q. B. 210; 28 L. T. 118; 21 W. R. 652.

At the election of a local board of health, the chairman being about to go out of office, another act as returning officer in case of the chairman being nominated for re-election. Nomination papers were sent in due course to the chairman, and amongst them one nominating him as a candidate. He nevertheless continued to receive the nomination papers, and when all had been delivered prepared the voting papers, inserting grant it against an officer of a corporation esta-blished by charter, pursuant to 7 Will. 4 & 1 Vict. required by s. 24. He did not further act as

returning officer; and was returned as re-cleeted. a quo warranto relied upon an alleged usage and There was nothing to shew that the names were inserted in the voting papers otherwise than in their proper order, or that the result of the election had been in any way affected by the voting papers having been prepared by the chairman instead of by the person appointed to act as returning officer :- Held, that, assuming the chairman's conduct to have been an irregularity, the court in its discretion ought not to allow an information to be filed against his election, no mischief having been done. Ib.

Office Held during Pleasure.]—On an application for a quo warranto against the clerk to a school board, on the ground that he was improperly elected according to 33 & 34 Vict. c. 75, s. 35, the court refused a rule, considering that the majority of the board might, without assistance, remedy the impropriety itself, the office being held during the pleasure of the board.

Brudley v. Sylvester, 25 L. T. 459.

A clerk to justices of a borough, appointed under s. 102 of the repealed Municipal Corpora-tions Act, 1835, 5 & 6 Will, 4, c. 76, s. 102, holds only during the pleasure of the justices, and therefore a quo warranto will not lie for his office. Reg. v. Fox., 8 El. & Bl. 939; 27 L. J., Q. B. 151; 4 Jur. (N.S.) 410; 6 W. R. 282.

When Granting Useless. |-The court refused to grant a rule for a quo warranto information applied for by the former occupant of an office, on the ground that his dismissal from office had been illegal, when they were satisfied that if reinstated he might legally, and would be dismissed again immediately. Richards, Exparte, 47 L. J., Q. B. 498; 3 Q. B. D. 368; 38 L. T. 684; 26 W. R. 695.

Office Determined.]-A party who had been appointed to, and was discharging the office of town clerk of a borough when the Municipal Corporations Act, 1835, passed, was afterwards removed by the town council, and claimed compensation under s. 66. A motion was then made, at the instance of the corporation, for a one warranto against him for exercising the office, on the alleged grounds that he was not a burgess at the time, was not sworn in, and did not make the declaration required by 9 Geo. 4, c. 17 :-Held, that it ought not to be granted for trying the title to an office which was determined, Harris, In re, 6 A. & E. 475; 1 N. & P. 576; 6 L. J., K. B. 161.

A que warrante was issued for holding an annual office, after its close, to try a civil right. Res v. New Radner, 2 Ld. Ken. 498.

Election to Offices. ]-To entitle a party to a quo warranto, on the ground that the person filling the office has not been elected by a majority of the class entitled to vote, the relator must shew who the class is that is entitled to vote, and that another person had a majority of such votes. Rev. v. Mashiter, 1 N. & P. 314; 6 A. & E. 153; W. W. & D. 173; 6 L. J., K. B. 121.

The charter of the Saddlers' Company provides, in case of vacancy in the office of assistants, that it shall be lawful for the wardens and assistants at their pleasure to elect one other of the commonalty, and that the wardens and assistants in all things appertaining to the good rule and government of the company should be 1 Ld. Ken. I. subject and obedient to the lord mayor and court of aldermen of London. An applicant for presided at a vestry meeting convened for the

practice of the company to elect by seniority. The court refused to make the rule absolute. as the evidence would not warrant a jury in finding the existence of a by-law to that effect. Reg.

v. Fisher, 5 B. & S. 575, n.
Held, also, that the mayor and court of aldermen could not control the court in the exercise of its jurisdiction over the corporate rights of the company. Ib.

Resignation of Office.]—A quo warranto was granted against a person for exercising an office in a corporation after he had resigned by writing, but without deed. Rer v. Paune, 2 Chit, 367.

The court will make the rule absolute, although the party has, since the rule obtained, resigned his office, and his resignation has been accepted. Rex v. Warlow, 2 M. & S. 75: 14 R. R. 592.

When a person wrongfully elected to a corporate office and admitted into it resigns, and his resignation is accepted, another candidate who claims to have been duly elected and to be admitted into the office is entitled to a quo warranto. *Rep.* v. *Blizard*, 7 B. & S. 922; 36 L. J., Q. B. 18; L. B., 2 Q. B. 55; 15 L. T. 242; 15 W. R. 105.

User of Franchise. |-There must be a user as well as a claim of a franchise, in order to found an application for a quo warranto : stating that the defendant, who was elected to an office, had tendered himself to be sworn in is not sufficient. Re.v v. Whitwell 5 Term Rep. 85; 2 R. R. 545,

But a swearing in though defective in law, yet being such whereby the party claimed at the time to be a free burgess of a corporation, is a sufficient user of the office to warrant a quo warranto against him, and not like a mere claim of the office. Rer v. Tate, 4 East, 337.

The affidavit of a relator, that he "has been informed and believes" that the defendant exercises the office which he is charged with nsurping, is sufficient. Rev v. Slythe, 9 D. & R. 226; 6 B. & C. 240; 5 L. J. (o.s.) M. C. 41; 30 R. R. 312.

A mere statement in an attidavit for a quo warranto against a town councillor, that he has accepted the office, is insufficient, under 5 & 6 Will, 4, c. 76. The acts constituting acceptance should be also stated. Reg. v. Slutter, 3 P. & D. 263: 11 A. & E. 505; 4 Jur. 316.

A statement that he has acted in the office, is sufficient. Reg. v. Quayle, 11 A. & E. 508; 4 P. & D. 442; 10 L. J., Q. B. 99; 5 Jur. 368.

The court will not institute a scrutiny and determine upon affidavits which of two candidates has been elected town councillor. Ib.

Where sufficient appears by the affidavits to draw the merits of an election to a corporate office into question, the court will grant a quo warranto, though the fact of the defendant's nsurpation no otherwise appeared than by the deponents' swearing to their information and belief that the defendant was admitted a freeman, and sworn and curolled accordingly, the defendant not denying the fact when called upon by a rule to shew cause. Rev v. Harwood, 2 East, 177.

A quo warranto for usurping the office of free burgess, does not lie against the mere claim of one who, though elected, never was admitted. Rew v. Ponsonby, 1 Ves. jun. 1; 2 Bro. P. C. 311;

Where it appeared that the defendant had

purpose of electing a member of a burial board, the exercise of a franchise, Rew v. Marrden, 1 under 15 & 16 Vict. c. 85, s. 12; that he and W. Bl. 579; 3 Burr. 1812.

It was granted for exercising the office of a franchise. to the clerk of the burial board informing him of his election; and that at the next vestry meeting, when he again presided, the minutes of the previous meeting, one of which was a memorandum of his election, were unanimously confirmed. The defendant stated that he had declined to attend any of the meetings of the board, and he had not at any time acted or claimed the right to act as a member of the board :-Held, that this was not a sufficient user of the office to found an application for a quo warranto. Reg. v. Jones, 28 L. T. 270.

Acceptance of Incompatible Office-Non-corporate Office-Necessity for User.]-In order to make the remedy by quo warranto applicable in the case of a non-corporate office there must be something more than mere acceptance of the office. Defendant, while holding the office of churchwarden, was proposed for the office of vestry clerk and declared elected. He published a letter thanking the electors, but never acted as On an application for a quo warranto, on the ground that the office of vestry clerk was incompatible with that of church-warden:—Held, that what defendant had done was not such an exercise of the office of vestry clerk as to reuder the remedy by quo warranto applicable. Reg. v. Tidy, 61 L. J., Q. B. 791; [1892] 2 G. B. 179; 67 L. T. 319; 41 W. R. 128; 56 J. P. 650.

# 2. AGAINST WHOM AND FOR WHAT OFFICES.

# a. Generally.

A quo warranto will lie for usurping any office, whether created by charter of the Crown alone, or by the Crown with the consent of parliament, provided the office is of a public nature, and a substantive office, and not merely the function or employment of a deputy or a servant, held at the will or pleasure of others. Darley v. Reg. 12 Cl. & F. 520.

The office of treasurer of the public money of the county of the city of Dublin, is an office for which an information in the nature of a quo warranto will lie. Ib.

A quo warranto will not lie for usurping an office which is not of a public nature, although such office may have been created by a charter of the Crown. Smyth, Ex parte, 8 L. T. 458; 11 W. R. 754.

A que warrante will not lie to try a question concerning the validity of an election to a fellowship of a college which was disputed by the master. Rev v. Gregory, 4 Term Rep. 240, n.;

2 R. R. 371, n.

Where a franchise has been exercised from very remote times under circumstances which make it reasonable to suppose that it emanated from a grant by the crown, and there has, at no period, been any considerable opposition to it, perion, been any considerance opposition to be the court will not allow a que warrante, to try its validity, merely on the ground that it cannot be distinctly traced to a legal origin, especially if the franchise has been partially recognised in any ancient statute. Reg. v. Archdall, 3 N. & P. 696; 8 A. & E. 281.

justice of the peace. Rex v. --, 2 Chit. 368. So, against ten, for exercising the office of commissioners for paving the town of Taunton under an act of 9 Geo. 3, who had been improperly elected to fill up vacancies in the original

number. Res v. Badeock, 6 East, 359. It will lie to repeal the grant of a franchise by scire facias, where the owner has neglected by some means, where the owner has neglected his duty. Peter v. Kendal, 6 B. & C. 703; 5 L. J. (o.s.) K. B. 282; 30 R. R. 504. A que warranto will not lie for the office of

A quo warranto win not ne for the onice of master of a hospital and free gramman school established by a royal charter. Reg. v. Mondey, 8 Q. B. 946; 16 L. J., Q. B. 89; 11 Jur. 56.

Quo warranto is not the proper proceeding whereby to try the right of one set of justices to interfere with the duties of another. Reg. v. Durham (County) J.J., Sanderland Borough J.J., Ex parte, 2 L. T. 372.

The court will grant a quo warranto information at the instance of a private relator when private rights are interfered with although the result may be that the existence of the corporation may be called into question. Reg. v. Lloyd, 2 L. T. 232.

Recorder.]—It lay for the office of recorder before the Municipal Corporations Act, 1885. Rese v. Colchester Corporation, 2 Term Rep. 259; 1 R. R. 480,

Borough Coroner.]—A coroner in a borough having acted under an irregular appointment, and been recognised in his office by the council for several years :- Held, that the office was full, not see craryeans;—recat, time one once was rant, and that a quo warranto lay to oust a subsequently-appointed coroner. Reg. v. Grimshaw, 10 Q. B. 747; 16 L. J., Q. B. 385.

Clerk of County Court.]-A party removed from the office of clerk of a county court by the judge of the court, with the approval of the Lord Chancellor, under the repealed County Courts Connection, more the repensed Country Courts Act, 1846, 9 & 10 Vict. c. 95, s. 24, for alleged inability, held entitled to try the validity of such removal by quo warranto. Rep. v. Oven, 15 Q. B. 476; 19 L. J., Q. B. 490; 14 Jur. 953.

In what Cases-Office held at Pleasure.]que warrante will not be granted to inquire into he right of an office which is held merely at the pleasure of a public official. Reg. v. Curroll, 22

Rate Collector ]—The office of collector of rates of a borough is not an office for which an information in the nature of a quo warranto will lie. Reg. v. Whelan, 20 L. R. Ir. 461.

A que warrante will not lie against a county treasurer to shew by what authority he holds the treasurer to show by what authority he had a confider if he has been de facto elected by the justices in quarter sessions. Rew v. Hereford JJ., I Chit. 700; 22 R. R. 830.

Treasurer to District Council ]—The office of treasurer to a district council is not one with respect to which the remedy of quo warranto will apply. Reg. v. Wells, 43 W. R. 576.

A quo warranto will not lie for encouraging procedure by quo warranto is applicable to

W. R. 8

Office of Vestry Clerk. ]-A writ of quo warranto will lie to inquire into the election of a clerk to a vestry. *Heg.* v. *Burrows*, 61 L. J., Q. B. 88: [1892] 1 Q. B. 399; 66 L. T. 25; 40 W. R. 207.

Office in Institution Privately Founded, but Incorporated by Statute. ]—A private individual founded an hospital for the relief of the poor (providing the building but no endowment), which was afterwards incorporated by an act of parliament, which enacted that it was to be under the management of governors, with provision for the appointment of medical and surgical officers. The hospital was subsequently endowed by another act with a sum of 1007, per annum, payable out of the public funds, such sum being stated to be for the purpose of providing "for the payment of surgeous and physicians, or the other necessaries of the hosnital":—Held. that the office of surgeon or physician to such an institution was not an office, the right to hold which could be inquired into by an information in the nature of a quo warranto. Reg. v. Anchinleck, 28 L. R., Ir. 404.

Office under Local Act.]-15 Car. 2, e. 17, creating the corporation of the Bedford Level, directs that they shall appoint a registrar and other officers at their pleasure, the duty of which registrar is to register titles to land within the Level; and he takes an oath of office :-Held, that a quo warranto does not lie against such an officer; he being a mere servant of the corporation, and his office not affecting any franchise or other authority holden under the Crown. v. Bedford Level Corporation, 6 East, 356: 2 Smith, 535.

A local act created a corporation, consisting of sworn commissioners, with summary power of seizure of goods, and imprisonment of the person, and of preventing and removing obstructions and misances in the streets; powers for paving, cleaning, and lighting; powers of appointing and paying officers, of determining the number of watchmen, of regulating them, and dismissing, paying, or pensioning them; of possessing property in materials required under the act, of instituting prosecutions, of imposing rates, of appointing and removing treasurers, to whom penalties, imposed by the act, were to be paid for the purposes of the act; and of hearing appeals by parties complaining of things done under the act :-Held, that a quo warrante would lie against persons claiming to be commissioners. Res v. Beedle, 3 A. & E. 467.

But it does not lie for the office of trustees under a public local act, elected as vacancies occur, by occupiers in the parish, and taking an oath of office, with power to appoint salaried treasurers, collectors, &c., of moneys raised under the act, accountable to themselves; to pass bylaws with penalties; to impose rates in case of certain other functionaries not so doing; to supply omissions in the rates, and to relieve parties aggrieved or incompetent to pay; to appoint salaried watchmen; to purchase, hold and manage property for the purposes of the act; to

question the validity of the election of a vestry- misances and apprehend for certain specified man elected under the provisions of the Metro- nuisances; to maintain the highways, and prepolis Local Management Act, 1855. *Heg.* v. vent encroachments thereon; to superintend the *Soutter*, [1891] 1 Q. B. 57; 63 L. T. 279; 39 lighting, paving, watching and cleansing of the streets; to remove dangerous buildings, on complaint upon oath (which they were to administer), and to sue in the name of their clerk, or one of themselves. Rex v. Henley, 3 A. & E. 463. n.

#### b. Parochial Offices.

A quo warranto does not lie for exercising the office of guardian of the poor for a union, under the Poor Law Amendment Act, 1834, 4 & 5 Will. 4. c. 76. Aston Union, In ve. 6 A. & E. 784; W. W. & D. 329; 6 L. J., M. C. 135. S. C., uom. Bez v. Carpenter, 1 N. & P. 773. But see contra, Reg. v. Hampton, 6 B. & S. 923; 12 Jur. (N.s.) 583; 13 L. T. 431; 15 W. R. 43.

The office of clerk to the board of guardians of a union appointed under the Poor Law Amendment Acr, 1884, s. 46, is an office created by statute, and of a public nature, in respect of which a quo warranto will lie. Reg. v. St. Martin-in-the-Fields Guardians, 17 Q. B. 149; 20 L. J., Q. B. 423: 15 Jur. 800. S. P., IEU v. Reg., 8 Moore, P. C. 139,

It does not lie against overseers. Rew v. Dauberry, I Bott's P. L. 324.

It lies for the office of constable. Reg. v. Booth, 12 Q. B. 884; 18 L. J., M. C. 25; 13 Jur. 6.

But it does not for the office of churchwarden. Rew v. Shepherd, 4 Term Rep. 381; 2 R. R. 416; S. P., Barlow, In re, 30 L. J., Q. B. 271; 5 L. T.

The court will not grant a quo warranto to inquire into the election of an assistant overseer, Reg. v. Simpson, 19 W. R. 73.

Election of Vestryman - Metropolis. ] procedure by quo warranto is applicable to question the validity of the election of a vestryman elected under the provisions of the Metropolis Local Management Act, 1855. Reg. v. Soutter, 60 L. J., Q. B. 71; [1891] 1 Q. B. 57; 63 L. T. 279; 39 W. R. 8; 55 J. P. 229.

#### c. Corporate Offices

Only against Individuals. ]-No quo warranto can be granted against a corporation acting as such, but only against individual members. v. Carmarthen Corporation, 1 W. Bl. 187; 2 Burr, 869.

The court will not grant a quo warranto against an individual to try the legality of a charter of municipal incorporation. Reg. v. Jones, 8 L. T. 502.

Municipal Election-Statute providing Proedure. ]—Sect. 87 of the Municipal Corporations Act, 1882, provides that an election shall not be questioned on any of certain specified grounds except by an election petition:—Held, that when an election is questioned on any of these grounds. quo warranto will not lie. Reg. v: Morton, 61 L. J., Q. B. 39; [1892] 1 Q. B. 39; 65 L. T. 611: 40 W. R. 109; 56 J. P. 105.

Quo Warranto generally.]—A quo warranto does not lie against a freeman of a borough who does not appear to possess any corporate property, manage property for the purposes of the act; to and who has been struck off the roll of electors contract for the supply of the poor, remove for members of parliament by the revising

free burgess of a borough :-Held, that his title could not be impeached because he was sworn in before officers who were so de facto but not de jure. Rex v. Slythe, 6 B. & C. 240: 9 D. & R. 226; 5 L. J. (o.s.) M. C. 41; 30 R. R. 312.

Right of Claimant to be put on Roll though no Burgess List. ]-On the revision of the burgess lists for a borough, the revision court erroneously treated the largess list for one of the parishes in it as void (though in fact good) and made out a new burgess list for that parish of the claimants who proved their claims. The defendant was one of these claimants, and was fully qualified to be a burgess. The town-clerk, adopting this new list as the burgess list for the parish, inserted the defendant's name in the burgess roll :- Held, that the defendant's name was improperly inserted in the burgess roll, and that he might be removed by a quo warranto, as the mayor and assessors had no power to make out such a list. Scal v. Reg., 8 El. & Bl. 22; 27 L. J., Q. B. 139; 3 Jur. (N.S.) 1244—Ex. Ch.

It is an inflexible rule of law, that where a person has been de facto elected to a corporate office, and has accepted and acted in the office, the validity of the election and the title to the office can only be tried by proceeding on a quo warranto information. Reg. v. Chester Corporation, 5 El. & Bl. 531; 25 L. J., Q. B. 61; 2 Jur.

(N.S.) 114: 4 W. R. 14.

The court will not grant a quo warranto against a burgess for being illegally upon the burgess roll, unless it is shewn that he has de facto exercised the office. Reg. v. Armstrong, 25

L. J., Q. B. 238; 2 Jur. (N.S.) 211.

A person's name was on the burgess list unobjected to at the revision in October, 1867, and he was elected town councillor on the 1st November following. His father received parochial relief in December, 1866 :- Held, that the court would inquire by quo warranto into his title to be on the burges list. Reg. v. Ireland, 9 B. & S. 19: 37 L. J., Q. B. 73; L. R. 3 Q. B. 130; 17 L. T. 466; 16 W. R. 358.

#### d. Incompatible Offices.

A que warrante lies against a person who had held the incompatible office of capital burgess and town-clerk, before and since 32 Geo. 3, c. 58. without interruption. Rev v. Bond, 6 D. & R. 333.

So, where there is a continuing incompatibility, though the party held the offices of capital burgess and town-clerk for more than six years.

Reg v. Lawrence, 2 Chit, 371.

On a motion for a quo warranto against a corporator, on the ground of the acceptance of an incompatible office, the relator must shew a legal appointment to the second office. Rew v. Day, 4 Man, & Ry. 54I; 9 B, & C. 702; 7 L. J. (o.s.) K. B. 308.

#### 3. WHETHER REMEDY BY QUO WARRANTO OR MANDAMUS.

The court will not grant a rule in the alternative for a quo warranto or a mandamus. Reg. v. Leeds Corporation, 11 A. & E. 512.

barrister. Reg. v. Pepper, 3 N. & P. 154; 7

A. & E. 745; 7 L. J., Q. B. 92.

Where a person had an incheate right to be a Term Rep. 259; 1 R. R. 480.

If a party has been ousted from an office by the election of another person to that office (the election not being merely colourable), his remedy is not by mandamus but by a quo warranto, Rew v. Oxford Corporation, 1 N. & P. 474; 6 A. & E. 349; 6 L. J., K. B. 103.

A party having a majority of votes for the office of councillor of a borough, and having been declared elected according to the form prescribed by 5 & 6 Will, 4, c, 76, s, 35, and having also been admitted, the office is full in fact, and the remedy to try whether it is full of right is by quo warranto. Reg. v. Derby Conneillors, 2 N. & P. 589: 7 A. & E. 419; W. W. & D. 671.

Where a councillor's name has been expunged from the burgess roll, a quo warranto is the proper mode to try his title to the office, and not a mandamns to the mayor to hold a fresh election. Heg. v. Ricketts, 3 N. & P. 151; 7 1, J., Q. B. 71.

On shewing cause against a mandamus commanding commissioners to administer the oath of office as commissioners to a person who, it was alleged had been elected by a majority votes under a statute, in opposition to another person whom the commissioners had sworn in as having a majority of legal votes:—Held, that a mandamus would lie, on the ground that it was an office for which a quo warranto would not lie, and therefore there was no other remedy. Reg. v. Keyningham Level Commissioners, 11 Jar. 58, 11.

Ne also Mandamus, ante, col. 185.

#### 4. ON WHOSE APPLICATION.

Generally.]—A quo warranto against persons for claiming to act as a corporation must be filed by and in the name of the attorney-general. Rev. v. Oyden, 10 B. & C. 230,

It cannot be filed at the instance of an individual against persons for usurping a franchise of a private nature, not connected with public government. Ib.

The court will judge from all the eirenmstances who are the real prosecutors. Rew v. Cudlipp, 6

Term Rep. 503.

And will not permit a corporator to file an information against another, for a defect of title which equally applies to his own, or to the title of those under whom he claims. Ib.

For the circumstance of the relator's standing in the same situation with the defendant, or its appearing that the corporation must necessarily be dissolved by impeaching the defendant's title, and those who claim under him will govern the discretion of the court in refusing such an application. Res v. Bond, 2 Term Rep. 767; see Res v. Clarke, 5 R. R. 508, 509,

Even though the relator has enjoyed his office many years minterruptedly. Rea v. Cowell, 6

D. & R. 336,

A burgess is a good relator, although the effect of the information would be to dissolve the corporation. Reg. v. Parry, 2 N. & P. 414; 6 A. & E. 810.

On motion for a quo warranto against a town councillor, founded on a defect in the burgess roll, it is not a valid objection to the relator that he is not a burgess; his interest is sufficient, if A mandanus to admit a recorder refused, he is subject to the government of the councillors because there was a recorder de facto, and the as an inhabitant. If the motion is made on the party had a remedy by quo warranto, though affidavit of three persons, two of whom are not

anobjectionable as a relator though his affidavit cognisant of the contents of his own charter, and alone does not shew sufficient ground for the information. Ib.

An inhabitant of a borough may be a relator on an application against a town councillor, though he is not a burgess. Reg. v. Quayle, 11 A. & E.

508; 5 Jur. 386.

The court will grant leave to a private relator to exhibit an information against individual corporators, although the affidavits on which the rule is moved disclose matter tending to dissolve the corporation. Rev. v. White, 1 N. & P. 84; 5 A. & E. 613; 2 H. & W. 403; 6 L. J., K. B. 23.

A town conneillor is disqualified to be a relator to question the validity of the election of another town conneillor, he having been cognisant of the objection before the election, being present at the election, and having afterwards administered to him, without protest, the declaration required by 5 & 6 Will, 4, c. 76, s. 50. Reg. v. Greene, 2 G. & D. 24; 2 Q. B. 460; 6 Jur. 777.

Where, upon a rule for a quo warranto against A., for exercising the office of a town commissioner, to which he had been elected by rate-

payers, the relator was (as it was alleged) not entitled to vote ; yet, as he was an owner of rated property in the town :-Held, that he had sufficient interest to be a good relator. Reg. v. Briggs.

11 L. T. 372.

Where a relator has twice obtained rules nisi for informations calling upon a party to shew why he exercised the office of mayor of a borough, which rules had been discharged on cause shewn; the court will not allow the same relator, on an application against the succeeding mayor, to raise the same questions as to the title of the former mayor to exercise the office. Rev v. Lunghern, 2 N. & M. 618. See Rex v. Orde, 8 A. & E. 420, u.

Motive of Relator. |-- Under circumstances tending to throw suspicion on the motives of the relator, the court will not grant the application where the consequence will be to dissolve a corporation. Rea v. Trevenen, 2 B. & Ald. 479; 21

The court made a rule absolute, though it was shewn that the relator and other persons with whom he acted were influenced by a strong party pirit, and had, during three or four years, withdrawn themselves from corporation business, to the inconvenience of the borough, Rev v. Benney, 1 B. & Ad. 684; 9 L. J. (o.s.) K. B. 104. It is no objection that the person applying is

in low and indigent circumstances, and that there is strong ground of suspicion that he is applying not on his own account, or at his own expense, but in collusion with a stranger. The court, however, in a case of this kind, will require security for costs. Rew v. Wakelin, 1 B. & Ad. 50 : 8 L. J. (o.s.) K. B. 366.

The court discharged the rule where the relator was the legal adviser of the defendant, and advised him that he had been duly elected. Rew

v. Payne, 2 Chit. 369.

The court refused to grant a quo warranto, because the party applying for it had agreed not to enforce a by-law, upon which he now grounded his attempt to impeach the defendant's title. Reg v. Mortlock, 3 Term Rep. 300,

Acquiescence and Concurrence. ]-It is a valid objection to a relator that he was present and concurred at the time of the objectionable elec- and ante, CORPORATION.

qualified to be relators, the information may, tion, even although he was then ignorant of the nevertheless, be granted if the third party is objection; for a corporator must be taken to be of the law arising therefrom. Rese v. Trerenen, 2 B. & Ald. 330; 20 R. R. 461. S.P., Reg. v. Greene, 2 G. & D. 24; 2 Q. B. 460; 7 Jur. 777.

It is a valid objection to a relator applying for a quo warranto information for usurping the office of burgess that he was formerly present at and concurred in the election of another burgess, when the objection he sought by the application to avail himself of was taken and overruled, and he voted for the party then elected. Rew v. Parhyn, 1 B. & Ad. 690: 9 L. J. (o.s.) K. B. 104.

A relator, who has acquiesced in, and himself adopted, the mode of voting he objects to, is disqualified from applying for a rule. Reg. v. Loft-house, 7 B. & S. 447; 35 L. J., Q. B. 145; L. R. 1 Q. B. 433; 12 Jur. (N.S.) 619; 14 L. T. 359; 14

W. R. 649.

It is no objection to relators applying against a party for exercising the office of an alderman (his election to which they had opposed), that they afterwards made no opposition to his election to the principal office of magistracy (to which the other was a necessary qualification); or that they afterwards attended at and concurred in corporate meetings whereat he presided, or where he attended in his official character, such application being made within the time limited by law, viz., in four years after his election as an alderman. Rec v. Clarke, I East, 38; 5 R. R. 505.

An application made on the affidavits of

several persons, of whom all but one have consented to the election proposed to be impeached, may be granted on the affidavit of that one, if he avows himself to be the relator. Rea v.

Symmous, 4 Term Rep. 223.

A corporator who has voted at an election of corporate officers is not a competent relator to impeach that election on the ground of an objection to a presiding officer, at least, without shewing that he was ignorant of the objection when he voted at the election. Rew v. Slythe, 9 D. & R. 181; 6 B. & C. 240; 5 L. J. (o.s.) M. C. 41: 30 R. R. 312.

On a motion for a quo warranto against a capital bargess, on the ground of irregularity in his election, it is no answer that the relator frequently acted with the party against whom he applies in corporation basiness, during two years following such party's election, the relator not being shewn to have concurred in the election, nor is the relator disqualified by the mere circumstance of lawing formerly taken part in other elections, when the same irregularity existed as that complained of, but was not noticed. *Rew* v. *Benney*, 1 B. & Ad. 684; 9 L. J. (o.s.) K. B. 104,

It is no objection to the persons applying for a quo warranto which would operate in its effect to dissolve the corporation, that they attended the meeting at which the mayor was elected, whose election they impeach on the ground that the corporation was then dissolved by the loss of an integral part, and that they voted for another candidate, and afterwards attended other corporate meetings at which such mayor pre-sided. Rev v. Morris, 3 East, 213.

## 5. WITHIN WHAT TIME.

#### a. Municipal Offices.

See Municipal Corporations Act, 1882, s. 225,

#### b. In other Cases.

32 Geo. 3, c. 58, s. I. means six years before making the rule absolute for the information, and not six years before obtaining the rule nisi; and therefore the court refused to make the rule absolute where the six years had then elapsed, though they had not clapsed before the rule nisi. Rer v. Stokes, 2 M. & S. 71.

Where a corporator de facto had exercised his office more than six years, the court, in its discretion without entering upon the question of title, refused to grant a quo warranto against him. *Hex* v. *Braoks*, 2 Man. & Ry. 389; 8 B. & C. 321; 6 L. J. (0.s.) K. B. 322.

Where a rule nisi for a quo warranto was granted at the end of Easter Term, calling on the defendant to shew cause on the first day of the ensuing term, and it appeared that two days before Trinity Term commenced he had completed six years' enjoyment of the franchise :-Hekl, that the application was barred. Reg. v. Harris, 3 P. & D. 266; 11 A. & E. 518; 8 D. P. C. 499; 9 L. J., Q. B. 114; 4 Jur. 459. Before the 32 Geo. 3, c. 58, the court refused

an information against a person who had been in the peaceable possession of his franchise six years. Res. v. Dickin, 4 Term Rep. 282.

So, the court refused to grant an information to impeach a derivative title where the person claiming the original title had been in the undisturbed possession of his office six years. Rev v. Pencock, 4 Term Rep. 684.

#### 6. PRACTICE.

#### a. Generally

No Control Exercised after Information. Where a proper case has been laid before the court to induce them to grant the information, they have never exercised any control over it afterwards as to the manner in which it is to be conducted. Her v. Brown, 4 Term Rep. 276.

Argument.]-If any points, besides the principal one are stated for argument on a quo warranto, they should be stated distinctly, otherwise the court will not take notice of them. Reg. v. Alderson, 1 G. & D. 429; 1 Q. B. 878; 10 L. J., Q. B. 277; 6 Jur. 321.

Venue.]—Venue changed on the ground that the trial of the issue can be more conveniently had in the county of the substituted venue. Clerk v. Reg., 9 H. L. Cas. 184; 31 L. J., Q. B. 175; 5 L. T. 66.

Trial, ]-On the trial of quo warranto informations, if the affirmative is on the defendant his counsel may begin; but it is otherwise if it is on the relator. Rer v. Tates. I Car. & P. 323.

New Trial, -A new trial may be granted on an information in nature of a quo warranto.

Rew v. Francis, 2 Term Rep. 484.

Bringing Error on.]—Sect. 146 et seq. of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, which prescribed a new mode of proceeding to error in any cause, did not extend to informations in the nature of a quo warranto, in respect of which the flat of the attorney-general had to be obtained, and a writ of error sued out according to the former practice. Reg. v. Seale, 5 El. & Bl. 1; 24 L. J., Q. B. 221; 1 Jur. (N.S.) 593; 3 W. R. 414.

If the attorney-general has granted his fiat for a writ of error to issue, the court will not interfere, the flat being conclusive. Rey. v. Clarke, 7 W. R. 601.

#### b. Affidavits.

Upon an application for a quo warranto information, suggesting that the defendants were elected contrary to the provisions of a particular charter, the affidavit must state that the charter was accepted, or that the usage had been in conformity to the charter ; and the court, after determining that the affidavit was ill for omitting so to state, refused leave to amend it. Rev v. Barrey, 4 M. & S. 253; 16 R. R. 453.

The affidavit in support of the motion must state at whose instance the application is made. It is not enough for a party to depose that, if the court grants the information, it is his intention contro grants in mornando, i.e. is nearthern to become really and bona fide the relator. Hey. v. Hedges, 11 A. & E. 163; 9 D. P. C. 493; 1 W. P. C. 63; 10 L. J., Q. B. 6; 5 Jur. 290.
Affidavits in support of a que warrante should

state any usage there may be which differs from what might be held to be the construction of what might be about a local and the charter of the incorporation of the borough.

Rev. v. Hendley, 7 B. & C. 496; 1 Man. & Ry.

345; 6 L. J. (O.S.) K. B. 53.

The relator is bound by the day on which, in

his affidavit (though founded on information and belief), the election is alleged to have taken place; and if that day is mistaken, the defendant is not bound to shew a regular election on another day. \*\*Rulfe\*, 1 N. & M. 773.

The rule was dismissed with costs, where the affidavits in support suppressed several material facts. Rev v. Hughes, 7 B. & C. 719; 1 Man. & Ry. 625; 6 L. J. (o.s.) K. B. 190; 31 R. R. 288.

The court will receive the affidavit of a person who is himself estopped from being a relator, if the motion is made by a relator properly qualified, although the complete ground of the appli-

nea, anthong the complete ground of the appli-cation appears only from the affidavit of the party estopped. Rox v. Blanne, 4.A. & E. 664. An affidavit should shew that the relator is a properly qualified person. Reg. v. Thirlusina, 38, L. J., Q. B. 17; 10 Jun. (N.S.) 206; 9 L. T. 781; 12 W. R. 384.

A rule had been granted upon an affidavit, which described the relator merely as "of B., tailor" :- Held, that the description was not sufficient, and the rule was discharged. Ib.

## c. Statement of Objections to Title.

Where there are several informations pending against the aldermen of a borough founded on the same objection of title, the court has not power to make a rule binding either party to submit to the result of the first information tried.

Rev v. Cozens. 2 N. & P. 164; 7 A. & E. 285; 6. D. P. C. 3.

It is not sufficient to state in the rule that the defendant was not entitled to be appointed, and that the relator was. Reg. v. Edye, 12 Q. B. 936;

that the relator was. Reg. v. Edge, 12 Q. 15. 1930; 18 L. J., Q. B. 6; 13 Jur. 8.
Rule held applicable to pleadings only, and not to prevent relator at trial of information going into objections not specified in the rule. Reg. v. Tugwell, 9 B. & S. 367; 38 L. J., Q. B. 12: L. R. 3 Q. B. 704.

A rule nisi was obtained on the ground of an undue removal of one person from, and of an undue election of the defendant to the office of town clerk of a borough. The rule did not mention, and the affidavit did not distinctly disclose, the objection that the removal and clercion had taken place at a meeting without due notice that such was the business of the meeting—Held, that the objection of the want of such notice could not be taken in support of the rule. Reg. v. Thumas, 3 N. & P. 288; 8 A. & E. 183; 7 L. J., Q. B. 141.

#### d. Quashing Information.

A quo warranto cannot be quashed on motion, though both parties consent. Rex v. Edgan, 4 Burr. 2297.

## e. Costs of Rule.

A prosecutor shall pay costs where he makes a groundless and frivolous application for a quo warranto, knowing it to be so. *Rex v. Lewis*, 2 Burr. 780; 2 Ld, Km. 497.

But if circumstances are very strong in favour of a corporate franchise, and against the application, the rule nist will be discharged with costs, Mar v. Wardroper, 4 Burr. 1963: 1 East, 41, n.

Where a rule nisi is discharged, and it appears that the party making the affidavit as relator is indigent, and unable to pay cests and was procured to make the application by another, who is the real presentor, the court will order the costs to be paid by the party sa promoting the application. *Boy. v. Greene*, 4 Q. B. 646; 11 L. J., Q. B. 281; 6 Jur. 896.

It makes no difference that such party was employed on the motion as an attorney. *Th.*But if the facts rendering him liable appear

only by the affidavits in opposition to the rale, the payment of costs by him must be the subject of a distinct motion. It.

Where the court has discharged the onle, it will, in its dispertion, on a subsequent application, order payment of costs by the party who was virtually relator. Such application having been made upon reading new affiliavits, which did not state any fresh circumstances beyond those in the affidavits filed in opposition to the original rule, the card grammed it, but without costs. Reg. v. Green, 12 L. J., Q. B. 239; 7 Jm. costs. Reg. v. Green, 12 L. J., Q. B. 239; 7 Jm.

It is not necessary to demand the costs of such third party, before obtaining the second rule, where he is the attorney of the nominal relation, and has joined in the affidavits for the quo warranto, Ib,

# f. Change of Relator or Solicitor.

After the rule has been made absolute, the court will change the relator, on motion on his behalf, if, by reason of his necessary absonce from England in the conduct of his own private affairs, he is mable to enter into the recognizance required by  $4 \times 5$  WIL & M. c. 18, s. 2, Rey. v. Quayle, 9 D. C. 548; il A. & E. 508; il A. & E. 508; if Y. & D. 42; il L. J. Q. B. 99. If the relator, and the defendant employ the

If the relator and the defeudant employ the same attorney, the court will make a rule absolute to change the attorney for the prosecution, although there is no collosion between the parties, and the attorney intended to proceed bona fide to obtain the judgment of the court. Hey. v. Anderson, S. P. & D. 2; 11 A. & E. 3.

## g. Consolidation of Informations.

The court will not consolidate several informations against several persons for distinct offices, for there must be an information against each to cnable each to disclaim. *Hex v. Warlow*, 2 M. & S. 75: 14 R. R. 592.

But four informations were consolidated into one, where the several rights were properly determinable in one information. Rev v. Collingwood, 1 Burr. 573.

Where there were several quo warranto informations pending against the aldermen of a borough, founded on the same objection of title, the court held that it had not the power to make a rule binding either party to sabnit to the result of the first information tried. \*\*Rees v. Chzens, 7 A. & E. 285; 2 N. & P. 164; 6 D. P. C. 3.

#### h. Costs on Disclaimer or Resignation.

Under particular circumstances, the court allowed a disclaimer to be entered without costs. Rev v. Holt, 2 Chit, 366.

The court will make a rule for a quo warranto information absolute, although the defendant has resigned the office and his resignation has been resigned the office and his resignation has been object of the relator is, not only to cause the object of the relator is, not only to cause the defendant to vacate the office, but to substitute another candidate at once in the office, as in such a case the relator is entitled to have judgment of oustor or a dischainer outered on the record. In making the rule absolute, the court will excreise a discretion as to costs. Reg. v. Blizard, 7 B. & S. 922; L. R. 2 Q. B. 55: 15 I. T. 242.

Where a person has been elected to the office of conneillor of a borough for which he was a candidate, and has acted in such office, and afterwards, upon a rule nisi for a quo warranto being obtained against him, declined to shew cause, and submitted to resign, and, if necessary, formally to disclaim, the court will make the rule absolute, without imposing any terms upon the relator as to the costs of any subsequent, proceedings. Reg. v. Enrashen, 22 L. J. O. R. 174.

proceedings. Rey. v. Eurushawe, 22 L. J., Q. B. 174. An unqualified person was elected a town conneillor of a borough, without having taken any part in the election; but on being informed by the town clerk, that if he did not accept the office he would be hable to a fine, he signed the usual declaration. Upon application for a quo warranto, he sent in a written resignation to the town clerk, which was accepted:—Held, that the relator was not entitled to the costs of the application. Rey. v. May, 2 L. M. & P. 144; 20 L. J., Q. B. 208: 15 Jur. 122.

Though a person whose election to the office of town conneillor is void by reason of a mistake of the presiding officer is willing to disclaim, and consents to a rule for a quo warento feig made absolute, the court will not order that the relationshould bear the expense of the information should bear the expense of the information disclaimer. Heyv. Hartley, 3 El & Bl. 144; Jur. 623; 2 W. R. 159. Coultra, Rey. v. Marcley, 4 Q. B. 146; 3 G. & D. 400; 12 L. J., Q. B. 123; 7 Jur. 85, 7 Jur. 85.

Where a rule for a quo warranto for the usurpation of an office has been obtained and served upon the defendant, who thereupon resigns and does not show cause against the rule, it will be made absolute, but without costs, Reg. v. Newcombe, 15 W. R. 108.

A quo warranto was moved for against an officer elected by ballot, on the ground that a

large proportion of the persons who voted were not qualified; but it was not skewn for whom the votes of those persons were given:—Held, that on his application the officer could not be required to prove his election valid, but it lay on the opposing parties to show (if that was practicable) that his majority was obtained by bad votes. How, Afferson, 5 B. & Ad. 855.

## 7. WHAT TITLE PUT IN ISSUE.

Quere, whether a derivative title can be impeached when the person from whom it was derived died in the undisturbed possession of it. Rev. v. Stacey. 1 Term Rep. 1.

Such title cannot be impeached by those who have acquiesced and acted under it. Ih.

After the death of a mayor, his capability to election cannot be disputed. Rew v. Spearing, 1 Term Rep. 4. u.

The court admitted a party to defend the defendant's title. Rex v. Marshall, 2 Chit, 370.

A title to one office which is a qualification to hold another office, held not to be within the repealed 32 Geo. 3. e. 58, s. 3; and, therefore, although the party hale exercised the tirts for six years, the court made the rule absolute for an information for exercising the second office upon a defect of title to the first. Here v. Ntokes, 2 M, & S, 71.

## 8. JUDGMENT AND COSTS.

Judgment.]—If a defendant fails in the titles he sets up, judgment must be for the Crown. Rex.v. Yarmouth Corporation, 4 Burn. 2143.

There may be a judgment of onster, though

the usurpation is not continued to the trial, Rev v. Williams, 1 W. Bl. 98.

A judgment of onster against a mayor by default was set aside. Rer v. Winchelsen Corporation, 4 Burr. 2277.

Upon a quo warranto against one for claiming the office of alderman, if he disclaims, and judgment of ouster is given against him, he is concluded from shewing to a second information, for excreising the same office, that he was duly elected before such first information and judgment of ouster, and that he was afterwants swom in by virtue of a peremptory mandamus from the court. Rev. Clarke, 2 East, 75; 6 B. R. 874.

In a upo warranto information against a mayor, he dained under an election and swearing purposant to 11 Geo. 1, c. 4, and shewed an election accordingly, and that he was sworn agreeably to that statute: then specified a swearing according to the charter, but not to the direction of the 11 Geo. 1, c. 4; the replication took issue on this swearing, which, with eleven others, were found for the king without evidence (though admitted to have been rightly founded); the court considering the defendant's whole title as one entire title was unanimous in setting aside the verdict, upon his payment of cests, and giving him liberty to amend his plea. Roe v. Philips, 1 Burr. 292; 1 Ld. Ken. 331.

If a judgment is entered without costs, where 26 L. T. 790. costs ought to have been given it can only be amended in the same term. Rev. Amery, 1 Anst. 178; 1 R. 18, 383.

So, in the House of Lords, no amendment can be in such a case after the session. Ib.

Costs.]—Costs are not given, unless in usurpation of offices or freedoms in corporations. Rev. Williams, 1 W. Bl. 93.

A defendant in a quo warranto information against him, to shew by what authority he held the office of registrar and clerk of the court of requests of the city of Bristol, was not entitled to costs. Resv., Hall. 2 D. & R. 341: 1 B. & C. 327: 1 L. J. (0.8.) K. B. 88.

On a judgment for the relator, he is cutitled to costs. Rev v. Amery, 1 Aust. 178; I R. R.

Where any one of several issues is found for the presecutor, on which judgment of onster is given, he is entitled to costs on all the issues. *Res.* v. *Downes*, 1 Term Rep. 453.

The prosecutor of a quo warranto information against a constable of Birmingham is not entitled to costs. Rev v. Wallis, 5 Term Rep. 375.

The returning officer in an incorporated borough sending members to parliament, is not liable to costs within the operation of 9 Anne, c. 10, in the event of judgment against him on a quo warranto information. Rev. v. M·Kay, 8 D. & R. 893; 5 B. & C. 640.

A private relator who has obtained judgment in a quo warranto is cutified as of course to the costs of the prosecution, as well as the costs of an interlocutory motion in which he failed.

1 Rey. v. Dudley, 4 Jun. 915.
Previously to the repended Municipal Corporations Act, 1885, 5 & 6 Will. 4, c. 76, the mayor for the time being of a brough corporate, named in schedule (A), also held and exercised the office of corner for the borough. Subsequently to that act, the borough petitioned for and obtained a separate court of quarter sessions, and appointed a coroner under s. 62 — Held, that it was not an office within the meaning of 9 Anne, c. 20, s. 5, so as to entitle the relator to costs, on judgment for the Crown. Reg. v. Grimshare, 5.
D. & L. 249; 2 B. C. Rep. 146; 17 L. J., Q. B. 19; 12 Jun. 134.

An office, to come within the meaning of the 9 Anne, c. 20, ss. 1, 4 and 5, must be a corporate

A quo warranto alleged that the defendant, within the town of B., in the county of M., exercised, without legal warrant, the office of mayor; and, together with R. and J., the powers and privileges of a boly corporate, by the name and description of the mayor and bniliffs of the brough of B. The defendant suffered judgment by default:—Held, that the relator was entitled to cests under 9 Anne, c. 20, s. 5. Lapay v. Hey, (in error), 2 B. & S. 656; 31 L. J., Q. B. 209: 6 L. T. 610; 10 W. R. 623.

Upon the trial of a quo warranto for exercising the office of a member of a local board of health, the defendant did not appear, and a verdict passed for the relator. The 9 Anne, c. 20, gives costs upon informations concerning the offices of mayors, buildfs, portreeves and other offices within etics, towns corporate, boroughs and other places:—Held, that, notwithstanding the incorporation of local boards by the repealed Sanitary Act (23 & 24 Vict. c. 20), s. 46, the relator was not entitled to costs. Reg. v. Morgan, 26 L. T. 700.

Abandonment—Costs.]—A person giving notice of an application for information in the nature of a que warranto against a person claiming to hold a corporate office is responsible for costs incurred thereby, even though the application is abandoned before it can be heard. Ballard v. Hallined, 6. 5. 1. J., Q. B. 382.

Security for Costs. ]-The court will not stay | B. Customs of Manors. proceedings until the prosecutor give security for costs, on the ground that the relator is in insolvent circumstances, where it appear that he is a corporator, and no fraud is suggested. *Heav* v. II game, 2 M. & S. 346; 15 R. R. 273.

Where the person applying is very poor, and there is strong ground of suspicion that he is applying not on his own account or at his own expense but in collusion with a stranger, the court will require security for costs. Row v. Wakelin, 1 B. & Ad. 50; 8 L. J. (o.s.) K. B. 366.

Costs in Error.]—On a writ of error to the Exchequer Chamber upon judgment upon a quo warranto information, the party in whose favour the court of error decides is not thereby, and by the Law Terms Act, 1830, 11 Geo. 4 & 1 Will, 4, c. 70, s. 8, entitled to enter up a judgment of that court for his costs in error. Rowley v. Reg., 6 Q. B. 668; 14 L. J., Q. B. 240; 9 Jur. 432,

J. M. L.

# CRUELTY.

To Animals. - Sec ANIMALS.

In Divorce Cases. ]-Sec HUSBAND AND WIFE,

To Children and Helpless Beings. ] - See CRIMINAL LAW.

## CURATE.

See ECCLESIASTICAL LAW.

# CURTESY (TENANT BY).

See HUSBAND AND WIFE.

# CUSTODY OF CHILDREN.

See HUSBAND AND WIFE (DIVORCE)-INFANT.

Illegitimate.]-See BASTARD.

# CUSTODY OF DEEDS.

See DISCOVERY-DEED AND BOND.

## CUSTOM.

- A. VALIDITY AND REASONABLENESS.
  - 1. General Rules, 238.
  - 2. In Mines, 241.
  - 3. In Highways, 241.
  - 4. In Contracts, 242,
  - 5. Respecting Parishes and Towns, 243.
  - 6. Public Sports and Games, 244.
  - 7. Profits à preudre, 245.

- - 1. Validity, 247.
  - 2. Enfranchisement, 249.
  - 3. Evidence, 250.
  - C. AS TO LANDLORD AND TENANT, 251.
  - D. CUSTOMS OF TRADE, 252.
- E. CUSTOMS OF LONDON. 1. What are, 256.
  - 2. How Proced, 260.
  - 3. At Elections-See CORPORATION.
- F. EVIDENCE, 262,
- G. OTHER CHSTONS.

Burial-See ECCLESIASTICAL LAW.

Commons-See COMMON

Copyhold-See COPYHOLD,

Corporation-Sec Corporation,

Mines-See MINES.

Stock Exchange-See Company.

And see other specific titles.

# A. VALIDITY AND REASONABLENESS.

## 1. GENERAL RULES.

A custom is void which is unreasonable, uncertain, savours too much of arbitrary power, and tends to make a lord of a manor a judge in his own cause. Wilkes v. Broadbeat, 1 Wils. 63. It is no objection to a custom that it is not conformable to the common law of the land.

Horton v. Beckman, 6 Term Rep. 760, 764. There can be no prescriptive right, in the nature of a servitude or an easement, so large as to preclude the ordinary uses of property by the owner of the land affected. Duce v. Hau. 1 Macq. H. L. 305.

Semble, that where a claim, in the nature of a servitude or an easement, is incapable of judicial control and restriction, it cannot be

sustained by prescription. Ih.

It does not follow that rights sustainable by grant are necessarily sustainable by prescription. Ih.

A prescription for taking three bushels of barley out of every ship's cargo brought to a certain quay to be exported, is reasonable and good. Serjeant v. Read, 1 Wils. 91.

A custom that every pound of butter sold in a particular market town should weigh eighteen ounces, is bad. Noble v. Durell, 3 Term Rep. 271.

Presumption of Legal Origin.]-Where an onerous liability has been asserted and submitted to for a long series of years, although the evidence begins well within modern times, anything not manifestly absurd which will support and give a legal origin to such a custom will be presumed. Therefore, a liability to repair a seawall submitted to since 1818 ought to be presumed to have a legal origin. L. & N. W. Ry., v. Fobbing Lexels Commissioners, 66 L. J., Q. B. 127; 75 L. T. 629.

The owners of an oyster-fishery had, since the reign of Elizabeth, held courts, and granted, for a reasonable fee, licenees to fish to all persons Frewen, 35 L. J., Ch. 692; L. R. 2 Eq. 634; inhabiting certain parishes, who had been appren- 12 Jur. (N.S.) 879; 14 L. T. 846, ticed for seven years to a duly-licensed fisherman. In an action by a person so qualified against the owners of the fishery for not granting him a licence to fish on payment of the usual fee :- Held, that the fishing, having always been by licence, had not been as of right, and therefore could not give rise to a custom, however general and long continued. Mills v. Colchester Corporation, 36 L. J., C. P. 210: L. R. 2 C. P. 476; 16 L. T. 626; 15 W. R. 955. L. R. 3 C. P. 575, infra. Affirmed

Held also, that it was no objection to the custom, if otherwise good, that the fee alleged to have been paid for the licences was not a fixed fee, but a fee of reasonable amount. 1b.

Immemorial User - Possibility of Legal Origin.]—There can be a legal origin for a custom to moor vessels in a navigable tidal estnary of the river Thames, forming part of the Port of London, by means of beams buried in the soil of the foreshore and attached to a chain and buoy to which the same vessel from time to time returns, and such an origin will be presamed on proof of immemorial user. Such a right is incidental to navigation, and, apart from any grant or dedication, any of Her Majesty's subjects navigating navigable tidal waters is entitled to enjoy it. Att.-Gen. v. Wright, 66 L. J., Q. B. 834 : [1897] 2 Q. B. 318 ; 77 L. T. 295 ; 46 W. R. 85—C. A.

A custom that the rector shall occupy in severalty forty acres, part of a common of 1,200 acres, in discharge and satisfaction of all the tithes of hay and folder on the whole common, may have a legal origin. Anon., 1 L. J. (o.s.) Ch. 199.

The owners of an anchorage-ground at Whitstable had received dues from all ressels anchoring there time out of mind and were also the owners of an oyster-fishery adjoining the anchorage-ground, and maintained buoys and beacons which served to mark the limits between the oyster-ground and the anchorage-ground, and also to indicate the channel by which vessels might enter the anchorage-ground. In an action to recover dues from the owner of a vessel which had been anchored on this ground :-Held, that they had an immemorial right to the dues; the consideration being the services rendered to the navigation by the maintenance of the buoys and beacons. Whitstable Free Fishers v. Foreman, 36 L. J., C. P. 273; L. R. 2 C. P. 688; 16 L. T. 747; 15 W. R. 1133, Affirmed 37 L. J., C. P. 305; L. R. 3 C. P. 578: 18 L. T. 734; 16 W. R. 1019 —Ex. Ch.; and in Dom. Proc. nom. Foreman v. Whitstable Free Fishers, L. R. 4 H. L. 266; 21 L. T. 804; 18 W. R. 1046.

Upon a bill in equity to establish a right to a chancel as part of a parish church, against the lord of a manor, who claimed it as appendant to the manor or manor house, it appearing that the chancel was an ancient chapel coeval with the church, and that it was a private chapel creeted by the lord of the manor :- Held, that the immemorial use and occupation, coupled with reparation, entitled the lord of the manor by prescription to the perpetual and exclusive use of the chancel, and that this right might exist, notwithstanding that the freehold might not be in

Who within—Tenement in Parish. ]—A person who rents a tenement within a parish, which he uses occasionally, but does not actually reside there, is within a custom for all the inhabitants of a parish. Fitch v. Fitch, 2 Esp. 543; 5 R. R.

Fees-Reasonable Charges. ]-The mere circumstance of the owners of an oyster-fishery having for a period of 150 years received a fee of 21. 2s. for a licence for four dredges, will not, in the absence of all evidence on the subject, warrant the assumption that 37. 3s, is an unreasonable sum to demand for such a licence. Mills v. Colchester Corporation, 37 L. J., C. P. 278; L. R. B C. P. 575; 16 W. R. 987-Ex. Ch.

Marriage Fees, ]-A marriage fee cannot be claimed of common right, but if it is of a Bryant v. Foot, 9 B. & S. 444; 37 L. J., Q. B. 217; L. R. 3 Q. B. 497; 18 L. T. 587; 16 W. R. 808-Ex. Ch.

When a fee has been received for a great length of time, the right to which could have had a legal origin, it may and ought to be assumed that it was received as of right during the whole period of legal memory to the present time, unless the contrary is proved. Ib.

The right to a payment claimed as immemorial may be disproved by proof of its being rank; i.e. so large that it could not possibly have existed at the commencement of the time

of legal memory. Ib.

The court will take judicial notice of the difference in the value of money at the time of Richard I, and the present day. Ib.

The parson of an agricultural parish claimed a fee of 13s, on every marriage solemnised in his parish church. A special case found that from 1808 down to 1854 the sum of 13s, or 13s, 6d, had always been paid:—Held, that the claim could not be supported. Ib.

of an archdeaconry court, to be valid, must be of an architecteonry court, to be valid, must be founded upon immemorial usage. Sheppared v. Payne, 12 C. B. (N.S.) 414; 31 L. J. G. P. 297; 9 Jur. (N.S.) 354; 6 L. T. 716. Affirmed, on appeal, 16 C. B. (N.S.) 182; 33 L. J. G. P. 158; 19 Jur. (N.S.) 540; 10 L. T. 193; 12 W. R. 581.— Ex. Ch.

The office of registrar of an archdeaconry court, being a freehold office, with duties of a continuous and presumably perpetual character, and one whose existence is essential to the due exercise of the functions of the archdeacon, is an office to which fees may be annexed by immemorial usage. Ib.

The fact of such fees having been paid and received from 1727 down to 1862 is evidence from which the immemorial receipt of them ought to be presumed, if they could have had a legal origin; and the fact of their amount having from time to time been varied does not necessarily affect their validity. Ib.

In considering the reasonableness of such fees regard may be had to the amounts established water and the person preserbing, and although the estate of louse to which the chancel was appendint complete not be situate in the parish. *Charton* v. It is only in respect of services rendered, or by statute for similar services rendered by other which the officer is ready and willing to perform, that such a claim can be substantiated. Ib.

— Irish Attorney-General.]—The Irish attorney-general refused to entertain a writ of error, for the purpose of determining whether or not he should grant his flat thereto, without the eastonary fee of fifteen guiness, on the ground that it was the immemorial practice of the office of the clebed of the clebed of the clebed of the through the state of the clebed of the transfer of the state of the flat of the state of the transfer of the state of the transfer of the state of the stat

#### 2. In Mines.

The Act of Settlement of the Isle of Man, 1708, confirmed to the tomats their customary estates of inheritance, "saving always all mines and minerals of what kind and unture seever, oursries and delfs of flag, slate or stone".— Held, that a enstann by the tenants to dig for clay and sand did not contravene the saving clause, and that such tenants were cutified to dig for clay and sand. Att. Gen. (See of Man) v. Mylehreed, 48 L. J., P. C. 36; 4 App. Cas. 294; 40 L. T. 764—P. C.

A custom that any timer within Cornwall may nequire a right to the tim within certain limits, taking proceedings in the stammy court, of which the landowner has notice, and completing his title in that court, and in case of minerals being found, rendering a portion of the produce to the lord or owner of the soil; and that the right so acquired may be preserved by an ammericancy of the bounds; and that it is not necessary for its preservation that the minerals (if any) within the limits should be sought after, and the land worked for mineral purposes by the boundowner, or on his behalf, is bad for unreasonableness, Ragora v. Breatma. 10 Q. B. 26; 17 L. J., Q. B. 34; 12 Jun. 263.

In an action for working mines under ground near to the plaintiff's house, so that the housewas injured and in danger of fulling for want of support, the defendant claimed as lessee of the manor in while the house was situate, and of the infines therein, a prescriptive right to work the infines therein any houses parcel of the manor, paying to the occupiers of the surface a reasonable compensation for the use of the surface, but without making compensation on any other account, and justified under that right:—Held, first, that such a prescription was bad, as being aurreasonable. Hilton v. Grannille (Eurl), D. & M. 614; 5 Q. B. 701; 18 L. J., Q. B. 193; 8 Jur. 319.

Held, secondly, that such a right could not exist by custom. Ib.

The stanners of Devonshire are not entitled

The stanners of Devonshire are not entitled by enston to divert water from streams into their mines, and for that purpose to dig trenches over other people's lands. Bustard v. Smith, 2 M. & Rob. 129.

And see MINES.

#### 3. IN HIGHWAYS.

A person was charged under 5 & 6 Will, 4, c. 50, s. 72, with obstructing a public footway. He

had put up a stall for the sale of refreshments at a statute sessions for the hirting of servants; this had been done for more than fifty years, and the statute sessions had been held before 5 Eliz. c. 4. He, thereupon, contended that he had a right by custom to creet his stall in the same way as at a fair, or, at all cevents, that he bona fide channed such a right, and the justices jurisdiction was therefore onsted. The justices having convicted him:—Held, that the justices were right; for that as the statute sessions were introduced by the Statutes of Labourens, the first of which was in the reign of Edw. 3, there could be no such custom by immemorial usage as was chained. Simpson v. Wells, 4 L. J., M. C. 105; J. R. 7, Q. B. 214; 26 L. T.

But a custom to creet a booth or stall, during the period of a fair or market, on any part of a public street or highway (sufficient space being left for the public to pass) is a good custom, Elecond v. Bullock, 6 Q. B. 383; 13 L. J., Q. B. 330

## 4. IN CONTRACTS.

Variation of Documents.]—A custom cannot vary or after the construction of written documents. *Meazies v. Lightfont*, 40 L J., Ch. 561; L. R. 11 Eq. 459; 24 L. T. 695; 19 W. R.

A custom to control the words of a covenant in a deed must be one which both parties to the covenant can know, and must be certain and invariable. Abbut v. Butes, 43 L. J., C. P. 150; 30 L. T. 99; 22 W. R. 488. Affirmed 45 L. J., C. P. 117; 33 L. T. 491; 24 W. R. 101.

Inconsistent with Charter-party.] Where a vessel is chartered to proceed with cargo to a "safe port . . . as ordered, or as near thereunto as she can safely get, and always lay and discharge afloat," the master is not bound to discharge at a port where she cannot, by reason of her draught of water, "always lie and discharge affoat" without being lightened, even if she can be lightened with reasonable dispatch and safety in the immediate vicinity of the port or in the port itself. A vessel was chartered to proceed with a engo of grain from Baltimore to Falmouth for orders, "thence to a safe port in the United Kingdom as ordered, or as near thereunto as she could safely get, and always lay and discharge affoat." The vessel was lay and discharge affoat." ordered to Lowestoft. Her draught of water, when loaded, was such that she could not lie afloat in Lowestoft Harbour without discharging a portion of her cargo, but the discharge of cargo might have been carried on with reasonable safety in Lowestoft Roads. The consignee offered at his own expense to lighten the vessel in the roads, but the master refused to proceed to Lowestoft to discharge, and went to Harwich as the nearest safe port, and there discharged the cargo :- Hekl, that the consignee could not recover damages against the shipowner for the refusal of the master to discharge at Lowestoft. The Alhambra, 50 L. J., P. 36; 6 P. D. 68; 43 L. T. 636; 29 W. R. 655—C. A.

Held, also, that evidence that it was the custom of the port of Lowestoff for vessels to be lightened in the roads before proceeding into the harbour was not admissible. *Ib*.

By a charter-party the vessel was to deliver at 50, H., "or so near thereto as she could safely get"; He to discharge as customary; the cargo to be

merchant's risk and expense. The draught of water of the vessel with the cargo on board was too great to allow her to reach H. The nearest point to which she could safely get was S., where the merchant refused to accept delivery of any part of the cargo. In order to lighten the vessel. part of her cargo was discharged into lighters at S, and sent in them to H. Her owner having sued the charterer to recover the lighterage expenses :- Held, that a defence alleging that by the custom of the port of H, the defendant was not bound to take delivery elsewhere than at H. was bad on demurrer, inasmuch as it sought to set up a enstom inconsistent with the written contract, and that the plaintiff was entitled to recover the lighterage expenses. Hayton v. Irucio, 5 C. P. D. 130: 41 L. T. 666: 28 W. R. 665-C. A.

See also EVIDENCE-SHIPPING.

#### 5. RESPECTING PARISHES AND TOWNS.

Rates, Making of. ]-Where a parish contained within itself a borough not co-exreusive with it, and the mayor of the borough, on a return to a mandamus for allowing a poor-rate made by the churchwardens and overseers of the whole parish, stated a custom, which had existed since 43 Eliz. c. 2, of appointing separate churchwardens and overseers, and of making separate rates for the borough, and for those parts of the parish which lay without the borough :- Held, that such custom was invalid. Rea v. Gordon, 1 B. & Ald. 524: 19 R. R. 376.

Appointment of Churchwardens.]-Down to 1848 a parish consisted of six townships, and by custom the churchwardens were chosen as follows:—In one township the outgoing churchwarden presented two names to the rector to choose from, in four other townships the parishioners presented two names to the rector to choose from, and in the sixth two names were similarly presented to the rector; and the six persons chosen by the rector became the parish churchwardens. In 1848, by an order in conneil, approving of a scheme prepared by the ecclesiastical commissioners under 3 & 4 Vict. c. 113, the last-mentioned township was constituted a separate rectory, and from that time in the old parish the five remaining townships only presented names to the rector, and there were only five churchwardens elected for the parish :-Hekl, that the separation of the one township did not affect the custom in the remaining five. and that the five persons chosen thereunder were lawfully churchwardens of the parish. Bremner v. Hull, 35 L. J., C. P. 332; L. R. 1 C. P. 748; 12 Jur. (N.S.) 648; 15 L. T. 352; 14 W. R. 964; 1 H & R 800

Sale of Beer.]—The Beer Act (11 Geo. 4 & 1 Will. 4, c. 64) does not abrogate a custom in a borough that no one shall sell beer within the borough except a freeman licensed by the mayor and aldermen. Leicester v. Burgess, 2 N. & M. 131; 5 B. & Ad. 246.

Sales by Auction.]—A custom that the town crier of a corporate town shall have the exclusive Sales by Anction.]—A custom that the rown within 2 & 3 Will. 4, c. 71, s. 2. Monosey v. erier of a corporate fown'shall have the exclusive privilege of prochaiming, by the sound of the bell, the sale of all goods brought into the Sale of the solid by auction is a good custom. Individual in respect of his land, not to a class of

brought to and taken from alongside the ship at | Jones v. Waters, 1 C. M. & R. 713; 5 Tyr. 361; merchant's risk and expense. The draught of 1 Gale, 5: 4 L. J., Ex. 109.

Perambulation of Boundaries. - Evidence of a custom to perambulate the boundaries of a parish is not sufficient to support an allegation to perambulate the boundaries of a liberty. Grant v. Kearnen, 12 Price, 773.

A custom for parishioners on the perambulation of the boundaries to go through a particular house situated within the parish, but not upon Taylor v. Derey, 7 A. & E. 409; 2 N. & P. 469; W. W. & D. 646; 7 L. J., M. C. 11; 1 Jur. 892.

Inhabitants of "District." -A custom laid in all the inhabitants for the time being of three adjoining and contiguous parishes to a right of recreation over land situated in one of such parishes is bad in law. The word "dis-trict," when a custom is laid in the inhabitants of a district, means no more than that particular division known to the law in which the par-Trickler property is situate, such, for instance, as a parish or a manor. Edwards v. Jenkins, 65 L. J., Ch. 222; [1896] I Ch. 308; 73 L. T. 574; 44 W. R. 407; 80 J. P. 167.

## 6. Public Sports and Games.

On Private Close.]—A custom for all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in the close of A., at all seasonable times of the year, at their free will and pleasure, is good; but a similar custom for all persons for the time being being in the parish is bad. Fitch v. Rawling, 2 H. Bl. 393; 3 R, R, 425.

A custom for the inhabitants of a parish to erect a maypole on the ground of a landowner within the parish, and dance round and about it, and otherwise enjoy any lawful and innocent and onerwise enjoy any fawrat and indecent recreation at any time in the year on the ground is reasonable and lawful. *Hall v. Nottingham*, 45 L. J., Ex. 50; 1 Ex. D. 1; 33 L. T. 697; 24 W. R. 58.

Village Greens.]-The law of Scotland agrees with the law of England in holding that the with the law of England in loading that the right to village greens and playgrounds stands upon a principle of original dedication to the use of the public. Dyce v. Hay, 1 Macq. H. L.

305 Where new inventions come into use, they may have the benefit of servitudes and easements, the law accommodating its practical operation to the varying circumstances of mankind. Ib.

Horse-racing.] — A custom for the freemen and citizens of a town, on a particular day in the year, to enter upon a close for the purpose of holding horse-racing thereon is a good custom, noding noise-racing thereon is a good custom, and, in pleading it, it is not necessary to aver that the particular day was a seasonable time. Monkey v. Lemay. 1 H. & C. 729; 32 L. J., Ex. 94; 9 Jur. (x.s.) 306; 7 L. T. 717; 11 W. R. 270.

A claim, by custom, for the freemen and citizens of a town, on a particular day in the year, to enter upon a close for the purpose of holding horse-races is not a claim to an easement

to bring the right within the term easement in 153; 1 Jur. (N.S.) 704. that section, it must be one analogous to that of a right of way or a right of watercourse, and must be a right of utility and benefit, and not one of mere recreation and amusement. Ib.

Horse Training. - A custom for the inhabitants of a parish to exercise and train horses, at all seasonable times of the year, in land beyond the limits of the parish is bad. Sowerby v. Coleman, 36 L. J., Ex. 57; L. R. 2 Ex. 96; 15 L. T. 667: 15 W. R. 451.

## 7. PROFITS A PRENDRE.

Custom Invalid. ]-A custom for the inhabitants of a particular place to take a profit in alieno solo is bad; a right to take such a profit can be claimed by prescription only. Grimstead v. Marlowe, 4 Term Rep. 717: 2 R. R. 512.

A profit à prendre in another's soil cannot be claimed by custom, however ancient, uniform, and clear the exercises of that custom may be. Att.-Gen. v. Mathias, 4 Kay & J. 579; 27 L. J., Ch. 761; 4 Jur. (N.S.) 628; 6 W. R. 780.

A right to carry away the soil of another without stint cannot be claimed by prescription, nor can the claim be sustained by evidence of a lost grant. Ib.

Right in a Class.]-The dwellers in a parish or manor cannot acquire any right to a profit à prendre : and if in laying a custom to a profit à prendre the dwellers are included in the class alleged to have the right, the custom so laid is bad. Allyond v. Gibson, 34 L. T. 883; 25 W. R. 60—C. A.

To an action for entering the plaintiff's clo the defendant pleaded that there is a public footpath into, through, and over the close, for the Queen's subjects to go and pass on foot at all times at their will and pleasure, and that there has been from time immemorial an ancient and laudable enston used and approved of, within the parish in which the close is situate, that the inhabitants for the time being have always used to have, and of right ought to have, the liberty and privilege of going along and using the footpath for the purpose of angling with rods and lines for fish from the footpath, at all seasonable times in the daytime, for recreation only, and not for profit, and so justified the trespass :- Held. that plea was bad, as it set up a right by enstom to take a profit à prendre in alieno solo. Bland v. Lipscombe, 4 El. & Bl. 712, n. : 3 C. L. R. 261; 24 L. J., Q. B. 155, n.; I Jur. (N.S.) 707, n.; 3 W. R. 57.

There can be no public right of fishing in nontilal waters, even where they are to some extent "navigable rivers." Pearce v. Scotcher, 9 Q. B. D. 162: 46 L. T. 342; 46 J. P. 248.

To take Water. ]-A right in the inhabitants of a township to enter upon the land of a private individual, and take water from a well therein

persons, such as freemen or citizens, claiming a properly claimed by custom. Ruce v. Ward, 4 right in gross, wholly irrespective of land; and El. & Bl. 702; 3 C. L. R. 744; 24 L. J., Q. B.

To take Clay. ]-In an action for breaking the plaintiff's close, and digging and carrying away clay, the defendant justified as owner of a brickkiln, and pleaded that all occupiers thereof for thirty years had enjoyed, as of right, to dig, take and carry away from the close so much clay as was at any time required by him and them for making bricks at the brick-kiln, in every year, and at all times of the year :- Held, that the claim was unreasonable and bad. Clayton v. Corby, 5 Q. B. 415; D. & M. 449; 14 L. J., Q. B. 364; 8 Jur. 212.

Involving Right to Land, |- The right to the whole of a given substratum of coal lying under a close is a right to land, and cannot be claimed by prescription; a right to take coal is different. Wilkinson v. Proud, 11 M. & W. 33; 12 L. J., Ex. 227: 7 Jur. 284.

To take Shingle.]—A special custom for the inhabitants of a purish to take shingle for the repair of the highways in the parish from a portion of the beach above high water mark, being private property, is bad, being a claim of a profit a prendre in alieno solo. Pitts v. Kingsbridge Highway Board, 25 L. T. 195; 19 W. R. 884.

To an action for breaking and entering land of the plaintiff, being part of the seashore, between high and low water-mark, in or adjoining the township of Owthorne, and taking gravel, stones, sand, and seaweed, the defendant pleaded pleas of justification, some setting up a right in the inhabitants of the township of Owthorne to take the gravel, &c., to be used for the cultivation and improvement of their land; others claiming it for To take Fish.]—A custom for all the inhabitants of a parish, as such, to enter the close of the plaintiff, and take fish there without limit, is bad. Lingt v. Janes, 6 C. B. 81; 17 L. J., C. P. 206; 12 Jur. 637. that the pleas were had; for that, so far as they were capable of being construed as justifying under a custom, such custom would be void. being a claim of a profit a prendre in alieno solo, which can only exist by grant or prescription; and that if the claim was founded on prescription it would be equally bad, inasmuch as it was a claim by persons who, not being a corporation, were incapable of taking by grant, and not being claimed in a que estate. Constable v. Nicholson, 14 C. B. (N.s.) 230; 32 L. J., C. P. 240; 11 W. R.

> To Glean,]—No person has at common law a right to glean in a harvest field: neither have the poor of the parish, leadly settled (as such), any such right. Steel v. Houghton, 1 H. Bl. 51; 2 R. R. 715. And see Warlledge v. Manning, 1 H. Bl. 53, n.

> To carry away Boughs. ]-A custom for poor and indigent householders living in A. to cut and earry away rotten boughs and branches in a chase in A. cannot be supported; the description of the persons entitled being too vague. Selby v. Robinson, 2 Term Rep. 758; 1 R. R. 615.

To Cut Wood. ]-A right claimed by the infor domestic purposes, is a mere essement, and habitants of a pi sit to cut and carry away for not a profit a prendre, and may therefore be use as fuel in the lown houses fagots or baskets of the underwood growing upon a common manor, in consideration of repairing n wharf belonging to the lord of the manor, is a right to a within the manor, not confining it to the wharf, profit à prendre in the soil of another. Such a right, therefore, cannot exist by custom, Rivers (Lird) v. Adams, 48 L. J., Ex. 47; 3 Ex. D. 361; 39 L. T. 39; 27 W. R. 381.

A right of lopwood, lying within a manor, that is, a right of the inhabitants of a parish at certain periods of the year to lop for fuel the branches of trees growing upon the waste lands of the manor, cannot be created by custom. Chilton v. London Corporation, 47 L. J., Ch. 433; 7 Ch. D. 735; 38 L. T. 498; 26 W. R. 474.

See also EASEMENT.

## B. CUSTOMS OF MANORS

#### 1. VALIDITY.

Nomination of Jury.]—An immemorial custom, for the steward of a manor to nominate the jury to serve on the court-leet at the election of July to serve on the controller at the caccombination of a burough, is good in law. Rear v. Jolliffe, 3 D. & R. 244; 2 B. & C. 54; 1 L. J. (0.8.) K. B. 282; 26 R. R. 214.

Twenty years' regular usage, uncontradicted

and mexplained, is cogent evidence for a jury to presume that a custom for the steward of a manor to nominate the jury to serve on the court-leet, at the election of the mayor of a borough, is an immemorial custom. Ib.

Swearing of Jurors.]-A custom, to swear the inrors at one court-leet to inquire and return their presentments at the next court, is bad in law. Davidson v. Moserop, 2 East, 56.

A court-leet, holden on the 28th of April, was adjourned, after the jury had been swom in, till the 15th of December, which day was given them to make their presentments :- Held, that an adjournment of such duration (which was admitted to be according to the custom of the manor) was not unnecessarily unrensonable. Wilrock v. Windsor, 3 B. & Ad. 43.

Breaking False Measures. ]-A custom in a manor, for the leet jury to break and destroy measures found by them to be false is lawful.

In an action for seizing weights and measures, four defendants pleaded that they were sworn, with divers, to wit, twenty others, as a leet jury, according to the custom of the manor of Stepney and that it was the custom of the jury so sworn to examine weights and measures within the manor, and seize them if defective; and they alleged that they, the defendants, being on such jury so sworn as aforesaid, examined and seized the plaintiff's weights and measures, which they found defective. There was evidence at the trial that only five of the leet jurors were actually in the plaintiff's shop when the defendants made the seizure there, though the rest were close at hand; but the judge refused to let any question go to the jury on this part of the case, being of opinion that the objection was on the record :-Held, that the objection was on the record, and was valid; it not appearing by the plea that the examination and seizure were made by the jury sworn at the court-leet, according to custom. Sheppard v. Hall, 3 B. & Ad. 433; 1 L. J., K. B.

is good. Colton v. Smith, Cowp. 47; Lofft, 463.

Descent of Lands.]—A custom within a manor that lands shall descend to the eldest sister, where there is neither a son nor a daughter, does not extend to an eldest niece; but the lands must descend according to the rules of the common law, in default of such son, daughter, and sister. Denn d. Goodwin v. Spray, 1 Term Rep. 466; I R. R. 250.

The custom of descent in a manor was, in the nature of borongh English, the youngest son of the person last seised inheriting in preference to the eldest; and if the youngest son were dead without issue, then the next youngest son; and if no son, the daughters as co-parceners; and if no issue, then the youngest brother of the person last seised, and the youngest son of the youngest brother, if such youngest brother were dead, or if such youngest brother were dead without issue, the next youngest brother; and if no brother, the sisters taking as parceners. There was also one entry of descent and admission in favour of the youngest son of the uncle of the person last seised, and one entry of descent and admission shewing the descent to the youngest sons respectively of two sisters, who were heirs parceners to the person last seised :- Held, that there was no evidence to authorise an extension of the custom of descent in favour of so remote a collateral relative as the youngest son of the youngest brother of the great-grandfather, ex parte materna, of the person seised. Muggleton v. Barnett 1 H. & N. 282; 26 L. J., Ex. 47; 2 Jur. (N.S.) 1026. Affirmed in the Exchequer Chamber,
 2 H. & N. 653; 27 L. J., Ex. 125; 4 Jur. (N.S.)
 139; 6 W. R. 182.

The word descent in the presentment of the custom of a manor is to be construed in its popular sense as a taking by any mode of succession, not in its technical sense as a taking by-inheritance as opposed to a taking by purchase; and, therefore, a person taking by devise takes by descent within the meaning of the custom. Bickley v. Bickley, 36 L. J., Ch. 817; L. R. 4 Eq. 216.

Use of Mill. ]-A custom that all the inhabitants of a manor shall grind all their corn, grain and malt, which by them or any of them shall be used or spent on the ground within a manor, at a certain mill, is good. Cart v. Birkbeck, 1 Dongl, 218.

A custom that all the tenants, resiants and inhabitants within a manor, should grind at the lord's mill all their corn and grain, as well growing within the manor as brought from other places, and spent or consumed in a ground state in their respective houses, within the manor, may be a good custom; but it does not extend to restrain the inhabitants who do not grow corn and grain, or who have no corn and grain of their own, from buying or using in such houses, ground corn or flour, though it may not have been ground or grown within the manor, but produced from corn ground at other mills. Richardson v. Walker, 4 D. & R. 498; 2 B. & C. 827; 2 L. J. (0.8.) K. B. 180.

· Suspension of Custom. ]-And where by the custom of a manor all the tenants, resiants and inhabitants within the manor were bound Tells at a Wharf.]—A prescription as lord of to grind all their corn, grain and mait, as well a manor for toll of all goods landed within the growing within the manor as brought from other

places, and which, after the grinding thereof, and the trustees, for the purpose of cutting down their houses, at two aucient mills belonging to the lord having pulled down one of the mills, so Copyhold Enfranchisement Acts (4 & 5 Vict. as to deprive the tenants of their option:—Held, c. 35, 15 & 16 Vict. c. 51, s. 8, and 21 & 22 Vict. that the custom was suspended. Richardson v. Capes, 4 D. & R. 512; 2 B. & C. 841; 2 L. J. (o.s.) K. B. 182.

- Toll for. In an action upon a custom for not grinding at the plaintiff's mills, the plaintiff may declare generally upon a custom for a certain toll, without specifying the particular toll, or the consideration for it, or that it is a reasonable toll; and a continuance of uniform payment and acquiescence is evidence of its reasonableness, and the court will judge under all circumstances what is reasonable. Gard v. Callard, 6 M, & S. 69; 18 R, R, 310.

Erection of Booths.]—A custom for all victuallers to creet booths on a common, being parcel of the waste of a manor (selected by the lord for holding fairs yearly, every fortnight), and to place posts and tables there, a reasonable time before the Monday next after the Feast of Pentecost, and to continue them so erected until the Feast of All Souls, each paying therefor to the lord a compensation of 2d., is good. Smith v. Tyson, 1 P. & D. 307; W. W. & D. 749; 9 A. & E.

Profits à Prendre.]-A custom may be good for copyholders to carry away the entire soil of their copyhold teuements. Hanner v. Chance, 4 De G., J. & S. 626; 34 L. J., Ch. 413; 11 Jur. (N.S.) 397; 12 L. T. 163; 13 W. R. 556.

The dwellers in a parish or manor cannot acquire any right to a profit a prendre ; and if in laying a custom to a profit a prendre, the dwellers are included in the class alleged to have the right, the custom so laid is bad. Allgood v. Gibson, 34 L. T. 883; 25 W. R. 60— C. A.

The first section of the Prescription Act (2 & 3 Will. 4, c. 71), which relates to profits a prendre, applies only to cases where one man claims by custom, prescription, or grant, some profit or benefit to be taken or enjoyed from or upon the land of another, and has no application to the case of a right claimed by a copyholder in his own tenenient, according to the custom of the manor. Hanner v. Chance, supra.

A custom in a manor that copyholders of inheritance may break the surface and dig and get clay, without stint, out of their copyhold tenements, for the purpose of making bricks to the ments, to the purpose of maxing briess to be sold off the manor, is good in law. Salisbury (Marquis) v. Gladstone, 9 H. L. Cas. 692; 34 L. J., C. P. 222; 8 Jur. (N.S.) 625; 4 L. T. 849; 9 W. R. 930.

#### 2. Enfranchisement.

Effect of Award.]-By the custom of a manor the lord, with the assent of the homage, could make copyhold grants of part of the manor waste. The lord granted a portion of the waste to C., reserving the trees, and subject to a restriction against building on any part of the ground. In the grant was a power of entry for the lord, the trustees of a charity and the copyhold tenants of the land adjoining, for the purpose of pulling down houses thereafter creeted on the soil down houses thereafter creeted on the soil for and get sand, sandstone, gravel, and clay granted; and also a power of entry for the lord from their respective tenements, and to curt and

should be spent or consumed in a ground state in trees or shrubs obstructing the prospect from the charity waste. C.'s interest vested by purchase the lord, or one of them, at their own option, and in B., who gave notice to the lord, under the c, 94, s, 10), of his desire to have the land enfranchised :- Held, that the award of enfranchisement put an end to the restrictions above mentioned, and that the land must be valued ashaving been discharged from them. Brabant v. Wilson, 6 B. & S. 979; 35 L. J., Q. B. 49; L. R. 1 Q. B. 44; 12 Jur. (N.S.) 24; 13 L. T. 319; 14 W. R. 28. See also COPYHOLD.

#### 3. EVIDENCE.

Of Similar Customs. ]-On the question as to the existence of a custom in a particular manor, evidence of a like custom in an adjoining manor, though within the same parish and leet, is not admissible. Anglesey (Marquis) v. Hatherton (Lord), 10 M. & W. 218; 12 L. J., Ex. 57.

A custom in a manor may be proved by one instance. Hanner v. Chance, supra,

In a suit by a lord to restrain a copyholder from digging vitreous sand on his own tenement, evidence of a custom to dig vitreous sand for twenty-seven years, and of a custom to dig sand generally for a long period, was adduced:—Held, that the evidence of the custom was sufficient. Ib.

In Face of Written Documents.]-Evidence sufficient in itself to establish a enstom in a manor will be insufficient to establish such enstom in the face of ancient documents made within the time of legal memory, and which negative the existence of any such custom. Partland (Duke) v. Hill, 35 L. J., Ch. 439; L. R. 2 Eq. 765; 12 Jur. (N.S.) 286; 15 W. R. 88.

Presumption.]—The meaning of s. 6 of the Prescription Act is, that no presumption or interference in support of the claim shall be derived from the bare fact of user or enjoyment for lessthan the prescribed number of years. *Hanner* v. *Chance*, 4 De G., J. & S. 626; 34 L. J., Ch 413; 11 Jur. (N.S.) 397; 12 L. T. 163; 13 W. R.

But where there are circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight as evidence, so as to preclude a jury from taking it, along with other circumstances, into consideration as evidence of a grant. Ib.

Customary or Prescriptive Rights.]—Customary rights of copyhold tenements differ from prescriptive rights; the former are usages which apply to a number of persons in a certain district or locality, but prescriptive rights are claimed by one or more person or persons as existing in themselves or their ancestors, or as attached to a

particular estate. Ib.

The law has laid down no rule as to the extent of evidence which is required to establish a custom, or from which the presumption or inference of the fact of a custom may be rightly drawn. It is the province of a jury to draw these conclusions of fact. Ib.

Circumstances under which the court, sitting as a jury, found the existence of a custom in a copyhold manor authorising the tenants to dig

carry away the same on to other lands, and to use or sell the same, either on or off the manor, without licence from the lord. Ib.

Loss by Negligence.]—There must be one rule applicable to ecclesinstical persons as well as to lay, when the question is whether rights belonging to them have or have not been lost by negligence. Ib.

Leases without Enjoyment.]—Leases without proof of enjoyment under them, are admissible to prove a particular custom of a manor. Clarkson v. Woodhouse, 5 Term Rep. 412, u. 3 Dougl. 180.

Frequent Grant of Lioences.]—The court discharged a rule for a mandamus to the lord of the manor, to compel him to grant a licence for a tonant to dig brick earth for the purpose of making bricks, there being no evidence of any castom to grant such licences, except that they had frequently been granted since 1729, on payment of 21l. for each aere. Rep., v. Hall, 1 P. & D. 293; 9 A. & E. 339; 1 W. W. & H. 741; 8 L. J., Q. B. 8 & E. 339; 1 W. W. & H. 741;

By the custom of a manor, the tenant had a right to demise for any period not longer than three years without a licence; and for every licence to demise for a longer period the load was entitled to 4d for every year of the term granted. Several licences were shewn, the carilest in 1729, under which various terms of years, not exceeding forty-seven, had been granted. Under these circumstances the court discharged a rule for a mandanus to the load to grant a licence to demise for two several terms of forty and twenty-one years. Ih.

Depositions in Ancient Suit. ]—In an action by a copyholder against the lord of the manor for a false return to a mandamus, in which mandamus a custom was set forth, in respect of copyholds granted for two lives, that the surviving life should renew, paying to the lord such fine as should be set by the homage, to be equal to two years' improved value, and not guilty pleaded; depositions ande in an ancient suit, instituted against a former lord of the manor by a person who claimed to be admitted to a copyhold for lives, upon a custom for any copyhold tenant for life or lives to change or fill up his lives, paying to the lord a reasonable fine, to be set by the lord or his steward, and which depositions were made by witnesses on behalf of the said copyholder, were held to be admissible evidence for the lord, as depositions of persons called on behalf of a person standing in pari jure with the new copyholder, although it was not proved that the persons making such depositions were copy-holders, but it appeared only from the depositions themselves that they were such or were persons acquainted with the customs of the manor; and their depositions, supposing them to be only admissible as declarations of persons deceased, were not inadmissible on account of their being made post litem motam, because the same custom was not in controversy in the former suit as in the present. Freeman v. Phillipps, 4 M. & S. 486; 16 R. R. 524. See also EASEMENT.

C. AS TO LANDLORD AND TENANT,

Away-Going Grop. ]—A custom that tenants, whether by parol or deed, shall have the away-going crop after the expiration of their terms is good. Wiglesworth v. Dallison. 1 Dongl. 201.

So, a custom that a tenant may leave his away-going crop in the barn of the farm, after he has quitted the premises, is good. Beavan v. Delahay, 1 H. Rl. 5; 2 R. R. 696. S. P., Lewis v. Harris, 1 H. Rl. 7, n.; 2 R. R. 698, n.

Applicable to all Tenancies.]—Where a custom of the country is proved to exist, it is to be considered applicable to all tenancies in whatever way created, whether verbal or in writing unless expressly or impliedly excheled by the written terms themselves. Wilhins v. Wood, 17 L. J., Q. B. 319; 1.2 Jur., 583.

Traversing General Custom.]—Where, to an action, a defendant plended n custom applicable to all farms within the parish, which were not exempted by special agreement or otherwise.—Held, that to avail himself of the fact that his particular farm was exempted, the plaintiff ought not to traverse the custom generally, but to confess it, and avoid it by shewing that the exception applied to his farm. Econs v. Ogities, 2 X v. J. 79.

Agricultural Tenancy - Selling Flints - Reservation of Mines and Minerals.] - By an agreement for a lease the tenant agreed to cultivate the land according to the most approved vare the mint according to the alone applicational system of husbandry and to use it for agricultural purposes only, and to commit no waste. The lessor reserved "all nines and minerals, sand, lessor reserved "all nines and minerals, sand, and applications are supported to the state of the s quarries of stone, brick-earth and gravel pits. The farm was in a district where large numbers of flints came to the surface in the ordinary course of ploughing, and it was necessary to remove them in order to cultivate the land effectually. The tenant removed the flints which came to the surface in the ordinary course of agricultural operations and sold them, and there was no evidence that it was the custom of the country for tenants to do so, when not prohibited by their leases :-Held, that such a custom was reasonable and good. Tucher v. Linger, 52 L. J. Ch. 941; 8 App. Cas. 508; 49 L. T. 373; 32 W. R. 40; 48 J. P. 4—H. L. (E.).

Held, further, that the reservation of minerals in the agreement did not indicate an intention to exclude the custom so as to deprive the tenant of the right. Ib.

Proof of Gustom.]—In ascertaining the nature of an agricultural custom regard is to be had not so much to what the witnesses state to be their opinion as to the extent of the custom, as to what they prove to have been publicly done throughout the district. Ib.

# D. CUSTOMS OF TRADE.

Custom of Merchants.]—The custom of merchants is the general established law, not any special local custom. But it must be controlled by adjudged cases. Edin v. East India Co., 1 W. Bl. 299; 2 Burr. 1216.

Contravening Express Contract.]—A usage of trude cannot be set up in contravention of an express contract interfore, on a warranty of prime singed to therefore, on a warranty of prime singed to a practice in the back, evidence is not admissible of a practice in the back as prime singed bacon; nor of a practice to the prime singed bacon; nor of a practice to each of the open contraction of the prime singed bacon and remedy, if he to practice the purchase from all remedy, if he open contractions of the defect by an early day. Tates v. Pyps, 6

General Lien.]-In an action the defendants justified the retaining of the goods under an ancient custom, from time immemorial, used in the trade of public warehouse-keepers in London, for all such public warehouse-keepers to have a general lien upon all goods, from time to time housed or remaining in their warehouses, for and in the name of the merchants or other persons by whom such public warehouse-keepers are retained or employed, for all moneys or any balance thereof due from such merchants or other persons to such warehouse-keepers, for or on account of advances or expenses which such public warehouse-keepers should have made or been put to, in or about the payment of duties. or of customs on goods consigned to them from abroad, or the payment of freight and other charges, for the conveyance of such goods to the port of London, or the entering, landing, and warehousing such goods:-Held, that such custom was unreasonable and unjust, and could not be supported in law. Leuckart v. Coper. 3 Scott, 521; 2 Hodges, 150; 3 Bing. (N.C.) 99; 6 L. J., C. P. 131.

Dealings-When Uncertain. -If there is a general usage applicable to a particular trade or profession, persons employing one in such trade profession will be taken to have dealt with him according to that usage, but a usage for a veterinary surgeon to charge for his attendance when there was not much medicine required is too uncertaiu. Sewell v. Cerp, I Car. & P. 392.

As to Sale of Corn. ]-A custom of the Liverpool corn market, that when corn is sold by sample. if the buyer does not on the day the corn is sold examine the bulk and reject it, he cannot afterwards reject or refuse to pay the whole price, is a reasonable custom. Sanders v. Jameson, 2 Car. & K, 557.

Printers.]-By the custom of trade, a printer is not entitled to recover for printing a work until the whole is completed and delivered. Gillett v. Mawman, 1 Taunt. 137.

There is no general custom of trade by which printers are bound to insure for the booksellers the paper of the works which they print. Mawman v. Gillett, 2 Taunt. 325.

Machinery—Fixtures.]—Machinery affixed to the freehold of ironworks is considered to be within the order and disposition of the bankrupt trader, where, by the custom of the country, when ironworks are let, such articles are furnished by and continue to be the property of the lessor. Rufford v. Bishop, 5 Russ. 346; 7 L. J. (o.s.) Ch. 108.

Purchase on Hire System—Property in Goods.] -C. & Co., upholsterers, lent furniture on hire to the defendants (who were hotel-keepers) to be ment of the full price agreed upon it was to become the property of the defendants. Until this had been done it was to remain the property of C. & Co. Upon one instalment being unpaid C. & Co. put a man in possession of the furniture, and the defendants executed an assignment of the lease of the hotel, and of all their personal chattels and effects including the hired furniture, written agreement, R. hired furniture of the

Taunt. 446; 16 R. R. 653. S. C., nom. Yeats v. The trustee in bankruptcy claimed the furniture Pum, 2 Marsh. 141; Holt, 95. bankruptey in the possession of the bankrupts as reputed owners, with the consent of the true owners C. & Co. —Held, that the assignment of the whole property which was duly registered was an act of bankruptey, but that C, & Co,'s furniture not having been paid for remained their property, and was not in the order and disposition of the bankrupts, and did not pass by the assignment; that the assignment was good so far as it was a mortgage of the leasehold, but was void so far as it was assignment of personalty as being an act of bankruptey, and that the trustee was entitled to all the personal effects of the bankrupts, but not to the hired furniture. Crawcour v. Salter, 51 L. J., Ch. 495; 18 Ch. D. 30: 45 L. T. 62; 30 W. R. 21-C. A.

The custom of hiring furniture for the purposes of hotels is so notorious that no person giving credit to an hotel-keeper is entitled to assume that the furniture of which he is in possession is his own property. The foundation of the doctrine of "reputed ownership" is that a man has been permitted to obtain false credit; this custom is so common, and so well known, that a man cannot gain false credit by the pos-

session of furniture. Ib. The custom of letting a piano out on hire under an agreement by which upon the payment of the price fixed for the purchase by monthly instalments extending over a period of three years the hirer becomes the owner of the piano, and which is known as "the three years' hire system," is a well-established and good custom, and will therefore prevail to take a piano, hired under such an agreement, out of the order and disposition of the hirer on his becoming bankrupt. Hattersley, Ex parte, Blanchard, In re, 47 L. J., Bk. 113; 8 Ch. D. 601; 38 L. T. 619; 26 W. R. 636.

Furniture.] — The fact that it is the custom of furniture dealers to let out furniture on a three years' hiring and purchase agreement does not disentitle the general public to assume that an ordinary householder is the real owner of the furniture which is in his house. Brooks, Ex parte, or Pickering, Ex parte, Fowler, In re, 23 Ch. D. 261; 48 L. T. 453; 31 W. R. 833; 47 J. P. 470—C. A.

The furniture in the dwelling-house of a trader having been seized under an execution, a friend of his bought it from the sheriff at a valuation, and then verbally agreed that the debtor should continue in possession of it and use it as before, paying, by way of rent, interest at 5 per cent. per annum on the purchase-money, until he should be able to repurchase it at the price given for it. This arrangement was carried out, given for it. This arrangement was carried out, and the debtor remained in possession of the furniture as before until he filed a liquidation petition. He had not repurchased it. The trustee in the liquidation claimed it under the reputed ownership clause. It was admitted that paid for by monthly instalments, and on pay- there is a custom for furniture dealers to let out furniture on a three years' hiring and purchase agreement, but there was no other evidence as to the existence of any custom of hiring furniture : -Held, that the trustee was entitled to the furniture. Ib.

- When Purchase Complete.] - By a to C. & Co., and afterwards became bankrupts. value of 631 from L. & Co. R. was to pay for payment of any instalment, L. & Co. might seize and remove the furniture and retake possession of it. On payment of all the instalments the furniture was to become his property, but until such payment it was to remain the sole property of L. & Co. This agreement was not registered as a bill of sale. The furniture comprised in the agreement was in the possession of R. at the commencement of his bankruptcy: -Held, that the property in the furniture did not pass to him until all the instalments had been paid; that neither the agreement nor the licence to seize the furniture amounted to a bill of sale by R., and therefore that registration was minecessary. Robertson, In re. Lewin, Ex parte, left to the jury.
47 L. J., Bk. 94; 9 Ch. D. 419; 39 L. T. 12; 26, 742; 30 W. R. 841. W. R. 733-C. A.

- Option of Purchase Distress by Lessor.]
-Agreement for the hire of railway waggons for the term of five years at a yearly rent of 101. apiece, with power to the lessors, when the rent should be in arrear for seven days, to distrain goods on the lessee's premises, and sell, &c., as landlords may on distress for rent, the lessee at the end of the term to have the option of purchasing the waggous for 5s. each. The lessee having gone into liquidation, the lessors dis-trained under the agreement. The agreement being admitted to be of a usual character having regard to the subject-matter, a motion in an action by the debtor and the receiver under his petition to restrain proceedings upon the distress was refused. The agreement and the distress thereunder were held not to be in fraud of the general creditors in the lessee's bankruptey, power to distrain will not by itself in an ordinary case render such an agreement fraudulent against ereditors in bankruptcy. Lemany. Yorkshire Rail-way Waggon Co., 50 L. J., Ch. 293; 29 W. R. 466.

Proof of. |- Evidence of the general opinion of merchants is allowed to be given to prove the custom of merchants. Camden v. Cowley, 1 W. Bl. 417.

The opinion of merchants is not the custom of

merchants. Edin v. East India Co., supra. To prove the manner of conducting a particular branch of trade at one place, evidence may be given to shew the manner in which the same branch is carried on at another place. Noble v. Kenneway, 2 Dougl. 510.

Usage of trade is a general and prevailing course of business, and witnesses who are called to prove it should cause their minds to revolve over

instances known to them of its having been acted on. Hall v. Benson, 7 Car. & P. 911. A usage of trade must be proved by instances, and cannot be supported by evidence of opinion merely. Canningham v. Fonblanque, 6 Car. & P. 44.

Semble, that a plea of a custom of trade in London may be supported by proof of a custom evailing in London and other English ports. Milward v. Hibbert, 3 Q. B. 120.

A long-continued practice of average adjusters, who prepared their statements according to the law as laid down by the courts, is no evidence of such a custom or usage of trade as can be impliedly incorporated in a contract between a shipowner and owner of cargo. The defendants, who were the owners of cargo, in an action penses caused by the ship putting into a port of 3 P. W. 12.

it by monthly instalments. In the event of non-refuge, landing, storing and re-shipping the eargo, payment of any instalment, L. & Co. might and leaving the port, alleged a custom of trade that seize and remove the farniture and retake pos- in such a case the expenses incurred in and about warehousing the cargo were apportioned among the owners of the cargo alone, and the expenses of reshipping the cargo, port dues, &c., were borne by the owners of the ship and freight. Several witnesses were called who gave evidence to the effect that for sixty or seventy years the practice of average adjusters had been as stated by the defendants, but that, in consequence of the decision in Atwood v. Sellar (5 Q. B. D. 286), some average adjusters had altered their mode of adjustment in such a case :- Held, that this was not evidence of a enstom of trade which could be Srendson v. Wallace, 46 L. T.

> Implied Contract. -On the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, there is, in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make. The plaintiffs, who were manufacturers but not dealers in iron. by a written contract, on the margin of which was their trade-mark (a crown with their initials). contracted to sell to the defendants, who thereby contracted to buy of the plaintiffs, 2,000 tons of ship-plates of the quality known as "crowu," to pass Lloyd's survey, to be delivered monthly at the defendants' shipyard. The contract contained a strike clause by which the supply of the iron contracted for might be suspended during the continuance of any strike of workmen; but it had no express stipulation that the plates should be of the plaintiffs' manufacture. Before the contract was completed the plaintiffs closed their works, and proposed to complete the con-tract by delivery of ship-plates of the quality mentioned in the contract made by another firm. The defendants having refused to accept these, the plaintiffs sued them for breach of contract. At the trial the defendants tendered evidence to shew that in the iron trade there is a custom that, under a contract between a manufacturer of iron plates and a customer for the supply of them, the seller must, in the absence of stipulation to the contrary, supply plates of his own make, and that the purchaser is entitled to reject other plates if tendered, though of the quality contracted for. The learned judge at the trial rejected this evidence, and gave judgment for the plaintiffs :- Held, that such evidence was improperly rejected. Johnson v. Regiton, 50 L. J., Q. B. 753; 7 Q. B. D. 438; 45 L. T. 374; 30 W. B. 350—C. A. .Ind see TRADE.

# E. CUSTOMS OF LONDON.

### 1. WHAT ARE

In General.]-A citizen of London cannot under the custom devise land out of London in mortmain. The residue of a mixed fund so given results to the heir-at-law and next of kin in proportions. Middleton v. Cuter, 4 Bro. C. C. 409.

If money be devised to an infant daughter, who marries, the court may refuse helping the husband to the money, unless he makes a suitable settle-ment; though if the portion be small, and the against them by the shipowner to recover a husband a freeman of London, the custom of general average contribution in respect of ex- London is a suitable provision. Adams v. Pierce, If a loss happens to a freeman of London's estate, by the insolvency of the executors, such loss shall be borne out of the testamentary part of his estate only, and not out of the whole personal estate. Head v. Duck, Pre. Ch. 409.

Where an obligee is sued by the custom of London, his co-scennities shall contribute; so by the custom of London, when a surety pays a debt, he shall maintain an action against the principal, though the has no counter bond. Layer v. Nelson, 1 Vern. 436.

The custom of London shall not prevent the artendance of a term on the inheritance. Tiffin v. Tiffin, 1 Vern. 2; 2 Ch. Cas. 49. S. P., Dowse v. Pernical, id. 104.

Ancient Lights.]—The custom of London which authorised the reising of a building on an old foundation, so as to obstruct the passage of light and air through the ancient windows of a neighbour's house, is abrogated by 2 & 3 Will 4, c. 71, s. 3. Merchant Teptores' (b. v. Trascart, 11 Ex. 855; 25 L. J., Ex. 173; 2 Jur. (X.S.) 355; 4 W. R. 295–Ex. Ch. S. P., Katters' (b. v. Loy, 2 G. & D. 414; 3 Q. B. 109; 11 L. J., Q. B. 173; 6 Jur. 803.

The presumption of a right, for twenty years' undisturbed enjoyment of light, is excluded by the custom of London. Wyustunley v. Lee, 2 Swan, 333.

Apprentice.]—If an apprentice in London marries without his master s consent, the master cannot turn him away for that reason, but must sue his covenant. Stephenson v. Houlditch, 2 Vern. 492

One apprentice gives a boul to another apprentice for 504, won at play. Bond decreed to be delivered up, gaming among apprentices being of the worst consequences. By the custom of London, a master may justify turning away his apprentice if he frequents gaming. Woodroffev. Harnham, 2 Veru. 291.

Election of Members of Corporation.]—The common conneil of London has not any jurisdiction to inquire concerning the election of any person to be one of the common conneilmen of the city, for, by the immemorial custom of the city, the cognizance and examination of such elections belong to the court of record, held before the lord mayor and aldermen. Belton v. Jeffer, 2 Bro. P. C. 1463.

A custom of the city of London for the Court of Mayor and Aldermen to examine and determine whether or not a person elected alderman of a ward, and returned to the court as such aldeman, is, according to their discretion and sound consciences, a fit and proper person and duly qualified, is a valid custom. Hew v. Johnson, 6 Cl. & F. 41; 1 Robinson, 1.

So a custom, that when the inhabitants of any ward shall three times return to the court the same person to be alderman, who shall be by the court, according to the former custom, adjudged on such three returns, according to the discretion and sound consciences of the mayor and aldermen unay, for remedy the dignity and discharge the duties of the office, the mayor and aldermen may, for remedy thereof, nominate, elect, and admit a fit person, being a freeman, out of the whole body of the citizens, to be alderman of such ward. Ib.

The latter custom is not abrogated by 11 Geo. 1, c. 18, s. 7; nor by the by-law of the city, 13 Anne. *Ib*.

VOL. V.

Porterage of Aliens' Goods.]—The rights of the city of London, and of the parties appointed by them, to the unshipping and porterage of aliens' goods imported into London, are wholly abolished by 8 & 4 Will. 4, c. 66, whether these goods are consigned to British merchants or to aliens resident there. Callyer. Steamet, 5 Scott (X.B.) 34; 4 Man. & G. 676; 12 L. J., C. P. 73.

Employment of Foreigner.]—A custom in the city of London, that a freeman of the city shall not set on work in the manual occupation of a butcher one who is a foreigner to the liberties of the city, is good. Shaw v. Puyuter, 4 N. & M. 290; 2 A. & E. 312; 4 L. J., K. B. 16.

Obstruction of Highway.]—A custom within the city of London, that if any person has occasion to erect or pull down any building near to any public way within the city, and has occasion for that purpose to erect, place and continue any hoarding in such a manner as thereby to obstruct or enclose any part of any public way, and has applied to the lord mayor of the city for his licence to erect, place and continue the same, the lord mayor has full power and authority to authorise, license and permit such person to erect such hoarding, of such dimensions and in such manner and for such time as he thinks proper for such purpose, is a reasonable custom, and a party may justify under it in erecting a hoarding on a public footpath. Bradbee x. Christ's Hospital, 2 D. (S.S.) [64: 5 Scott (N.R.) 79; 4 Man. & G. 714; 11 L. J., C. P. 209.

Foreign Attachment.]—To an action for money due on an award, the defendant plended a recovery by attachment, at the suit of a creditor of the plaintiff, in the Mayor's Court, and that a custom existed in the city of London, that if, in a plaint in the Mayor's Court, the defendant in such plaint made default, and it appeared that any person owed such defendant any sum of money, such defendant should be attacked by such sum of money, so being in the hands or enstody of such other person (as granishee). The plea did not allege the custom to be, that the granishee must be resident within the city. Upon verum to a writ of certiforari, requiring the mayor and alderment to eurify the custom :—Held, that no such custom existed as alleged in the defendant's plea. Crosby v. Hetherington, 5 Scott (X.E.) 637; + Man. & G. 933, 12 L.J., C. P. 261.

In order to render a recovery by foreign attachment, according to the custom of London, answer to an action in the superior courts, there must have been execution excented. Mayrath v, Hardy, 6 Scott, 627; 4 Bing, (N.C.) 782; 6 D. P. C. 749; 1 Arn. 352; 7 L. J., C. P. 299; 2 Jirr. 594.

Appointment of Solicitor.]—No municipal corporation but that of London can appoint an attorney, except under the corporate seal. Arnold v. Powle Corporation, 4 Man. & G. 860; 5 Scott (N.R.) 761; 2 D. (N.S.) 574; 12 L. J., C. P. 97; 7 Jun. 653.

Cutting Fishing Nets.]—There is no custom in London giving the water-bailiff power to cut

Landing of Oysters.]—The deputy day-meters of the city of London are entitled, by immemorial custom, to the exclusive right, by themselves and their servants, of measuring, shovelling, unloading and delivering all oysters brought in any boat or vessel for sale, along the compensation for so doing; and a jury found that 8s, for every score for the first 100 bushels, and 4s, for every score of bushels of the remainder of a cargo, was a reasonable recompense to them for the labour of shovelling, unloading and delivering out the oysters, exclusive of the sums paid to the corporation of London for metage, under 11 Will. 3, c. 24, s. 7. The meters are not therefore bound to perform in their own persons the manual labour of shovelling, &c., but are bound to provide sufficient men for the purpose, and are liable to an action in default of doing so. Laybourne v. Crisp, 4 M. & W. 320; 8 Car. & P. 397; 8 L. J., Ex. 118.

Upon a bill by the deputy meters of oysters at Billingsgate, appointed by the city of London (the allowance claimed for metage, &c., of the cargoes brought to market being established as reasonable by the verdict upon an issue), an account and payment of the arrears were decreed. Lewes v. Sutton, 5 Ves. 683.

A decree by some against the others of the deputy day oyster-meters having the exclusive right of shovelling, unloading and delivering oysters within the port of London, for an account and equal apportionment amongst the meters of the scorage dues received by them, such decree being founded on the immemorial existence of the body of meters, which was held to be proved, notwithstanding the meters were originally labourers, and that they habitually described London. Theopeous v. Daviel, 10 Hare, 296; 22 L. J., Ch. 507; 17 Jur. 778; 1 W. R. 532.

The correspondence of the corporation of the body of meters. 2b.

The correspondence of the corporation of the cor

The corporation of L. had from time immemorial exercised the functions of superintending the measuring and unloading oysters at the market of L. This they did by their officers, "the yeomen of the waterside," who appointed eighteen "deputy day oyster-meters," who by custom were entitled to the monopoly of this employment. There was no immemorial fec; but in 1760, Ss. per twenty bushels for the first hundred bushels, and 4s. per twenty bushels for all additional quantities loaded, were, on a trial for quantum meruit, found by the jury to be reasonable charges. In addition to this, purchasers of oysters usually paid to the holdsmen, justified in refusing it when proffered. Ib. or persons actually performing the work, a gratuity of 1d. per peck. The offices were saleable; but if a deputy day oyster-meter died without having sold his office it reverted to the corporation of L. Between 1836 and 1850 two offices thus fell vacant, and were kept by the corporation in their own hands, they conforming to the usages of the body of deputy day oystermeters. Those usages were mainly such as directed the rotation of employment, and the throwing all payments (except the 1d. per peck, which went to the holdsmen) into a common stock, which was equally divided amongst them.

unlawful nets or seize fish. Bulbroke v. Goodece, upon the express agreement that they would 1 W. Bl. 569.

Regard the rota, and not put their earnings their earnings the regard the rota, and not put their earnings the second of the regard the rota and not put their earnings the common fund, but retain every man his own. On a bill filed by the other sixteen deputy day ovster-meters to restrain these two new members of their body from working, except upon the same terms as all the rest, and from disregarding the by-laws and regulations of the body of river Thames, to any place within the limits of deputy day syster-meters:—Held, that it was the port of London, and to receive a reasonable necessary for the plaintiffs to make out the immemorial existence of the body of which they formed part, otherwise they would have stood in no better position than deputies appointed by persons who were themselves deputies. Ib.

Proof that there had been an equal division of the scorage dues received by the deputy day oyster-meters for the last sixty years, a former decree in a suit in which the common right of the meters was in question, and earlier evidence that the meters were employed by turns :- Held, to be sufficient to show that they were entitled to an equal division among themselves of the scorage dues which they received. Ih.

It being proved that for at least sixty years past the affairs of the deputy day ovster-meters had been regulated by themselves, and there being no evidence of any interference with the body, either by the yeomen of the waterside or the corporation, it was held that the deputy day oystermeters had the right of making by-laws and regulations binding on their body, as to the manner in which their duties should be performed. Ib.

Held, also, that however it might be competent to the corporation of London, in such corporate character, or as representing the veomen of the waterside, to alter the rights and duties of the office of the deputy day oystermeters, yet it was not competent to the corporation, in exercising the mere power of appointing meters, to appoint one who should hold his office upon terms inconsistent with those

dants with default in declining to receive an additional payment per peck for the services of the holdsmen, which many buyers would voluntarily pay, but to which the meters were not lawfully entitled; and would, on the other hand, allow the defendants such reasonable payments as they had made for the labour of the holdsmen, by whom the duty of shovelling, unloading and delivering the oysters was performed. 1b.

Semble, that a payment which cannot be legally demanded, and which is even in itself improper, may yet be so legalised by custom as that one of several interested parties is not

Market Overt. ]-A wholesale warehouse in the city of London, used as a shop, and having glazed windows, in which articles are exhibited for sale towards the street, is a market overt by the custom of London, for goods commonly sold there. The custom is not confined to shops which are literally open to the street. Lyons v. Depass, 3 P. & D. 177; 11 A. & E. 326; 9 Car. & P. 68; 9 L. J., Q. B. 51; 4 Jur. 505.

# 2. How PROVED.

Recorder's Certificate.]—The courts cannot take notice of a custom of London, unless it has stock, which was equally divided amongst them. The corporation of L, which go to the common this monopoly, appointed two of the common holdsmen to the two offices then in abeyance, 1 Wils. 8; 2 Stra. 1187. But the courts take notice of such of the customs of London as appear to have been certified by the recorder. Bluequiere v. Hunchins, 1 Dougl 378.

If the lovel mayor and addermen have once certified as to the custom of London, the certificate is conclusive, and the court never refers the same question a second time. Brain v. Kuat, 12 Sim. 453; 9 Jur. 979.

— By Parol.]—If a custom of London is properly triable by the mayor and aldermen, certified at the bar of the court in term, by the month of the recorder. Plummer v. Benthum, 1 Burr. 24.8.

A rule to enter a suggestion that it is an ancient custom that, where a custom of the city of London is put in issue in any of the superior courts, the mayor and aldermen should be required by writ to return that custom by their recorder orally, and for a writ commanding them so to return it, is absolute in the first instance. Cur v. London Corporation, 4 L. T. 476.

— Gertiorari.]—Where a custom of the city is put in issue, a certiorari goes to the mayor and addermen, commanding them to certify, by the mouth of the recorder, whether or not there is such easton as alleged; and upon such certificate by the recorder in open court, the judgment is entered accordingly. Crowby v. Hetherington, 5 Scott (N.R.) 687; ± Man. & G. 938; 12 L. J., (C. P. 261).

Judicial Notice, —Where a custom of the distribution of record, that court notices the custom for ever after: but other courts of record, to which it has not been certified, cannot take notice of it. Piper v. Chappell, 14 M. & W. 624: 9 Jur. 601. S. P., Bruin v. Knot. 12 Sim. 436: 9 Jur. 370.

The courts will not take judicial notice of the custom in London to cart whores: it must be proved. Stainton v. Jones, 2 Selw. N. P. 1225.

## F. EVIDENCE.

Form of Question.]—At the trial of an action for not accepting goods, described in a colonial broker's catalogue, the defendant's counsel put the catalogue that to the hands of a witness, and, without laying foundation for the question by asking whether there was any usage, asked at once whether, from the catalogue, it would be inferred by custom that the goods were sound and in their original packages:—Held, that the question in that form was unadmissible. Curtis v. Peeh, 18 W. R. 230—Ex. Ch.

Present Existence.]—A custom, proved to have existed from time immemorial till 1689, must be taken to exist still, if there is no further evidence proving or disproving its existence. Scales v. Key, 11 A. & E. 819: 3 P. & D. 505.

— Immemoriality.]—The general law as to a custom is, that if its existence at a distant time is shown, and there is no evidence that at any certain time it did not exist, a jury may infer that it went back as far as the reign of Richard the First, which is the time of legal memory. Leuchkart v. Copper, Car. & P. 119.

Non-user.]—Long-continued non-user is strong evidence of the custom never having existed. Hammerton v. Haney, 24 W. R. 603.

Against whom.]—Evidence of usage can only be relied on against those who have been themselves, or whose predecessors have been, parties to the facts constituting the second of the facts of the facts constituting the second of the second of the facts of the facts constitutingly. In a suit for rates against each energies in a partish, within a portion of such complets which had been americal to a borought.—Held, that previous payments of such trates by the magistrates of the borough to the authorities of the parish afforded no evidence of usage against the individual occupiers. Evelog v. Burns, Macl. & B. 435.

Inconsistent Customs.]—A juvy cannot, from the same evidence, find a customary right in all the inhabitant occupiers of land within a district, and a prescriptive right to the same subjectmatter, in respect of a particular estate within the district. Bluent v. Troponning, 5 N. & M. 308; 3 A. & E. 54; 1 H. & W. 432; 4 L. J., & E. 234.

Lost Grant—Profit à prendre, ]—Enjoyment of a profit à prendre by the owners and occupiers of a particular estate, during living memory, without any evidence of user or non-user at any autrecelent period, is evidence of a prescriptive right, but will not support a plea of a lost grant. ID.

In order to support such plea of a lost grant, some evidence tending to point the user, as regards its commencement, to the period of the supposed grant must be given. Ib.

Exceptions.]—If a custom is set forth generally, and it is proved that there are exceptions, it is a variance. *Griffin v. Blandford*, Cowp. 62. And see *Peter v. Kendall*, 6 B. & C. 703; 5 L. J. (O.S.) K. B. 282.

Meaning of Words.]—A general dictionary of the English language is no authority to shew on a trial the meaning of a word, which is relied on, as deriving a peculiar meaning from mercantile usage. *Houghton* v. Gilbart, 7 Car. & P. 701.

Abolition of Custom.]—As a custom is local law, it cannot be got rid of except by statute. Hammerton v. Haney, 24 W. R. 603.

See also EASEMENT.

Admissibility to Explain Contract.] - See EVIDENCE.

J. M.

# CUSTOMS.

See REVENUE.

# CY PRÈS.

See CHARITY.

# DAMAGE FEASANT.

See ANIMALS—REPLEVIN.

# DAMAGES.

- A. WHAT ARE NATURAL CONSEQUENCES OF WRONGFUL ACT.
  - 1. Physical Damage, 264.
  - 2. Personal Inconvenience, 272.
  - 3. Measure of Value and Loss. a. General Principles, 274.
    - b. Where no Market, 275. Market Value. 276.

    - d. Where Sub-Contracts or Special Purpose, 281.
    - Nature of Right, 291.
    - f. Aggravation, Mitigation, and Reduction, 295.

    - Prospective, 299.
       Double or Treble Damages, 300.
  - 4. Costs of Action when Recoverable, 300.

#### B. PRACTICE.

- 1. As to Verdict .- See PRACTICE (VER-DICT).
- 2. New Trial, See PRACTICE (NEW TRIAL).

#### C. IN PARTICULAR CASES.

- 1. Penalty or Liquidated Damages,-See PENALTY.
- 2. Damages or Injunction.—See Injunc-TION.
- 3. In Actions for Specific Performance,—
  See Specific Performance.
- 4. Breach of Warranty of Authority .- See PRINCIPAL AND AGENT.
- 5. Infringement of Patent .- See PATENT.
- 6. Under Lord Campbell's Act .- See NEGLI-
- GENCE. 7. In Actions for Wronaful Dismissal .- See
- MASTER AND SERVANT, 8. Action for Waste against Tenant .- See
- LANDLORD AND TENANT.
- 9. Action for Breach of Covement.—See LANDLORD AND TENANT—VENDOR AND PURCHASER.
- 10. Issue and Transfer of Stocks and Shares. -See COMPANY 11. Non-delicery of Cargo. See Shipping
- (CARGO). 12. Dishanour of Bill of Exchange.—See
  BILLS OF EXCHANGE.
- 13. Detention of Stock .- See DETINUE,
- 14. In Actions of Trocer.—See TROVER. 15. Misropresentations in Prospectus .- See
- COMPANY (PROSPECTUS.) Actions of Damage — Collision. — See Shipping (Collision).
- 17. On Sale of Goods .- See SALE OF GOODS.
- 18. Work and Labour .- See WORK AND
- LABOUR. 19. Action against Carriers. - See CARRIERS.
- 20. Actions of Defamation .- See DEFAMA-TION.
- 21. Against Co-respondent in Divorce Cases. -See HUSBAND AND WIFE.
- 22. Undertaking as to Damages .- See In-JUNCTION.
- See ulan BANKER-TRESPASS REPLEVIN, and other specific titles.

A. WHAT ARE NATURAL CONSEQUENCES OF WRONGFUL ACT.

1. Physical Damage.

Contract to provide Stabling-Depreciation. The plaintiff sent some horses to stables with which the defendant had contracted to supply him during a fair. Another person to whom the defendant had subsequently let the same stables, with the assistance of the defendant's servants. turned the plaintiff's horses out of the stables without their clothing, and while they were standing in the defendant's yard until other stables could be procured, some of them caught cold and became depreciated in value. The jury found that the depreciation in value was the result of the breach of contract by the defendant : -Held, that the defendant was liable for the depreciation thus caused, and that the damage deprecention thus caused, and that the damage was not too remote. Hobbs v. L. & S. W. Ry.
 (L. R. 10 Q. B. 111) questioned. M. Makov.
 Field, S. D. J. Q. B. 552; 7 Q. B. D. 591; 45
 L. T. 381; 46 J. P. 245—C. A. Reversing 29 W. R. 472.

Passengers put into Wrong Train-Inconvenience-Illness. |-- A husband took tickets at Wimbledon for himself, wife, and two children, of five and seven years of age respectively, to go to Hampton Court station by the last train at night ; by the negligence of the porters they were put into the wrong train and carried to Esher ; being unable to obtain accommodation for the night

at Esher or a conveyance, they walked home, a distance of between four and five miles, and the night being wet the wife caught cold and medical expenses were incurred :- Held, that the husband was entitled to recover damages in respect of the inconvenience suffered by being compelled to walk home, but that the illness of the wife was a consequence too remote from the breach of contract for damages to be recoverable for it. *Hobbs* v. *L. & S. W. Ry.*, 44 L. J., Q. B. 49; L. R. 10 Q. B. 111; 32 L. T. 352; 23 W. R. 520. See preceding case.

Railway — Negligence — Theft by Fellow-Passengers. ]—The plaintiff, by his statement of claim, alleged that he had suffered damage through being robbed while a passenger on the defendants' railway, and that through the refusal of the defendants' servants to afford him facilities. for arresting the persons who had robbed him, he was prevented from recovering the property stolen :--Held, that the statement of claim disclosed no cause of action. He also claimed to recover the amount of the money stolen from him as damages for the negligent overcrowding of the carriage:—Held, too remote. Cobb v. G. W. Ry., 62 L. J., Q. B. 335; [1893] 1 Q. B. 459: 4 R. 283; 68 L. T. 483; 41 W. R. 275; 57 J. P. 437-C. A.

Caused by Railway Accidents. ]—Considera-tion of the directions proper to be given to a jury as to the damages to be awarded to the plaintiff for the bodily suffering arising from personal injuries, and the damages to be awarded to him for loss of professional income arising from those injuries. *Phillips v. L. & S. W. Ry*, 5 Q. B. D. 78; 41 L. T. 121; 28 W. R. 10—C. A. See *S. C.*, 49 L. J., C. P. 233; 5 C. P. D. 280; 42 L. T. 6; 44 L. T. 217—C. A.

When a jury is called upon to assess damages for personal injuries occasioned by negligence, they should take into consideration two matters —first, the pecuniary loss occasioned by the accident; and secondly, the injury the party sustains in his person, or in his physical capacity of enjoying life; and, as regards the first, they should take into account, not only his present the should take into account, not only his present loss, but his incapacity to earn a future improved income. Fair v. L.  $\S$  N. W. Rg, 21 L. T. 326; the remaining carriages (including that in which S W. R. 68. A was scated) followed down the incline, also at

A declaration in an action for negligence, after alleging that the plaintiff was limit withe being carried as a passenger, concluded by stating as slaminge that she was greatly hurt, maimed, wounded, and permanently injured. At the trial, it was proved that the plaintiff was accustomed to the numagement of a restaurant, and the judge directed the jury in assessing the damages to ask themselves, "what salary would a lady of experience in the trade be able to command for managing a public-louse in London at a fair salary"."—Held, that the question was justified by the form of the count, although no special damage was laid. Potter v. Metropolitan Ru. 28 I. T. 735.

—On Insurances against.]—A. effected with a railway assume company a contract, which stated that he was thereby assured by the company in 1,000t, to be payable to his legal representatives in the event of death happening to the assured from railway accident whilst travelling in any class carriage on any line of railway in Great Britain or Ireland, or a proportionate part of the 1,000t, to be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. The assured was travelling in a railway carriage, and on the arrival of the train at a station, and after it had stopped, he, in stepping out of the carriage, without any negligence on his part, shipped off the fron step, whereby he sustained an injury :—Held, that this was a railway accident, and that the damages could not be estimated by the proportion which the injury bore to the amount payable on loss of life. The obtails V. Railacay Passonyiers Assurance Co., 10 Ex. 45; 2 C. L. It. 1034; 23 L. J., Ex. 249; 18 Jur. 583; 2 W. R. 528.

Held, also, that the assured was entitled to recover damages for the expenses and suffering occasioned by the injury, but not for loss of time or loss of profit. Ib.

Negligence—Nervous Shock.]—Damages in a case of negligent collision must be the natural and reasonable result of the defendants' act; damages for a nervous shock or mental injury caused by fright at an impending collision are too remote. The Notting Itill (9 P. D. 105) approved. Victorina Rulliway Commissioners v. Conditos, 57 L. J., P. C. 69; 13 App. Cas. 222; 58 L. T. 309; 37 W. R. 129; 52 J. P. 500—P. C. Where n gate-keeper of a milway company

Where a gate-keeper of a railway company negligently invited the plaintiffs to drive over a level crossing when it was dangerous to do so, and the jury, although an actual collision with a train was avoided, herertheless assessed damages for physical and mental injuries occasioned by the fright:—Held, that the verdict could not be sustained, and that judgment must be entered for the defendants. Quere, whether proof of "impact" was necessary to maintain the action. 2h.

While A was travelling as a passenger in an the fence, and the horse by bitting and kicking starts for the derivative through the fence injured the mare. The horse line of railway, the train, which was too heavy did not trespass upon the plaintiffs field by

occupied by A., with certain others, remaining attached to the engine. The hinder part of the train having thereupon descended the incline with great velocity, the engine was reversed, and with the remaining carriages (including that in which A. was seated) followed down the incline, also at a high rate of speed, until stopped with a violent jerk. In an action for injuries sustained by A., it was proved that A. was put in great fright by the occurrence, and that she suffered from nervous shock in consequence of such fright, She was incapacitated from performing her ordinary avocations; and medical witnesses were of opinion that her symptoms might result in paralysis:—Held, that if great fright was, in the opinion of the jury, a reasonable and natural consequence of the circumstances in which the defendants had placed A., and she was actually put in great fright by these circumstances, and if injury to her health was, in their opinion, a reasonable and natural consequence of such great fright, and was actually occasioned thereby, damages for such injury would not be too remote, and might be given for them. Victorian Railway Commissioners v. Coultas (13 App. Cas. 222) not followed. Bell v. G. N. Ru., 26 L. R. Ir. 428.

Mismanagement of Railway.]—A railway engine fell over from the line into the garden of a private party. This happened through the negligence of the company's servants. Damage was done to flowers in the garden by a crowd that assembled there. In an action against the company by the occupier of the garden:—Held, that the damage done by the crowd was too remote. Scholes v. North London Ry., 21 L. T. 835.

A herd of beasts was being driven at II p.m. along an occupation road to some fields. road crossed a siding of a railway on a level, and while the cattle were crossing the siding the servants of the railway company negligently sent some trucks down an incline into the siding, which separated the cattle from the drovers and frightened them, and they rushed away. Six of them were ultimately found at between 3 and 4 a.m. lying dead or dying on another part of the railway; and they had gone along the occupation road up to a garden and orchard about a quarter of a mile from the level crossing, had got into the garden through defect in the fences, and so on to the line:-Held, that as the railway company had been guilty of negligence which caused the drovers to lose control over the cattle and caused the cattle to become infuriated, it was no answer that if the fence of the garden had not been defective the accident would not have happened; and that consequently the damages were not too remote. Sneesby v. Lun-cashire and Yorkshire Ry., 45 L. J., Q. B. 1; 1 Q. B. D. 42; 33 L. T. 372; 24 W. R. 99—C. A. And see CARRIERS.

Horse Kicking through Wire Fence. —The defendants were occupiers of a plot of land, which was separated from a field of the plaintiffs by a wire fence. They turned into their plot of land an entire horse; and the plaintiff put into his field a mare. The defendants horse and the plaintiffs mare got together upon either side of the fence, and the horse by bitting and kicking through the fence injured the mare. The horse did not treaves upon the plaintiff field by

crossing the fence. Upon previous occasions he [1895] 2 Q. B. 640; 14 R. 767; 73 L. T. 459; had been watched, and the plaintiff had warned 44 W. R. 49; 59 J. P. 804—C. A. the defendants to keep him away from the mare. The plaintiff having sued for the injury to the mare, the county court judge held that there was no case to go to a jury :-Held, that the plaintiff was entitled to judgment : for there was evidence that a trespass had been committed and the damage was not too remote. Ellis v. Lottus Iron Cb., 44 L. J., C. P. 24; L. R. 10 C. P. 10; 31 L. T. 483; 23 W. R. 246.

Agistment—Negligence.]—The plaintiff sent his more to the defendant to be agisted. The mare was put into a part of a field which was separated from a cricket ground by a wire fence. Through the defendant's negligence the gate between the two parts of the field was left open. whereby the mure strayed on to the cricket-ground. The cricketers attempted to drive the mare back, but instead of passing through the gateway she ran against the wire fence and was injured : + Held, that the damage was the natural consequence of leaving the gate open, and that the defendant was liable. *Halestrap v. Gregory*, 64 L. J., Q. B. 415: [1895] 1 Q. B. 561; 15 R. 306; 72 L. T. 292; 43 W. R. 507.

Weak Carriage Pole. |-The plaintiff bought a pole for his carriage from the defendant, a coachbuilder. The pole broke in use and the horses became frightened and were injured. In an action for the damage, the jury found that the pole was not reasonably fit for the carriage, but that the defendant had been guilty of no negligence :- Held, that the plaintiff was entitled to recover the value of the pole, and also for damage to the horses, if the jury on a second trial should be of opinion that the injury to the horses was the natural consequence of the defect in the pole. Randall v. Newson, 46 L. J., Q. B. 259; 2 Q. B. D. 102; 36 L. T. 164; 25 W. R. 313—C. A.

Breach of Warranty—Remoteness.]—A ship-owner, in contracting with a stevedore with regard to the unloading of a ship, promised to supply all the necessary gearing reasonably fit for the purpose. One of the chains supplied was defective, the defect being of a kind which might have been discovered by the exercise of reasonable care on the part of the stevedore. In the course of the unloading the chain broke, and one of the stevedore's workmen was injured in consequence. The workman brought an action against the stevedore under the Employers' Liability Act, 1880; the stevedore did not contest the action. and paid the workman in settlement of his claim, which sum he now sought to recover from the shipowner as damages for breach of warranty. It was admitted that 125l. was a reasonable sum :- Hekl, that the accident to the workman was a natural consequence of the shipowner's breach of contract, and such as might reasonably be supposed to have been within the contemplation of the parties to the contract between the shipowner and the stevedore; that the want of diligence on the part of the stevedore towards his workman in not discovering the defect afforded no defence to the stevedore's action against the shipowner, and that the stevedore was entitled to recover from the shipowner, as damages for the breach of his warranty as to

Natural Consequence of Original Negligence. A steamship, whilst getting up her anchors in a gale of wind to proceed to a safer anchorage, negligently failed to obtain the assistance of a tug so as to enable her to perform the manceuvre safely. She was in consequence driven against a pier, where she again negligently abstained for a considerable time from taking the assistance of a tug, which was offered to her. Having ultimately taken such assistance, she was towed in the only direction then possible, when, coming into a heavy seaway and the full force of a strong gale, the towing hawser parted and she was driven ashore, doing damage to the plaintiff's property. There was no negligence on the part of the ship after she took the assistance of the tug. Trinity masters having advised the court that the breaking of the tow rope was a thing that would "very probably" happen, considering the direction in which it was necessary to tow the ship after she had collided with the pier, and considering the wind and weather she would meet whilst being towed, it was held, that the damage.

Collision—Contract for Future Voyage—Remoteness.]—The loss to a shipowner of profit which he would, but for a collision, have derived under a contract previously entered into for a future voyage of his ship, must be taken into account in assessing the damages caused by the collision. The Argentino, 59 L. J., P. 17; 14 App. Cas. 519; 61 L. T. 706; 6 Asp. M. C. 433 -H. L. (E.)

following upon such breaking of the tow rope was a natural consequence of the defendants' original negligence, and that the owners of the ship were liable for such damage. *The Gortor*, 70-L. T. 703; 7 Asp. M. C. 472.

—— One Ship Solely to Blame—Subsequent. Loss of Injured Ship.]—The defendants' ship, which was admitted to have been solely to blame, collided with the plaintiff's barque, cutting off her starboard quarter, the captain of the barque losing his usual means of navigating his shipnamely, his steering compass, log-line, and charts -and being left with an inefficient compass and chart. The captain, in order to save his ship, made for the Thames, and, without any want of care or skill in navigating his ship, mistook a certain lightship which he saw, and, the course of his ship being altered, she almost immediately afterwards stranded:—Held, that the defendants were liable for the ultimate loss of the plaintiff's ship, and that the damages claimed in respect thereof were not too remote, as the stranding was the natural and reasonable result of the defendant's wrongful act, and was such a consequence as, in the ordinary course of things, would flow from their act. The City of Lincoln, 59 L. J., P. 1; 15 P. D. 15; 62 L. T. 49; 88 W. R. 345; 6 Asp. M. C. 475—C. A.

Explosion of Gas. ]-A gas company, having contracted to supply the plaintiff with a service pine from their main to the meter on his premises, laid down a defective pipe, from which the gas escaped. A workman, in the employ of a gas fitter engaged by the plaintiff to lay down the pipes leading from the meter over the prethe lines of the genting, the amount which he had paid in settlement of the workman's claim, Morebray 7. Merryacather, 95 L J., Q. B. 50; [ceeded. An explosion then took place, whereby

damage was occasioned to the plaintiff's pre- unless such loss or injury would have occurred in miss. to recover compensation for which he whichever way the property had been dealt with. brought an action against the company:—Held, Ib. that the damage was not too remote, and that the plaintiff, not being the master of the workman, could not be considered as contributing to the damage by reason of his act, and was therefore entitled to recover. Burrows v. March Gas and Che Co., 41 L. J., Ex. 46; L. R. 7 Ex. 96; 26 L. T. 318; 20 W. R. 493—Ex. Ch.

Horse Slipping on Ice in Road. ]-A servant (in breach of the Metropolitan Police Act, 2 & 3 Vict. c. 47, s. 54) washed a van in a public street, and allowed the waste water to run down the gutter towards a grating leading to the sewer, about twenty-five yards off. In consequence of the extreme severity of the weather, the grating was obstructed by ice, and the water flowed over a portion of the causeway, which was ill paved and uneven, and there froze. There was no evidence that the master knew of the grating being obstructed. A horse, while being led past the spot, slipped upon the ice and broke its leg :-Held, that this was a consequence too remote to be attributed to the wrongful act of the servant. Sharp v. Powell, 41 L. J., C. P. 95; L. R. 7 C. P. 253; 26 L. T. 436; 20 W. R. 584.

Trespass to Coal Mine. ]-A defendant trespassed on the plaintiff's coal mine and worked part of the coal, leaving large pillars of coal unworked. Evidence having been brought to shew that the coal left unworked was rendered practically worthless :-Held, that damages in respect of the coal so left were not too remote. Williams v. Raggett, 46 L. J., Ch. 849; 37 L. T. 96; 25 W. R. 874.

Deterioration of Lighters by Seizure.]-In August, 1868, a company brought an action against the defendant, and obtained a warrant of seizure against certain lighters which belonged to him. The seizure remained in force till May, 1864, when it was released, the company failing in the action. In 1867 a creditor of the defendant seized the lighters under an execution, and they were sold. The defendant then commenced an action against the company to recover the difference between the cost price of the lighters and the price at which they had been sold, alleging that they had been deteriorated by the previous seizure :- Held, that the damages were too remote, and could not reasonably have been foreseen as the consequences of the seizure, and that the defendant could not recover. Nicosia v. Vallone, 37 L. T. 106-P. C.

Contract to Warehouse Goods in Particular Ib. Place. ]-The defendant contracted to warehouse certain goods for the plaintiff at a particular place, but he warehoused a part of them at the slander was false, the fact that it was false another place where, without any negligence on his part, they were destroyed. In an action to as an objection to the husband appearing on the recover as damages the value of the goods :-Held, that the damage was not too remote, and that the defendant, by his breach of contract, had rendered himself liable for the loss of the goods. Lilley v. Doubleday, 7 Q. B. D. 510; 44 L. T. 814.

If the owner of property gives another person authority to deal with it in a particular way, the bank the waters of a tidal river overflowed and such person chooses to deal with it in the low lands lying west of the cut. The plainanother way, he must take the risk of the con-sequences, and is liable for its loss or injury, the cut, the water from which land used to drain to

Refusal to Admit Ship into Dock. |-- In an action for a breach of contract, in not admitting the plaintiff's ship into the defendant's dock whereby she grounded when the tide ebbed, and was damaged, it appeared that the ship left in ballast a dry dock, where she had been repaired, and, in charge of a pilot, was towed by a steamtug to the dock, where she arrived about high water. In consequence of the chain of the dock gate being broken, she could not be admitted. The captain was unacquainted with the navigation, and, considering that the ship was not sufficiently ballasted to go to sea, directed her to be anchored where she was. At the ebb of the tide she grounded and was damaged. There was conflicting evidence as to the state of the weather. The jury was asked first, whether there was a place of safety to which the ship could have been taken before the tide ebbed; and, secondly, whose fault it was that she was not taken there. Upon the first question they returned no answer, being unable to agree, but replied to the second, that neither the captain nor the pilot was to blame :- Held, per Martin, B., that the damages were not too remote to be recovered by the plaintiff. Per Pollock, C.B., Channell, B., and Pigott, B., that the finding of the jury was not sufficient to enable them to come to a conclusion, and that there must be a new trial. Wilson v. Newport Dock Co., 4 H. & C. 232; 35 L. J., Ex. 97; L. R. 1 Ex. 177; 12 Jur. (N.s.) 233; 14 L. T. 230; 14 W. R. 558.

Defamation-Special Damage.]-Where a wife (her husband being joined for conformity) brought an action to recover damages from A., for slander uttered by him to her hasband, imputing to her that she had been almost seduced by B. before her marriage, and that her husband ought not to let B. visit at his house; and the ground of special damage alleged was, that in consequence of the slander the husband forced her to leave his house, and return to her father, whereby she lost the consortium of her husband :- Held, that the cause of complaint would not sustain the action, for that the special damage did not show, in the conduct of the husband, a natural and reasonable consequence of the slander. Lynch v. Knight, 9 H. L. Cas. 577; 8 Jur. (N.S.) 724; 5 L. T. 291.

The loss by the wife of her maintenance by the husband, occasioned by slander uttered by a third person, may be made the subject of a claim for damages; but such loss cannot be presumed to have so arisen, it must be distinctly averred.

In such a case, though the act of the husband in sending away his wife was wrongful, because cannot be taken advantage of by the slanderer record as a plaintiff. Ib.

Flooding Lands. ]-In consequence of the negligence of commissioners under an act of parliament for improving the drainage of fen lands, the western bank of a cut made by them under their act gave way, and through the breach in

the west side through a culvert of the com- recover damages where the injury to the property missioners, which by their act of parliament they were to maintain open for a free passage of such water. After the bank had given way, but be-fore the waters of the flood had reached the culvert, the plaintiff stopped up the culvert, but the occupiers of lands on the west side of the cut. considering that the stopping of the culvert would be injurious to their lands, by preventing the great body of advancing water from finding an outlet there, removed the stoppage, and the result was that the flood waters passed through the culvert from the western to the eastern side of the cut, and reached and inundated the plaintiff's land. In an action by him for the damage sustained by his land being so inundated :— Held, that he was entitled to recover such damage, notwithstanding it arose in part by the opening of the culvert after he had stopped it up, as such damage was the natural result of the negligence of the commissioners. Collins v. Middle Level Commissioners, 38 L. J., C. P. 236; L. R. 4 C. P. 279; 20 L. T. 442; 17 W. R. 929.

In consequence of a railway embankment, the food waters of a river were pent back and flowed over land of the plaintiff, doing injury to a certain amount; had the embankment not been constructed, the waters would have flowed a different way, but would have reached the plaintiff's land, and would have done damage to a lesser amount:-Held, that the measure of damages recoverable by the plaintiff against the railway company was the difference only between the two amounts. Workman v. G. N. Ry., 32 L. J., Q. B. 279.

- Injury to Reversion. - Owing to the negligence of the defendants a building estate belonging to the plaintiff was overflowed by a flood. Part of the land was covered with houses (A) which were in the plaintiff's possession.
Another part was covered with houses (B) creeted by builders under building leases. Other parts were the subject of building agreements under which houses (C) were in course of erection, and the plaintiff was bound to make and had made advances to the builders on the security of the property. The remainder of the land (D) was vacant, and in the plaintiff's possession. The amount of damages to which the plaintiff was entitled was referred to a special referce. In respect of (A) the referee allowed as damages (1) the expense of repairing the honses, and the rent during the period of repairs; (2) the loss arising from the reduced reutal for four years in consequence of the prejudice against the neighbourhood caused by the flood. As to (B), he found that there was no injury which would last to the end of the leases, but he allowed a sum for depreciation of the selling value of the landlord's interest, in consequence of the houses being worth less to let. As to (C), he deducted the value of the houses when repaired and completed, less the expense of repairing and completing them, from the amount advanced, and awarded this difference to the plaintiff for depreciation of mortgage seenrities. As to (D), he gave three mouths of an estimated rent for delay in letting .—Held, that (A) (2) must be disallowed, for the loss of rental arising from the prejudice against the neighbourhood caused by the flood was not the natural result of or directly caused by the flood, and was not a legitimate ground for giving damages: That the sum allowed in respect of (B) must also That the sum allowed in respect of (B) must also

In an action at the suit of a passenger for false
be disallowed, for that a reversioner can only imprisonment by the captain, the former cannot

is permanent, so that it will continue to affect it when the reversion comes into possession, and he is not entitled to damages in respect of a temporary injury, on the ground that it affects the present saleable value of his reversion: That the sum given for depreciation of mortgage securities (C) must be disallowed, and an inquiry directed with the view of ascertaining to what extent the flood had made those houses a less sufficient security for the plaintiff's advances than they were before. Rust v. Victoria Graving Dock Co., 36 Ch. D. 113; 56 L. T. 216; 35 W. R. 673-C. A.

Injury through Breach of Warranty.]—See SALE OF GOODS.

Through Negligence. - See CARRIERS-NEGLIGENCE.

Connected with the Enjoyment of Land. ]-See LANDLORD AND TENANT-LAND CLAUSES ACT-MINES AND MINERALS.

To Ships. ]-See SHIPPING.

# 2. Personal Inconvenience,

Generally. - In an action of tort for injury to the plaintiff personally, damage for loss of profit on contracts which might have been entered into by him, is too remote. Priestley v. Maclean, 2 F. & F. 288. See Hobbs v. London & S. W. Ry., ante, col. 264.

On False Imprisonment.]—A defendant caused the plaintiff to be apprehended upon an unfounded charge, and to be detained from half-past one until two o'clock. In support of a claim for special damage in an action for false imprisonment, the plaintiff proved that he would have been engaged as a journeyman if he had presented himself at the factory at two o'clock on the day in question; but that, being unwell from the treatment he had received, he went home and did not go to the factory until the next morning, when he found that his intended employer had engaged another man :- Held. that this damage was too remote, *Hoey* v. *Felton*, 11 C. B. (N.S.) 142; 31 L. J., C. P. 105; 8 Jnr. (N.S.) 764; 5 L. T. 354; 10 W. R. 78.

In estimating damages in an action for false imprisonment and malicious prosecution, the jury must consider not only the sufferings and loss of the plaintiff, but also the necessity which exists for the occasional prosecution of innocent persons in order to prevent the escape of criminals from justice. Tulley v. Corrie, 16 L. T. 796.

An equity barrister of eminence was arrested by the officers of the sheriff of Surrey, in mistake for another person of the same name, the officers acting bona fide, on information given them by the clerk of the attorney who had sued out the writ. Under such circumstances and without any special damage, the party is entitled to substantial and liberal compensation. But where there is no special damage, 250 guineas are sufficiently in excess of what is required, as to be ground for granting a rule absolute for reducing the damages, or for a new trial. Davidson v. Molyneur, 17 L. T. 289.

recover, as special damage, additional passage money paid for returning in another ship, to which he had removed unless proof is given either that the imprisonment continued until the time of removal, or that the passenger had a reasonable fear of his personal safety. Boyce v.

Bauliffe, 1 Camp. 58.

The plaintiff shipped as a seaman, at a certain rate of wages per month, on board the vessel of the defendant at London, under articles for a commercial voyage not to exceed twelve calendar months to Rio de Janeiro, and different ports in the Atlantic and Pacific, and to terminate by his being brought back to some port in the United Kingdom or Continent of Europe between the Elbe and Brest. On arriving at Rio, the defendant proposed to employ his vessel as a ship of war in the service of the Pernylan government in the hostilities then being carried on between Pern and Spain. The plaintiff thereupon refused to proceed any further with the voyage, on the ground that it was illegal, and exposed him to risks and dangers not contemplated by his agreement with the defendant, and he accordingly left the slip, without leave, and went on shore at Rio, where he was arrested by the Pernvian authorities as a deserter from a Pernvian vessel of war, and committed to prison, where he remained some eight or ten days. Upon coming out of prison he found that his vessel had sailed away, and that his clothes and other articles belonging to him, which he had left on board, were gone. In an action to recover damages for the breach of the contract, the jury found a verdiet for the plaintiff, and assessed the damages resulting from such breach under three headsnamely, first, 12l. 10s. for the loss of wages which the plaintiff would have carned under the coutract had it been continued; and secondly, 201. for the loss of the clothes; and thirdly, 30%, for general damages for the imprisonment and otherwise by reason of the defendant's breach of contract :- Held, that the damages given under the second and third heads-viz, for the clothes and the imprisonment, were too remote to be made the subject of an action. Burton v. Pinkerton, 36 L. J., Ex. 137; L. R. 2 Ex. 340; 17 L. T. 15; 15 W. R. 1139.

Forcible Removal. ]-A passenger by railway was ordered to leave the carriage by the company's servants under circumstances which did not justify them in what they were doing. Upon leaving the carriage he placed a pair of raceglasses upon the seat, which, as the train proceeded, was lost :- Held, that the loss of these glasses was not the natural result of the wrongful act, and that the passenger could not recover their value. Glover v. L. & S. W. Ry., 37 L. J., Q. B. 57; L. R. 3 Q. B. 25; 17 L. T. 139.

Railway-Delay-Hotel Expenses. |-- A commercial traveller delivered a parcel of samples to a carrier to be carried to A., but did not state the contents of the parcel, or the purpose for which it was required. By the negligence of the carrier the parcel was delayed, and the traveller spent three days at A. unemployed, waiting for it. In an action against the carrier for negligence, in which the hotel expenses of the traveller during the time he was waiting for the parcel were claimed as damages :- Held, that such damages were too remote, and could not be recovered. Woodger v. G. W. Ry., 36 L. J., C. P. 177; L. R. 2 C. P. 318; 15 L. T. 579; 15 W. R. 383.

- Special Train.]—If a passenger on the railway of a company who has contracted to pay every attention to cusnre punctuality, takes a special train in order to avoid a delay that has arisen through the negligence of the company, the question whether he can recover the cost of the special train from the company will depend on whether the taking it was a reasonable thing to do having regard to all the circumstances. One mode of determining what would be reasonable is to consider whether under the circumstances a prudent person would have taken a special train at his own expense to avoid a delay that had arisen through his own fault. Le Blanche v. L. & N. W. Ry., 45 L. J., C. P. 521; 1 C. P. D. 286; 34 L. T. 667; 24 W. R. 808—C. A.

Contract to appoint Captain-Loss of Voyage. ] Where a defendant having purchased certain shares of an East India ship commanded by the plaintiff, and chartered by the company for four voyages, proposed to the plaintiff to resign the command in favour of the plaintiff's nephew, on receiving in exchange the command of another ship, and two voyages only were performed at the time of the commencement of an action against the defendant for a breach of the agreement, in not appointing the plaintiff to succeed him :-Held, that the jury might give damages for the loss of the two remaining voyages. Richardson v. Mellish, 2 Bing. 229; 9 Moore, 435; 1 Car. & P. 241; R. & M. 66; 3 L. J. (0.8.)

Loss of Credit.]—In an action by a principal against his agent in a particular branch for abandoning his agency, the jury having given damages for losses sustained by the principal in collateral branches of his business, by reason of the injury done to his credit by the agent's abandonment of his agency, the court refused to interfere with the verdiet, or to consider the damage too remote. Boyd v. Fitt. 14 Ir. C. L. R. 43: 11 L. T. 280.

# 3. MEASURE OF VALUE AND LOSS.

# a. General Principles.

Contract. |- The rule of the common law is. that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. Robinson v. Harman, 1 Ex. 855.

In actions of breach of contract, no damages ean be in general recovered that are incapable of being specifically stated and appreciated with certainty, and which depend merely on the feelings or inclination of the jury to give. Humlin v. G. N. Ry., 1 H. & N. 408; 26 L. J., Ex. 20; 2 Jur. (N.S.) 1122; 5 W. R. 76.

Solicitor's Negligence.]-An attorney had been employed to complete a purchase of a leasehold property, which his client had made at an auction, on conditions which stipulated that he should take an under-lease, and not demand an abstract of the vendor's title, nor inquire into the title of the lessor. He made no inquiries. but simply got a pretended lease executed by the seller, who had sold fraudulently, without any title whatever, the lease itself not even reciting any title, and the pretended seller giving actual possession, and not having any deed or document in his possession, to adduce as any evidence of

the purchaser was evicted by the real owner :-Held, that there was evidence of negligence on the part of the attorney; and that the proper measure of damage was the sum the client had to pay to obtain a title, with interest, and withont any deduction for rent, as he was liable over to the true owner for mesne profits during the time he occupied as owner. Allen v. Clark, 7 L. T. 781: 11 W. R. 304.

Conduct conducing to Damage. Timber was consigned by the plaintiff's ship "Johan" to the defendant, and landed and delivered to him in a harbour, by a statute for the regulation of which certain dues were payable thereon by him. The defendant failing to pay these dues, the ship was detained for nine days by the harbour authorities, at the expiration of which time the master obtained her release by paying the demand himself :- Held, that, assuming that the defendant was by the statute liable to pay the dues, and that the detention of the vessel was justifiable, the plaintiff was only entitled to recover the amount which he had paid for the dues, but not damages for the time the vessel was detained; inasmuch as he might at once have procured her release by payment of the money. Müller v. Jecks, 19 C. B. (N.S.) 332.

Agreement to Lend Money, !-- On a contract to take debentures in a company, no action will lie for the money agreed to be lent. An action will only lie for breach of the contract. measure of the damages is the loss sustained by the company through the breach. South African Territories v. Wallington, 66 L. J., Q. B. 551; [1897] 1 Q. B. 692; 76 L. T. 520; 45 W. R. 467

Where there is an agreement to lend money, and special damage results from the breach of that agreement, and a party is deprived of the opportunity of getting money clsewhere, sub-stantial, and not merely nominal, damages ought to be awarded. Manchester and Oldham Bank v. Cook, 49 L. T. 674.

#### b. Where no Market.

Non-Acceptance-Buty of Party Injured. ]-The damages for the breach of a forward contract to accept goods for which there is no market, is the full amount of the damage actually sustained, the person who broke the contract not being put to additional cost by reason of the other party not doing what he ought to do, as a reasonable man, and he, on the other hand, not being bound to do otherwise than is the ordinary course of his business. The plaintiffs contracted to sell to the defendant 15,000 tons of cannel coal in weekly quantities, the deliveries not to commence before June, at 26s. per ton, payable by monthly instalments, the defendant not to sell in certain specified places. The defendant repudiated the contract in July, but the plaintiffs attempted to come to terms with him, and did not treat it as broken until September, when, there being no regular market far cannel coal, they tried without advertising to find another purchaser according to the ordinary course of their own business. After several failures, the coal was sold at 19s. per ton .—Held, that the plaintiffs were entitled to

title, had he been asked for such evidence, and Lever v. Dunkirk Colliery Co., 43 L. T. 706-H. L. (E.)

> Non-Delivery. ]-Where goods are not delivered at the time specified in a contract for delivery, and their place can be supplied in the market, the measure of damages is the difference between the contract price and the market price, when they ought to have been delivered. If their place cannot be supplied in the market, and the vendee has done all that a person with reasonable care and skill could do to diminish the loss, the measure of damages is the difference between the value of the goods when they were delivered, and when they should have been delivered. Borries v. Hutchinson, 18 C. B. (x.s.) 445; 34 L. J., G. P. 169; 11 Jur. (x.s.) 267; 11 L. T. 771; 13 W. R. 386.

When goods, which cannot be procured in the market, are sold to be delivered on a day certain, the purchaser is entitled to recover, in an action for breach of contract to deliver, the amount which he has reasonably expended to avert the loss which he would otherwise have sustained from non-delivery. Hinde v. Liddell, 44 L. J. O. B. 105; L. R. 10 O. B. 265; 32 L. T. 449; 23

W. R. 65.

In an action against a railway company for the non-delivery of drapery goods, the measure of damages is the price at which the goods can be obtained in the market, if there is one at the place and time at which the goods ought to have been delivered; if not, the damages must be ascertaized by taking into consideration, in addition to the cost price and expense of transit, the reasonable profit of the importer. O'Hunlan v. G. W. Ry., 6 B. & S. 484; 34 L. J., Q. B. 154; 11 Jun. (N.S.) 797; 12 L. T. 490; 13 W. R. 741.

Where goods are delivered to a carrier to be carried from A. to B., and are lost, the owner isentitled to recover the value of the goods at B.; and that value is the price for which they can begot to, not at, B. Rice v. Barendale, 7 H. & N.

96; 30 L. J., Ex. 371.

—— Sub-Sale.]—In an action for damages for non-delivery of goods, where the same class of goods is not obtainable in the market at the place of delivery, the price on a sub-sale by a purchaser is evidence of the value of the goods, and the amount by which such price on sub-sale exceeds the contract price may be recovered asdamages, although the seller at the time of the contract had no notice of the sub-sale. Strond v. Austin, 1 Cab. & E. 119.

A purchaser bought champagne lying at a wharf at 14s. per dozen, and resold it at 24s. tothe captain of a ship about to leave England, The wharfinger refused to deliver the wine, and the purchaser was mable to fulfil his contract, champagne of a similar quality not being pro-curable in the market. The wharfinger had no-knowledge of the sale, or of the purpose for which the purchaser required delivery of the champagne. In an action for the conversion: -Held, that he was entitled, as damages, to the price at which he had sold the champagne.

France v. Gaudet, 40 L. J., Q. B. 121; L. R. 6 Q. B. 199; 19 W. R. 622.

## c. Market Value.

Subsequent Fall in Price.]-In an action the full amount of the difference between the against a collector of customs, for refusing to contract price and that which they obtained, sign a bill of entry for landing a cargo of foreign wheat, on which no duty was payable, the proper compelled by their mortgagor to replace the measure of damages is the amount of loss sus-tained by the plaintiff, by reason of a subsequent fall in the price of wheat. Barrow v. Arnaud, 8 Q. B. 595; 10 Jur. 313—Ex. Ch.

At what Time-Delay in Delivery by Request.]—When a vendor of goods, by contract in writing, at the request of the purchaser, who is at the time fixed for delivery unable to take and pay for the goods, withholds delivery till a later date on a parol promise to the purchaser to that effect:—Held, that, if at the expiration of the later date so fixed the purchaser refuses to accept delivery, the vendor may sue for damages as for a breach at the time fixed for delivery by the original contract, and is entitled to damages according to the market price at the later date verbally fixed for the purchaser's convenience. Hirkman v. Haynes, 44 L. J., C. P. 358; L. R. 10 C. P. 598; 32 L. T. 873; 23 W. R. 872.

Delay in Purchasing at Request.]-After the breach of an agreement to deliver goods, the buyer, at the seller's request, waited several months before bnying other goods in the place of those contracted for :- Held, that the true measure of damages was the difference between the contract price and the price of the substituted goods, though this price was greater than that of such goods when the contract was first broken. Ogle v. Vane (Lord), 9 B. & S. 182; 37 L. J., Q. B. 77; L. R. 3 Q. B. 272; 16 W. R. 463 -Ex. Ch.

- At Time of Breach. ]-A defendant sold a quantity of naphtha to the plaintiff at 2s. 2d. a gallon by sample; on the faith of this contract the plaintiff next day resold the naphtha, by sample, to H, at 2s. 6d. a gallon. The defendant failed to deliver the naphtha according to his agreement. The market price of naphtha rose to 5s. 9d. a gallon, so that the plaintiff was unable to perform his sub-contract with H. except at a greatly increased price. On a writ of inquiry to assess damages, the jary found a verdict for the plaintiff for 437l. 10s., being the full difference between 2s. 2d. and 5s. 9d. a gallon:—Held, that the damages were rightly assessed, and that the proper measure of damage is the difference between the contract price and the market price at the time of the breach. Josling v. Irvine, 6 H. & N. 512; 30 L. J., Ex. 78; 4 L. T. 251.

An officer in the army, employed in the civil service of the government of Australia, received a promise from the governor of the colony of a grant of certain land, upon condition that he settled in the colony. He retired from the army, and settled in the colony. His claim having been from time to time deferred, he took proceedings under a local act, enabling him, against the government of the colony, to obtain compensation :- Held, that he was cutitled to compensation, measured by the value of the specific land at the time of the commencement of the suit.

Robertson v. Dumarcsq, 10 L. T. 110; 13 W. R. 280.

A banking company who were mortgagees of Spanish bonds, employed the defendant to raise money upon them by deposit in his own name : the party with whom the defendant deposited them called on the defendant for repayment, and, on default, sold the bonds, with the concurrence of the defendant, without the knowledge of the

was answerable to the company for the market price of the bonds at the time of the actual sale, and that he was not answerable for the value of the bonds at any other time. Gordon v. Pum. 3 Hare, 223.

Carrier's Liability, though no Notice. |-- In an action against a carrier for non-delivery, according to contract, of goods of a marketable kind intended for sale, the jury may give as damages the difference between the market value on the day the goods ought to have been brought to market, and the day on which they are afterwards brought to market, although no notice is given to the carrier that the goods were intended for market; for such damages are the natural and immediate consequence of the act. Collurd v. S. E. Ry., 7 H. & N. 79; 30 L. J., Ex. 393; 7 Jur. (N.S.) 950; 4 L. T. 410; 9 W. R. 697. A. sent hops in bags from Kent to London by

a railway, for the purpose of delivering to the vendee, a hop dealer. The hops were detained by the company several days, and received some damage from water, and the vendee refused to accept them. A. dried the hops, and when fit for sale the price had fallen in value. Independently of that, the stained portion of the hops deteriorated the marketable value of the whole, although for the purpose of brewing the value of the bulk was unaffected :- Held, that A, was entitled to recover, as damages from the company, the difference in price of the amount of deterioration in the market value, and was not confined to the value of the parts actually damaged, although the company had no notice that the hops were sent for the purpose of sale, and not for use. Ib.

The damages recoverable for breach of a contract to carry goods must be such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract, as what would be the probable result of a breach of it. Hurne v. Midland Ry., 42 L. J., C. P. 59; L. R. 8 C. P. 131; 28 L. T. 312; 21 W. R. 481-Ex. Ch.

Where goods are being earried by sea, and owing to delay in delivery the market has fallen before their arrival, damages for such depreciation cannot be recovered. The Parana, 2 P. D. 118; 36 L. T. 388; 25 W. R. 596-C. A.

And see Carriers—Shipping.

- Loss of Market. ]-The defendants advertised that they would convey fish from London to Bonlogne at certain through rates by their special tidal train and passenger boat, "wind, weather and tide permitting." A consignment of fish intended for the Paris market (of which fact the defendants had notice) was delivered by the plaintiffs in London to the defendants, to be forwarded to Boulogue. Owing to rough weather, it was not put on board the passenger boat at Folkestone, but was sent on by a cargo boat, which arrived at Boulogne too late for the train to Paris. It was delayed at Boulogue for twenty-four hours, and deteriorated, and was put up for sale in the Paris market a day late :-Held, that there was no absolute undertaking to carry the fish by any particular train and boat, and that, if the defendants under the circumstances had used all reasonable care to deliver the fish company, and paid the balance of the proceeds with the utmost possible despatch, they had disto the defendant. The company was afterwards charged their obligation, and that damages could

Hawes v. S. E. Ry., 54 L. J., Q. B. 174; 52 L. T. 5 Tyr. 697; 4 L. J., Ex. 218. .514.

A ship having been damaged by collision with another ship, the owners of cargo on the former claimed damages from the owners of the latter ship. The cargo-owners claimed, inter alia, for damages in respect of the loss of market in consequence of a portion of the cargo having been delayed in its arrival at the port of destination : -Held, that loss of market was too remote a consequence to be considered as an element of damage, and that there was no difference in the principles as to remoteness of damage, whether the damages are claimed in contract or in tort. The Notting Hill, 53 L. J., P. 56; 9 P. D. 105; 51 L. T. 66; 32 W. R. 764; 5 Asp. M. C. 241-C. A.

The defendant, the master of the steamer "Carbis Bay," lying at Wilmington, signed bills of lading for 400 bales of cotton "shipped on board the 'Carbis Bay'" for Liverpool. In consequence of insufficient room only 165 bales could be shipped, and the defendant directed the remaining 235 bales to be shipped on board the steamer "Wylo," then lying in the same port, bound for Liverpool. The "Carbis Bay" arrived at Liverpool on the 26th of October, and the "Wylo" on the 29th of October, and both cargoes were delivered to the plaintiffs, who were in-dersees of the bills of lading. Between the 26th and the 29th of October a fall in the price of cotton took place, and the plaintiffs sucd the defendant for the loss thereby occasioned:— Held, that on the 26th of October the plaintiffs had a right of action against the defendant for non-delivery, that the measure of damages was the market price of cotton on that day, and that the subsequent delivery of the cotton ex " Wylo" could only be taken into account in reduction of damages, Smith v. Tregarthen, 56 L. J., Q. B. 437; 57 L. T. 58; 35 W. R. 665; 6 Asp. M. C.

Where Goods Previously Paid for. ]-The measure of damages for the non-delivery of goods, paid for at the time of purchase, is the difference between that price and the highest price the goods have attained up to the time of trial. Elliot v. Hughes, 3 F. & F. 387.

No Special Damage.]—In an action for a breach of contract, in not delivering a quantity of linseed pursuant to a contract of sale, it appeared that the plaintiff, pursuant to contract, had paid part of the purchase-money to the vendor in advance; that the defendant at the time when the linseed ought to have been delivered, had notice of his inability to perform the contract, but the money was not returned until after the action was commenced, when the amount was paid into court, with interest up to the time it was so paid in, as a consideration for a commission to examine witnesses abroad, and was only obtained out of court by the plaintiff a short time before the trial :- Held, that in estimating the damages the plaintiff was not entitled to take the price of linseed at the time of the trial as a criterion; and not having proved that he had sustained any special damage from the non-delivery of the seed and the non-return of the money, that the repayment of the money advanced, with simple interest upon it, and payment with case, with simple interest upon n and payment between the price he was to have poor to the difference between the contract price and and the market price when he was entitled to the price of the linseed at the time when it ought them. Chinery v. Viall, 5 H. & N. 288; 29 L. J., to have been delivered, was that to which he was Ex. 180; 2 L. T. 466; 8 W. R. 629.

not be given for the loss of the market in Paris. entitled. Startup v. Cortazzi, 2 C. M. & R. 165;

Payment by Bill subsequently Dishonoured. ]-Where, in a contract of sale, there are specified days for the delivery of the goods, and payment is to be made by bill, if the bill is given but dishonoured before the goods are delivered, the parties are placed in the same position as if no bill had been given, or as if the contract had been for ready money; and, therefore, if the vendor is sued by the vendee, after the dishonour of the bill, for non-delivery of the goods, the measure of damages is not the full contract price, but the difference between the contract and the market price of the goods at the time of the breach of contract to deliver. Valpy v. Oakley, 16 Q. B. 941; 20 L. J., Q. B. 380; 16 Jur. 38

— Parties.]—On 30th October, 1857, A. agreed with B. to buy of him 100 parcels of iron of a named quality, and 300 parcels of iron of another quality, to be delivered immediately, and paid for by a bill of exchange at four months' date, down. No specific from was appropriated for the purposes of the contract. A. gave the bill, which, on the 31st October, 1857, B. indorsed to his bankers, who continued the holders till the bill fell due. B. duly delivered the 100 parcels of iron, and gave A. a delivery order for the 300 parcels, which A., on 19th November, 1857, indorsed to his bankers, H. & Co., and a few days afterwards gave notice of the indorsement. H. & Co. presented the order at the works where the iron was lying, on 19th November, 1857, when delivery of it was refused. On 17th November, 1857, B. suspended payment, and on 10th February, 1858, A. was adjudicated a bankrupt. On 5th March, 1858, the bill given by A. fell due, and was dishonoured. The banking company, though they claimed to be creditors of A, for the amount of the bill, did not prove against his estate, nor had A. paid any part of the amount. B., however, had paid them a the amount. B., however, had paid them a composition of 8s. in the pound upon the amount of the bill:—Held, in an action for the non-delivery of the 300 parcels of iron, that A. was entitled to recover only nominal damages, and that the fact that H. & Co. were the real plaintiffs, suing in A.'s name, could not be taken into consideration as affecting the damages, inasmuch as H. & Co. could have no greater right to recover than A. himself had. Griffiths v. Perry, 1 El. & El. 680; 28 L. J., Q. B. 204; 5 Jnr. (N.S.)

Conversion—Re-sale.]—The plaintiff having contracted with the defendant to buy of him a lot of sheep at a certain price (less than the market price), to be paid for on delivery, took away five, for which he paid in a day or two, and agreed to take the rest in a fortnight. Within that time, before any application for the remainder, the defendant sent them away and resold them. The vendee then, within the fortnight, applied for half of them, offering to pay for them; and finding that they were resold, sued the vendor on the contract, and also in trover :-Held, that he was not entitled, on either count, to recover the full value, but only the difference between the price he was to have paid for them, of damages is the difference between the contract price and the market price at the time of the breach. Pawell v. Jessapp, 18 C. B. 336.
In an action for not delivering railway shares,

the measure of damages is the difference between the price of the shares at the time of the contract, and the day on which it is broken, allowing the purchaser a reasonable time, however, to purchase other shares. Shaw v. Holland, 15 M. & W. 136; 4 Railw. Cas. 150; 15 L. J., Ex.

87: 10 Jur.-100.

In an action against a public company for improperly withholding shares after tender of the sum due for calls and interest, the proper measure of damages is the value of the shares at the market price of the day of the tender, deducting the amount of calls and interest. Van Diemen's Land Co. v. Cocherell, 1 C. B. (N.S.) 732-Ex. Ch.

Deposit of Shares.]—Where the defendant, after signing an acknowledgment that scrip had been lodged in his hands by the plaintiff, and was to be redelivered to him on request, wrongfully detained the scrip for a considerable time, so that its market value had been much diminished, and did not redeliver it until after action brought :- Held, that the plaintiff was entitled to more than nominal damages. Archer v. Williams, 2 Car. & K. 26. See S. C., 5 C. B. 318; 17 L. J., C. P. 82.

But where the plaintiff suffered loss by the detention in this, that he was thereby deprived of the means of paying up his deposits, which would have entitled him to claim an allotment of other shares :-Held, that the damage was too

remote. Ib.

The true measure of damages in an action for not redelivering shares lent upon a contract to return them on a given day, is not the market price at the time of the breach, but the market price at the time of the trial. Owen v. Routh, 14 C. B. 327; 2 C. L. R. 365; 23 L. J., C. P. 105; 18 Jur. 356.

And see SALE OF GOODS.

#### d. Where Sub-Contracts or Special Purpose.

Loss of Profits. ]-In an action for damages for breach of contract in the sale of goods, the measure of damages is not merely the amount of the difference between the contract price and the price at which such goods could be bought at the moment when the contract was broken, but likewise a compensation for such profit as might have been made by the purchaser had the contract been duly performed. Dunlop v. Higgins, 1 H. L. Cas. 381; 12 Jur. 295.

The ordinary rule as to the measure of damages in case of breach of contract to accept a manufactured article, applies equally in the case of an unmanufactured article. Where, therefore, in the case of an anmanufactured article, there is a market price at the date of breach, the profits that would have arisen from the contract, and the losses sustained through its breach, cannot be considered as elements of the damage. Tredegar

Iron and Coal Co. v. Gielgud, 1 Cab. & E. 27. The defendant made a profit by collecting messages, and transmitting them by telegraph to America. He received a message from the the buyer was buying for the purpose of fulfilling plaintiff for transmission to their correspondent

On Sale of Shares.]—Upon the breach of a the message was in cipher, wholly unintelligible contract for the sale of shares, the proper measure to any but the plaintiff and his correspondent at New York. Through the defendant's negligence the message was not sent, and the plaintiff thereby lost profits which he would have made-had the order been executed:—Held, in an action for such negligence, that the plaintiff could not recover more than nominal damages. Sunders v. Stuart, 45 L. J., C. P. 682; 1 C. P. D. 326; 35 L. T. 870; 24 W. R. 949.

> Penalty-General Loss of Trade. ]-The defendant sold to the plaintiff adulterated butter, with a warranty that the substance was butter. The plaintiff retailed the same to customers, and, being prosecuted under the Margarine Act, 1887, was fined 31. In an action for breach of warranty :- Held, that the plaintiff could not recover damages for general loss of trade profits, whether consequent on such conviction or on the resales to customers of the adulterated substance, nor could recover as damages the amount of thefine imposed. Fitzgerald v. Leonard, 32 L. R. Ir. 675.

> Notice of Purpose for which Goods sent. ]-The plaintiff delivered a parcel at a receiving office of the defendants in London, addressed to "W. H. M., Stand 23, Show Ground, Lichfield, Staffordshire; van train." Nothing was said by the person who delivered the parcel at the receiving office as to the purpose for which it was being sent to Lichfield, or to draw attention to the label :—Held, that the label was sufficient notice to the defendants that the goods were being sent to a show, and that the plaintiffs were entitled to recover damages for loss of profits and expenses incurred by the goods being delayed, and not delivered at Liehfield in time for the show. Jameson v. Midland Ry., 50 L. T.

A parcel of samples was delivered to the defendants, a railway company, to be forwarded to the plaintiffs. By the negligence of the defendants, who had notice that the parcel contained samples, it was delayed on the way until the season at which the samples could be used for procuring orders had elapsed, and they had in consequence become valueless. The plaintiffs could not have procured similar samples in the market. In an action for the non-delivery in a reasonable time:—Held, that the plaintiffs were entitled to recover as damages the value to them of the samples at the time when they should have been delivered. Schulzev. G. E. Ry., 56 L. J., Q. B. 442; 19 Q. B. D. 30; 57 L. T. 438; 35 W. R. 683—C. A.

Loss of Profits-Contract to Re-sell. |- In an action for breach of contract to deliver goods it was shown that the goods were not procurable in the market, that the plaintiff had entered into a contract of sub-sale, which in consequence of the non-delivery he could not perform, that such contract was not known to the defendant at the time of sale, but that he knew that the goods had been purchased by the plaintiff for re-sale :- Held, that the plaintiff was not entitled to recover damages for loss of profit on the re-sale. Borries v. Hutchinson, infra, distinguished. Thol v. Henderson, 8 Q. B. D. 457; 46 L. T. 483; 46 J. P. 422.

Where a vender sold goods with notice that a contract which he had made with a merchant at New York, containing an order for goods, but abroad; and part of the goods was not delivered

at all, while the part which was delivered was their hands, but no further information. The delayed till after the appointed time :- Held, shoes were not delivered by the company till the in an action against the seller, that the buyer was entitled to recover as damages the profit which he would have made from his sub-contract, Borries v. Hutchinson, 18 C. B. (N.S.) 445: 34 L. J., C. P. 169; 11 Jur. (N.S.) 267; 11 L. T. 771; 13 W. R. 386.

- Contract to deliver in Two Months-Sub-Contract for Supply as soon as Possible-Notice.] -The plaintiff contracted with J. to manufacture a pile-driving machine within two months. thre a passurrum machine within two months. Shortly afterwards the defendant contracted with the plaintiff to make a portion of that machine "as soon as possible." The terms of the plaintiff's contract with I, were known to The defendant did not fulfil his the detendant. contract with the plaintiff until after the expirathe plaintiff and J., and J. refused to accept the machine:—Held, that the contract between the plaintiff and the defendant was to be performed within a reasonable time, to be measured, not by the particular existing staff and appliances of the defendant's business, but by the time in which a reasonably diligent manufacturer of the same class as the defendant would take in carrying out the contract. Hydraulic Engineering Co. v. McHaffie, 4 Q. B. D. 670; 27 W. R. 221— C. A.

Held, also, that the defendant was liable for the damages and loss of profit flowing to the plaintiff from the breach of his contract with J. Th. See Cory v. Thames Iromcorks Co., and British Columbia Saw Mill Co. v. Nettleship, post, cols. 289, 299.

Non-Delivery.]—On a contract to sell cotton of a certain quality at a certain price, to be delivered at a future time, the measure of damages for non-delivery is the difference between the contract price and the market price at the time limited for the delivery; and the buyer cannot recover for the loss of profit which he would have made by carrying out a resale at a higher price made in the interval between the contract and the time for delivery. Williams v. Reynolds, 6 B. & S. 495; 34 L. J., Q. B. 221;

11 Jur. (N.S.) 973; 12 L. T. 728; 13 W. R. 940. The measure of damages in the case of a breach of a contract to deliver goods at a specified time, is, the difference between the contract price and the market price at the time of the breach of contract, or the price for which the vendee has sold; but the latter cannot recover, as special damage, the loss of anticipated profits to be made by his vendees. Peterson v. Ayre, 13 C. B. 353.

- Notice of Sub-Contract. ]-The plaintiffs in the beginning of 1871, contracted to supply, at 4s. a pair, a large quantity of shoes to H. & Co., who required them to fulfil a contract for the supply of the French army during the war. The last day for delivery by the plaintiffs was the 3rd of February, 1872, and all shoes not so delivered would be thrown back on the plaintiffs' hands. The plaintiffs delivered a certain quantity of shoes to the Midland Railway Company at Kettering, consigned to H. & Co., in London, in time to be delivered on that day. Notice was given to the station-master that the plaintiffs were under contract to deliver on that day, and if not so delivered the shoes would be thrown on and the goods were sent by goods train at the

morning of the next day, and were rejected. The plaintiffs, using their utmost endeavours, could only sell the rejected shoes at 2x. 9d. a pair, and in consequence of the cessation of the war the consignees, but for their French contract, could not have sold them at a higher price even if duly received. The company paid into court 20%, which was sufficient to cover the incidental expenses and the ordinary damages to which the plaintiffs would be entitled, but the latter claimed to be entitled to recover the difference between 4s, and 2s, 9d, a pair :- Held, that they were not entitled to recover the difference. Horne v. Midland Ry., 42 L. J., C. P. 59; L. R. 8 C. P. 131; 28 L. T. 312; 21 W. R. 481— Ex. Ch.

A ship belonging to the defendant was taken by the plaintiff for the purpose of carrying coals to the coast of Africa. It was known by the defendant that Admiralty contracts were out for sending coals to this coast, and that the bills of lading were to be sent in by a certain day. The defendant, having failed to perform his contract: -Held, that he was liable in damages for the expenses incurred by the plaintiff in consequence of such failure in the performance of his con-tract with the Admiralty, the notice of that contract being sufficient to render him in law so liable. Prior v. Wilson, I L. T. 549; 8 W. R.

The plaintiff sent goods from Manchester by a railway company to his traveller at Cardiff, the delivery of the goods was, through the negligence of the company, delayed until after the traveller had left Cardiff, and the plaintiff, in consequence, lost the profits which he would have derived from a sale at Cardiff -Held, that in the absence of notice to the company of the object for which the goods were sent, the plaintiff could not recover from them such profits as damages for the delay. G. W. Ry. v. Redmayne, 35 L. J., C. P. 123; L. R. 1 C. P. 329; 12 Jur. (N.S.)

A can manufacturer, at Cockermouth, bought cloth at Huddersfield for the purpose of making it up into caps, which he was in the habit of selling through the country by means of travellers. The cloth was delivered to a railway company on the 15th of March, to be carried by their railway to Maryport; but, through the negligence of their servants it was sent to Bull Gill station, and did not reach the manufacturer's hands until the 12th of April, which was too late for his purposes. In an action against the company for not delivering the cloth within a reasonable time:—Held, that he was entitled to recover as damages the amount of the diminution in value of the cloth by reason of the season for making up and selling the caps having passed, but not for the loss of anticipated profits, or the expenses of travellers despatched on journeys rendered fruitless by reason of the inability to Femiliary 10 execute truthess by reason of the harding to execute their orders. Wilson v. Lancashire and Yorkshire Ry., 9 C. B. (N.S.) 632; 30 L. J., C. P. 232; 7 Jur. (N.S.) 232; 3 L. T. 859; 9 W. R.

What is sufficient Notice of a Sub-Contract.]

On the 6th June, C. delivered at a booking office in London, samples to be carried by the Midland Railway Company to Chesterfield; no directions were given as to the mode of carriage,

ordinary rate. The samples were contained in a box, on the top of which was a special printed label in the following terms, "Traveller's goods. Deliver immediately," and underneath was written the address of the consignee. The goods not being delivered before the evening of the 8th of June, although they might reasonably have been delivered on the 7th, C. sued the company to recover one guinea paid by them to their traveller for his expenses at the usual rate of one gninea a day, for which time he was delayed at hesterfield by the non-receipt of the goods :-Held, that there was no special contract between the parties, nor was the merely labelling the box as "Traveller's goods" sufficient notice to the company of the purpose for which the goods were being sent, so as to make that purpose common knowledge to both parties, or in any way to affect the company with special notice of the facts so as to make particular damages recoverable against them. Ry., 38 L. T. 226. Candy v. Midland

The plaintiff, under an alleged agreement that certain shares which he held in a company should be taken by one L. in payment of a debt should be taken by one L. In payment of a debt due from him to L., if such shares were regis-tered, executed a valid transfer of the same and handed the certificates to L. The plinitiff applied to the company under s. 26 of the Com-panies Act, 1867, to register the transfer, but they refused to do so upon the ground that he was inducted to them. The question of his in-debtechess was decided in his favour in an action between him and the company, and the transfer was subsequently registered. The com-pany had no notice of the alleged agreement between the plaintiff and L., the transfer being expressed to have been executed for a nominal sum. The market value of the shares having transfer was executed and that at which it was actually registered, the plaintiff sought to recover damages from the company for their wrongful refusal to register the transfer :- Held, that the plaintiff was only entitled to recover naminal damages, as the company had received no notice of the alleged agreement between him and L., and also because he had suffered no damage either in respect of calls or otherwise from the refusal of the company to register the transfer. Skinner v. City of London Marine Insurance Corporation, 54 L. J., Q. B. 437; 14 Q. B. D. 882; 53 L. T. 191; 33 W. R. 628—C. A.

Notice of Special Circumstances. ]-By the terms of the contract the defendants agreed with the plaintiffs to have a certain ship ready on a certain date, in the South West India Docks, to receive a cargo of tiles for shipment to Australia. The ship was not ready on the agreed day, and the tiles being kept waiting in the trucks in which the plaintiffs had had them brought into the docks, the plaintiffs were obliged to pay the railway company, the owners of the trucks, a certain sum for the detention, which sum they now sought to recover from the defendants as damages for their breach of contract. If the plaintiffs had followed the ordinary course of business at the docks, they would have employed the dock company to bring the files into the docks up to the ship's side, and the dock company's scale of charges, which were slightly higher than the railway company's, would have included storage of the tiles at the docks for

ordinary rate. The samples were contained in a during which the trucks were actually detained was less than three weeks:—Held, that the de-fendants had no right to assume that the plaintiffs would follow the ordinary course of business in the mode of bringing their goods into the docks, and that the plaintiffs were entitled to deliver the tiles in any manner they pleased, and that the detention of the trucks was the natural and ordinary consequence of the defendants' breach of contract. Welch v. Anderson, 61 L. J., Q. B. 167; 66 L. T. 442; 7 Asp. M. C. 177—

> Non-Acceptance—Sub-Contract.]—A declaraplaintiff agreed to supply to the defendants 3,900 tons of cast-iron chairs in certain quantities ner month, from February, 1847, to May, 1848, pay-ments to be made by the defendants a month after delivery, that although the defendants accepted a portion of the chairs, and although the plaintiff was ready and willing to perform the contract until the refusal and discharge of the defendants, yet they refused to accept or receive the residue of the chairs, and discharged the plaintiff from supplying the residue, and from the further performance of the contract. The plaintiff had contracted with other parties for the supply of some of the chairs at a price rather above the average price to be paid to him by the defendants, and was obliged to pay 500%, to get off his sub-contract, and he had also entered into arrangements with ironfounders for the supply of iron, and had built a foundry for the manufacture of the chairs :- Held, that these in assessing the damages. Cort v. Ambergate Ry., 17 Q. B. 127; 20 L. J., Q. B. 460; 15 Jur. 877. matters were properly taken into consideration

> Sub-Contract-Written Agreement not mentioning.]—The plaintiff having received an order from P. to supply from 150 lbs, to 200 lbs, of wound cotton daily, verbally agreed with the defendant that the defendant should undertake the winding of it, informing the defendant as was the fact, that the plaintiff had taken upon himself the consequences of late delivery, if any, to P., and obtaining from the defendant the assurance that he, the plaintiff, might rely on him. Afterwards, and on the day of the interview, the plaintiff sent the defendant a written order for the cotton, on the express condition that the same should be delivered daily, but containing no notice or stipulation as to the subtaining no notice or stipulation as to the sub-contract of the plaintiff with P. The defendant failing to deliver regularly to the plaintiff, and the plaintiff to P., the result was that P. daimed, and the plaintiff paid to P. 3000, by way of reinbursing P, for his loss upon re-sale of the goods which P.'s customers had refused to accept, as having been delivered late :- Held, that the plaintiff might recover the 3001, from the defendant as damages for the breach of contract to deliver the cotton daily. Sawdon v. Andrew, 30 L. T. 23.

Purchase for Specific Purpose. ]-On breach of contract by the seller to deliver an article obviously valueless if used for the purpose for which such an article is ordinarily used, the buyer is entitled to recover damages based on the value of the article if used for the specific purpose for which the buyer bought it, although such specific purpose were unknown to the seller three weeks without further charge. The time at the time of the sale. Such value may be ascertained by considering the net annual profits to be obtained from such specific use of the article. De Mattos v. Great Eastern Steamship Co., 1 Cab. & E. 489.

Particular Purpose-Part of Mill. |--When two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the con-templation of both parties at the time they made the contract, as the probable result of the breach of it. Hadley v. Baxendale, 9 Ex. 341; 2 C. L. R. 517; 23 L. J., Ex. 179; 18 Jur. 358; 2 W. R. 302.

When a contract is made under special circumstances, and those circumstances are communicated by one of the contracting parties to the other, the damages resulting from the breach of the contract which they would reasonably contemplate are, the amount of injury which would ordinarily follow from a breach of contract under those special circumstances. But if the special eircumstances are unknown to the party breaking the contract, he at the most can only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. Ih.

A carrier contracted with a miller to carry two pieces of iron forming the broken shaft of a mill, and deliver the same to an artificer to serve as a model for a new one. A shaft being indispensable to the working of the mill, and the miller not having another, the mill necessarily remained idle until the new shaft could be supplied, but of this the carrier was not aware. He did not. however, deliver the iron to the artificer within a reasonable time, and, a delay having con-sequently arisen in the delivery of the new shaft, was sned by the miller for a breach of his agreewas succest, the inner for a order of ms agree-ment:—Held, that he could not recover as damages the loss of profits incurred by the stop-page of the milk. Ib. See Hystraulic Engineer-ing Co. v. McHassie, ante, col. 283.

- Threshing Machine, -A. contracted to deliver to B., a farmer, a steam threshing machine within three weeks from the 24th of July, but did not do so till the 11th of September. B., as A. well knew, was in the habit of threshing out his wheat in the field, and sending it off at once to the market. In consequence of the nondelivery of the machine it became necessary to carry the wheat home and to stack it. The wheat was damaged by exposure to the weather, so that it was necessary to dry it in a kiln, and the quality was much deteriorated, and before it could be sold the market price had fallen.

A. knew that the machine was wanted for immediate use at the time appointed for the delivery, but he led B. on from day to day to believe that it would be shortly delivered :-Held, in an action for the non-delivery of the machine, that B. was entitled to recover damages in respect of the deterioration of the quality of wheat, in respect of the expenses of carrying and

Held, also, that B was not entitled to damages in respect of the fall in the market price. Ib.

A. contracted with B. to repair a steam threshing machine, undertaking to get it ready for harvest time. A new fire-box being needed, C. engaged to make one for A. in about a fortnight. but failed in the performance of his contract, and A. (who had paid C. for the article) was obliged to get one made elsewhere at an additional cost ; but this he did not do in time to enable him to perform his contract with B., although there was imple time for him to have done so after C. had broken his contract, whereupon B. sued A., who paid him 201, to settle the action :- Held, that A, was entitled to recover from C, the sum he had paid him for the fire-box, and the extra cost incurred in getting another; but that the compensation paid by A, to B, was not such a damage pension pant by A. 10 b. was no such a training as might fairly and reasonably be considered either as arising naturally from C.'s breach of contract, or such as might reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract, as the probable result of the breach of it. Portmun v. Middleton, 4 C. B. (N.S.) 322; 27 L. J., C. P. 231; 4 Jur. (N.S.) 689; 6 W. R. 598.

- Agricultural Show.]-The plaintiff was a dealer in cattle-spice and was in the habit of going about to agricultural shows exhibiting samples of his goods. He so exhibited them at Birmingham, and desiring to exhibit them at Newcastle, he had them delivered to an agent of a railway company who had a special office on the show-ground at Birmingham for the purpose of forwarding goods that had been exhibited.

The company's clerk supplied a blank consignment note. This plaintiff's agent filled up, describing the goods as sundries, and the address us Neweastle show-ground, and indorsing it, "must be delivered Monday certain," A conversation also took place with reference to the vital importance of having the goods at Newcastle on Monday. The goods not having been delivered at Newcastle on Monday, nor in time for the show, the plaintiff, who had gone there to meet them, such the railway company for the non-delivery, claiming damages for his expenses and loss of time or profit. The company paid 101. into court to cover expenses, and a verdict was entered for 201. additional in respect of loss of time or profit :-Held, that the verdict was right, the surrounding circumstances justifying the inference that the elerk knew the purpose for which the goods were wanted, and made that the basis of the contract so as to render the company responsible for the damage naturally flowing from the non-delivery. Simpson v. L. & N. W. Ry., 45 L. J., Q. B. 182; 1 Q. B. D. 274; 33 L. T. 805; 24 W. R. 294.

Held, also, that in the case of a man whose business it was to attend agricultural shows and make profit thereby, the profit which would have been made at a particular show is not too speeulative to form the subject of damages. Ib.

Prize Competition. ]-A prize had been offered for the best plan and model of a machine for loading colliers and barges, and plans and models intended for the competition were to be sent by a certain day; the plaintiff sent a plan and model accordingly by a railway, but through negligence they did not arrive at their destination until after stacking it, and in respect of the expense of kiln-drying. Smeet v. Ford, I. E. & El. 602; 2 the appointed day:—Semble, the proper measure L. J., Q. B. 178; 5 Jun. (x.s.) 291; 7 W. R. 208. of damages in such case is the value of labour as the latter is too remote a ground for damages.

Watson v. Ambergate Ry., 15 Jur. 448.

Intentions as to User-Supposition of Seller. When, on the sale of a chattel, the buyer intends it for a special purpose, but the seller supposes it is for another and more obvious purpose, the buyer can recover, as damages for the nondelivery according to the contract, the loss of profit which might have been made from the purpose supposed by the seller, provided the buyer has actually sustained damages to that or The second of th

A, agreed to sell and deliver to B, within a certain time the hull of a floating boom derrick; but A. did not deliver it till six months after the specified time. B., who was a large coal-mer-chant in the port of London, purchased the hull in order to place in it, as he in fact did, large hydraulic eranes and machinery for the purpose of transhipping his coals direct from colliers into barges. The hull was the first vessel of the kind ever built, and B.'s special purpose was entirely novel, and was unknown to A. A. believed that B. was parchasing the hull for the purpose of using her as a coal store. If B. had been prevented using the hull for his special purpose, he would either have sold her to be used in the hulk trade, as a coal store, or, if unable to do so, would have used her himself as a store, and this was the most obvious use to which such a vessel was capable of being applied by persons in the coal trade; but the hulk trade is a distinct branch of the coal trade, and was no part of his business. Had the hull been purchased for this purpose, the delay in the delivery would have occasioned loss to the amount of 4201. B. actually suffered damage to a much larger amount from not having the hull ready for his special purpose at the time fixed for the delivery:—Held, that B, was entitled to the 4201, as the damages which A, must be taken to have contemplated would result from the nonperformance of his contract. Ib.

A company of merchants ordered, and a company of distillers agreed to furnish, a eargo of whisky to be coloured like rum for the African market. It was stipulated that the colouring matter should be harmless. The stipulation was disregarded. The whisky produced effects alarming and startling, though not shewn to be actually deleterions. It consequently proved unmarketable:—Held, that the distillers were liable in damages. Macfarlane v. Taylor, L. R. 1 H. L., Sc. 245; 18 W. R. 214.

Repairing Ship. ]-A shipbuilding company, at the time of being wound up, was under a contract with a steam-packet company to do certain repairs to a ship within a given time, and under orders obtained in the matter of the winding-up the official liquidator was authorised to complete the repairs, the rights of all parties being re-The repairs not having been completed within the stipulated time, leave was given to the steam-packet company to go in under the the steam-packet company to go in under the winding-up order and prove in respect of any damage that might have accrued from the delay:—Held, that the measure of damages was the net profits which the steam packet company might have made if the contract had been com-

and materials expended in making the plan and pleted in time, but that the company was not model, and not the chance of obtaining the prize, entitled to prove for damages arising from imperfect workmanship during the delay. Trent and Humber Shipbuilding Co., In re, Cambrian Steam Packet Co., Ex parte, 38 L. J., Ch. 38; L. R. 4 Ch. 112; 19 L. T. 465; 17 W. R. 181.

In an action against the defendants for breach of contract in improperly repairing a sea-going steam vessel, the plaintiff claimed damages for the loss sustained by the detention of the vessel by reason of such improper repairs : -Held, that he was entitled to do so, the detention of the vessel being the probable result of the breach of contract. Wilson v. General Iron Serew Collier Co., 47 L. J., Q. B. 239; 37 L. T. 789.

In an action for non-delivery of a ship at the time contracted for, the jury gave as damages the difference between the profits she would have earned if delivered at that time, when freights were high, and the profits she did carn when delivered seven months later, when freights were low. That being the measure of damages agreed to at the trial, the court refused to d agreed to at the trial, the court retused to active the the veriliet. Fletcher v. Taylenr, 17 C. B. 21; 25 L. J., C. P. 65. See Wood v. Bell., 5 El. & Bl. 772; 25 L. J., Q. B. 148; 2 Jur. (N.S.) 349; and S. C., 6 El. & Bl. 355; 25 L. J., Q. B. 321; 2 Jur. (N.S.) 664 : 4 W. R. 602-Ex. Ch.

Loss of Part of Goods Shipped. |- In the absence of notice of the consequences which will ensue from a part of the goods shipped being lost, and of any contract express or implied to be answerable for such consequences, the shipper of such goods, on a part being lost, is, over and beyond the sum necessary to replace it, only entitled as for the delay to receive interest on the said sum till payment, even though the rest of the goods has been rendered useless till the or the goods has been reintered usedess in turn portion lost was replaced. British Columbia and Iancouver's Island Spar, Lumber and Saw Mill Co. v. Nettleship, 37 L. J., O. P. 235; L. R. 3 C. P. 499; 18 L. T. 604; 16 W. R. 1046.

Liability of Commission Agent for not Consigning Goods of Description Ordered. |- In an action against a commission agent for not consigning goods of the description ordered :- Held, that the true measure of damages was not the difference between the value of the goods ordered and that of those shipped, but the loss actually sustained by the plaintiff in consequence of the goods not being of the description ordered. Cusatbaylou v. Gibbs, 52 L. J., Q. B. 538; 11 Q. B. D. 797; 48 L. T. 850; 32 W. R. 138-C. A.

For not Collecting or Returning Bills-Alternative Contract.]—A declaration alleged that the plaintiff having shipped goods to a place abroad drew against the shipment, and intrusted the drafts to the defendant for presentment, for reward to the defendant, on the terms that he should return the drafts if not paid after acceptance to the plaintiff, or pay the plaintiff the amount of them; that the defendant did not return the drafts nor pay the amount of them :-Held (per Keating, Brett and Grove, JJ., Bovill, C.J., dissentiente), that the damages on the contract alleged in the declaration must be the contract alleged in the desiration must be the amount of the bills. Per Bovill, C.J., the contract as alleged in the declaration being a contract in the alternative, it might be performed by performance of either branch of the

Not Advancing Money as agreed. -- Where there is an agreement to lend money, and special damage results from the breach of that agreement, and the party is deprived of the opportunity of getting money elsewhere, substantial, and not merely nominal, damages ought to be awarded. Munchester and Oldham Bank v. Cook, 49 L. T. 674.

Liability for Breach of Warranty. - See SALE OF GOODS.

#### a Nature of Right.

Mere Violation of Right.]-Whenever an injury is done to a right, actual perceptible damage is not indispensable as the foundation of an action, but it is sufficient to shew the violation of the right, and the law will presume damage. Embrey v. Owen, 6 Ex. 353; 20 L. J., Ex. 212; 15 Jur. 633.

In an action against a banker for refusing to pay a trader's cheques, he having at the time of refusal sufficient assets of the trader, the latter may recover substantial damages without proof of actual damage. Rolin v. Steward, 14 C. B. 595; 23 L. J., C. P. 148; 18 Jur. 536; 2 W. R. 467

If a plaintiff has evidently sustained some damage, and the jury being musble to ascertain the amount, finds a verdiet for the defeudant, the court will permit the plaintiff to enter a verdict for nominal damages. Feize v. Thompson, 1 Taunt. 121.

Consignors are entitled to recover nominal damages against carriers for pre-delivery. *Hint* v. *L. & Y. W. Ry.*, 48 L. J., Ex. 545; 4 Ex. D. 188; 40 L. T. 674; 27 W. R. 778—C. A.

When A, deposited a dock warrant for goods with B., as a security for a loan to be repaid on a certain day, it being agreed that in default of payment B, should be at liberty to dispose of the pledge; and A. became bankrupt, and B. before the day of payment entered into an absolute contract for the sale of the goods; and he handed over the dock warrant on the day of payment, and the vendee took actual possession of the goods the day after: Held, that the measure of damages for which B, was liable was not the full value of the goods, but the damage which A, had was merely mominal. Johnson v. Stear, 15 C. B. (N.S.) 330; 33 L. J., C. P. 130; 10 Jun. (N.S.) 99; 9 L. T. 538: 12 W. R. 847.

Waiver.]—A person who accepts the amount of a debt, in respect of the nonpayment of which at the stipulated time he has become entitled to nominal damages, cannot after acceptance of the debt, sue for such nominal damages. Beaumout v. Greathead, 3 D. & L. 631; 2 C. B. 494; 15 T. J. C. P 130

Damuum absque Injuriâ.]—The plaintiff was entitled to the lateral support of his land, but not for the wall upon it. The defendant dug a

and this subsidence included particles of the plaintiff's earth, and caused the fall of the plaintiff's wall; but there would have been no partners war; put there would have seen to appreciable injury to the plaintiffs laud if the wall had not been upon it:—Held, that there was no cause of action. Smith v. Thackerah, 1 H. & R. 615; 35 L. M. C. P. 276; L. R. I. C. P. 564; 12 Jur. (N. 8.) 545; 14 L. T. 761; 14 W. R. 832.

Illegal Distress.]—Where a landlord distrains for rent goods which are not distrainable in law (as looms in work, there being sufficient without them to satisfy the rent), and the tenant pays the amount of the rent and the costs of distress. mon which the distress is withdrawn altogether : the tenant is entitled to recover only the actual damage sustained by the taking of those particular goods, and not the whole amount paid by him. Harrey v. Powoek, 11 M. & W. 740; 12 L. J., Bx. 434.

In trover, by a tenant against his landlord, for distraining goods pledged with the tenant, as a pawnbroker :-- Held, that the goods being in the hands of the pawnbroker to be dealt with in the way of his trade, were therefore privileged from distress; and the landlord being an absolute wrongdoer, the tenant was entitled to recover the full value of the goods, and not merely the value of his interest in them. Swire v. Leach, 18 C. B. (N.S.) 479; 34 L. J., C. P. 150; 11 Jur. (N.S.) 179; 11 L. T. 680; 13 W. R. 385.

Where a landlord distrains for rent, and the distress is void ab initio, and does not merely become so by a subsequent irregularity, the measure of damages in an action of trespass against the landlord by the person distrained upon is the actual value of the goods taken, and the jury, in estimating the damages, ought not to make any deduction from such value in respect of the rent due. Attack v. Bramwell, 3 B. & S. 520; 32 L. J., Q. B. 146; 9 Jur. (N.S.) 892; 7 L. T. 740; 11 W. R. 309.

Wrongful Sale by Sheriff.]-A party took a house of another, with goods valued as between an outgoing and incoming tenant, and employed an auctioneer to re-sell the goods; before could do so they were seized under an execution against the original seller; but the sheriff employed the same auctioneer to sell them, when they produced an amount considerably less than the valuation :--Held, in an action of trespass brought against the sheriff, that the jury was justified in giving damages for taking the goods to the full amount of the valuation. Luckley v. Pye, 8 M. & W. 133; 9 D. P. C. 744; 10 L. J., Ex. 305 : 5 Jur. 346.

Conversion—Right to Possession.]—In an action for the conversion of goods of which the plaintiff has the immediate right of possession, the true measure of damages is the full value of the goods at the time of the conversion. Edmondson v. Nuttall, 17 C. B. (N.S.) 280; 34 L. J., C. P. 102; 13 W. R. 53.

Sale-Payment by Instalments. ] - R. contracted with the plaintiffs to build for them a ship of a specific kind, on account of which they from time to time advanced money. After some of the advances had been made, and when the not for the wall upon it. The determine and a jot the darances had note make, and what the well in his own land, adjoining the land of the ship was partly bullt, R. gave the plaintiff, and land when he no longer required it, of sale:—Held, as the bill of sale passed the filled it up, but the material used for the filling present property in the ship to the plaintiffs, and

of such property to the time of the completion of the ship, and the defendants having taken wrongful possession of the ship after the bill of sale, and after further progress had been made in the building, but before she was completed, and having completed her, in trover for such conversion, that the plaintiffs could recover as damages the value of the ship at the time of the conversion, but not her value at any subsequent period, nor, as special damage, the amount of freight which the plaintiffs might have gained with her if R, had delivered her to them completed, according to his contract. Read v. Fairbanks, 13 C. B. 692; 22 L. J., C. P. 206; 17 Jur.

293

In trover for goods by assignees of a bankrapt, which had been purchased by him under an agreement, by which the purchase-money was to be paid by instalments, and an assignment of the property was to be executed by the vendor, when the whole purchase-money had been paid, with power for the vendor to re-enter in ease of default in payment of the instalments :—Held, that the assignees were entitled to recover the full value of such goods against a mere wrong-doer, notwithstanding default had been made in payment of some of the instalments, and the vendor had to that extent an interest in the goods, Turner v. Hardvastle, 11 C. B. (N.S.) 683; 31 L. J., C. P. 193; 8 L. T. 748.

And see SALE OF GOODS.

Possession Subject to Deed of Sale. ]-By deed of sale, A. assigned all his household goods to seeme a debt due from him to the assignee, subject to a provise that the deed should become void upon payment of the debt on a certain day, or on some earlier day, to be appointed by the assignee by a notice in writing, to be served on A. twenty-four hours before the day of payment so appointed; interest to be paid in the meantime. It was also agreed that, after default made in payment contrary to the proviso, it should be lawful for the assignee to enter and take possession of the goods, and to sell them, and reimburse himself out of the proceeds, accounting to A, for any suplus; and that, until such default, it should be lawful for A, to hold, use and possess the goods without hindrance from the assignee. The assignee served A. with a notice to pay on a day earlier than that named in the deed, and afterwards entered and took, and sold the goods, but the notice was bad, having been served less than twenty-four hours before the day of payment appointed :- Held, that A, had, under the deed, the right of possession of the goods, defeasible only by default in payment after due notice, and that he might therefore sue the assignee in trespass for having wrongfully entered and sold, and that in such action the measure of damages should be, not the value of the goods, but the value of A.'s interest in them at the time of the trespass. Brierly v. Kendall, 17 Q. B. 937; 21 L. J., O. B. 161.

In Action by Trustee for Breach of Agreement made with Bankrupt. ]—A. & S., being traders in embarrassed circumstances, sold their business to the defendant upon condition that he should pay certain debts owing by them. This he failed to do, and left a balance of 1,7501, unpaid to the creditors of A. & S. A. & S. after and not the damages which may be sustained wards liquidated their affairs by arrangement by the reversioner. *Ecelyn* v. *Raddish*, Holt, ander the Bankruptcy Act, 1869, and the plain- 543,

that the habendum did not postpone the vesting tiff having been appointed trustee, brought an action for breach of contract :- Held, that he was entitled to recover the sum of 1,750/., and not merely nominal damages. Parter v. Varley (9 Bing, 93) disapproved of. Ashdown v. Ingamells, 50 L. J., Q. B. 109; 5 Ex. D. 280; 43 L. T. 424-C. A.

> Wrongful Delivery by Holder of Pledge. -A. having purchased jute, warehoused it at the London Docks, paid a deposit on it, and received weight notes for it from the Dock Company, and these he deposited with B, as a security for advances made to A. by C., and B. agreed to hold them as such security. The jute having been destroyed by fire, A. applied to B. for the notes, who wrongfully gave them up to him, and A. then went to the vendor of the jute and obtained back the deposit and subsequently became insolvent and failed to repay C. his advances. C. having sued B. for his breach of contract in delivering up the weight notes to A.; -Held, that C. was cutitled to substantial and not merely nominal damages. Matthews v. Discount Corporation, L. R. 4 C. P. 228—Ex. Ch.

Withholding Grant of Land -Compensation. -An officer in the army, employed in the civil service of the government of Australia, received a promise from the governor of the colony of a grant of land, upon condition that he settled in the colony. He retired from the army and settled in the colony. His claim having been from time to time deferred, he took proceedings under a local act enabling him, against the government of the colony, to obtain compensation :- Held, that he was entitled to compensation, measured by the value of the specific land at the time of the commencement of the suit. Robertson v. Dumareng, 2 Moore, P. C. (N.S.) 66; 10 L. T. 110; 13 W. R. 280; 3 N. R. 587.

Right of Reversioner. |-- In an action by a reversioner for damage done to the reversion by entting off the caves of a building belonging to him, and by creeting a wall with a drip over his premises :- Held, that as there might be repeated actions for continuing the misance, evidence tendered at the trial of the first action for the purpose of shewing the diminution in the salable value of the premises was properly rejected. Buttishill v. Reed, 18 C. B. 696; 25 L. J., C. P. 290 ; 4 W. R. 603.

A landlord sued his tenant for an injury done by him to the reversion, by wrongfully removing from the land large quantities of clay; and for a conversion of the clay. The jury found that the removal of the clay had depreciated the value of the land by 1561; and that the value of the clay itself was 1501. A verdict was entered for the former sum :- Held, on motion to increase the verdict, by adding thereto the sum of 1501,, that the plaintiff was not entitled to receive the value of the clay as well as compensation for the injury done him by the removal of the clay. Templemore v. Moore, 15 Ir. C. L. B.
14. And see LANDLORD AND TENANT NUISANCE.

Tenant for Life. ]-A tenant for life in covenant, can only recover such damages as are commensurate with the injury done to his life estate.

By Tenants in Common.]-Where A. and B.; A plaintiff in an action of trespass claimed them, if B. dies, actions for infringements committed in B.'s lifetime survive to A., who is entitled at law to recover the whole damages. Smith v. L. & N. W. Ry., 2 El. & Bl. 69; 17 Jur.

#### f. Aggravation, Mitigation and Reduction.

Aggravation-Intention.]-In an action for throwing poisoned barley upon the plaintiff's premises in order to poison his poultry, the jury is not confined in their verdiet to the actual damages sustained, but may consider the malicious intention of the defendant, Lyons, 2 Stark. 317; 20 R. R. 688.

In an action for a wrong, whether arising out of a trespass or a negligent act, the jury. in estimating the damages, may take into consideration all the circumstances attending the committal of the wrong. Emblen v. Myers, 6 H. & N. 54; 30 L. J., Ex. 71; 2 L. T. 774; 8 W. R. 665. See Bell v. Midland Ry., 10 C. B. (N.S.) 287; 30 L. J., C. P. 273; 7 Jur. (N.S.) 1200; 4 L. T. 293; 9 W. R. 612.

In an action for wrongfully and injuriously pulling down a building adjoining the plaintiff's stable in a negligent and an improper manner, and with such a want of proper care that, by reason thereof, a piece of timber fell upon his stable and destroyed the roof, and by reason of the negligence, earclessness and unskilfulness. part of the building fell upon and injured his horse; evidence was given shewing that the defendant had acted wilfully and with the object of forcing the plaintiff to give up possession of the stable : the jury is properly directed, that if they think the defendant has acted with a high hand, wilfully and with the object of getting the plaintiff out of possession, the damages may be higher than if the injury was the result of pure negligence. Ib.

An unqualified person shooting a gamekeeper's dog will justify a judge in directing considerable damages. Roy v. Beaufort (Duke), 2 Atk. 192.

---- Plea of Justification. |-- In an action for false imprisonment, the defendant, in addition to the general issue, pleaded a justification, on the ground that the plaintiff had committed a felony, for which the defendant had him taken in custody; but at the trial his counsel abandoned this latter plea, and exonerated the plaintiff from the imputation contained in it :- Hekl, that the patting this plea on the record was a persisting in the original charge, and proper to be taken into consideration by the jury in estimating the amount of damages. Warviek v. Foulkes, 12 amount of damages. Warwiek v. Foulkes, 12 M. & W. 507; 1 D. & L. 638; 13 L. J., Ex. 109; 8 Jur. 85.

L. T. 180.

Mitigation and Reduction. ]-In an action for false imprisonment the defendant, under the plea of not guilty, may give in evidence the excuse, if it merely goes in mitigation of damages, though H. & N. 276; 27 L. J., Ex. 334; 6 W. R. 515.

are tenants in common of a patent assigned to substantial damages from the defendants for pulling down a wall, and they tendered in evidence a conveyance to them, to shew that they bona fide believed that the wall was theirs, but the judge refused to admit it. Semble, per Erle, C.J., that it ought to have been admitted, in reduction of damages. Skull v. Glenister, 16 C. B. (N.S.) 81; 33 L. J., C. P. 185; 9 L. T. 763; 12 W. R. 554.

In actions of contract, where, supposing the data to be admitted or established, and to beunaffected by any evidence introducing other legitimate elements of consideration, the damages may be more or less matter of calculation, although, prima facie, the plaintiff may be entitled to the full measure of damages, yet where the actual amount of damage has been in any degree affected by the conduct of the plaintiff or his agents, that is a legitimate element of consideration, and the jury is at liberty to diminish the damages on that account. But if they do so unreasonably and arbitrarily, the court will grant a new trial, as for a verdict against Wilson v. Hicks, 26 L. J., Ex. 242. evidence.

Although the plaintiff, in an action for an injury done, really has a right of action against the defendant, the jury is entitled to look at all the circumstances of the case, and at the couduct of both parties, and if they think that in going on with the action the plaintiff has acted in an obstinate and perverse manner, they may take that into consideration when estimating the damages. Davis v. L. & N. W. Ry., 4 Jur. (x.s.), 1303; 7 W. R. 105.

- Insurance Money. |- In an action for injuries caused by the negligence of a railway company, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages. Bradbura v. G. W. Ry., 44 L. J., Ex. 9; L. R. 10 Ex. 1; 3I L. T. 464; 23 W. R. 48. See Grand Trunk Ry. v. Jennings, 58 L. J., P. C. 1; 13 App. Cas. 800; 59 L. T. 679; 37 W. R. 403—P. C.

A plaintiff sued the defendants for damaging his ship by collision :-Held, that they were not entitled to deduct from the amount of damages. to be paid by them, a sum of money paid to the plaintiff by insurers in respect of such damage. Yates v. White, 4 Bing. (N.C.) 272; 5 Scott, 640. S. P. Jones v. White, 1 Arn. 85; 2 Jur. 303.

Agreement in Substitution-Increased Profits.

The plaintiff agreed with F, to let him land on a building lease for ninety-eight years, from Christmas, 1835, at a peppercorn rent, for three-years, and then at 115l, a year, payable quarterly, F. to build on the land, and cover in the mes suages within the first three years, and to accept a lease-proviso for re-entry on default. E, entered Vindictive Damages.]—Consideration of the plaintiff brought ejectment, and recovered posprinciples upon which vindictive damages are session on June 12th, 1839. After re-entry, the given against wrongdoers. Dreufus v. Perwrian plaintiff agreed with a new tenant to let him the Guano Cb., 58 L. J., Ch. 758; 42 Ch. D. 66; 61 premises for the residue of F.'s term, at a peppercorn rent for the year ending Midsummer, 1840 ; 701. for the year ending Midsummer, 1841; and 140%, a year for the rest of the term. The plaintiff, in an action for breach of F.'s agreement claimed as damages the difference between the rent which he would actually receive down to he cannot do so without a special plea, if it Midsammer, 1841, and that which would have amounts to a justification. *Linford* v. *Lake*, 3 accrued down to the same period if F. had kept his agreement :- Held, that the jury was not bound to award that amount, but might give | 15 C. B. 46 ; 23 L. J., C. P. 197 ; 18 Jur. 1105 ; their verdict on an estimate of the plaintiff's | 2 W. R. 595. real damage, taking into consideration the increased rent secured to him by the second agreement. Oldershaw v. Holt, 12 A. & E. 590; 4 P. & D. 307.

In an action for breach of a contract for the quick discharge of a ship, made with several persons jointly, where some of them had made profits by reason of such breach of contract which they would not otherwise have made, through another ship in which they were interested having been substituted for the purpose for which the former ship was required:—Held, that the amount of the joint damages could not be reduced by the profits so made by some of the West India Dock Co., 44 L. J., C. P. 181; L. R. 10 C. P. 300; 32 L. T. 321; 23 W. R. 624,

Cross Claims relative to similar Matters. - In an action for damages for the non-performance and improper performance of work which the plaintiff had employed the defendant to do, the defence was that the defendant had sued him for the price of the work alleged to have been improperly done, and the plaintiff had settled by paying the whole amount then sned for ; and that, as he might have given the non-performance and the defective performance complained of in evidence in reduction of damages, he was precluded from bringing a cross-action:—Held, that though he might have availed himself of the causes of action for which he sued in reduction of the claim in the former action, yet he was not bound to do so, but might maintain a separate action for them. *Duris* v. *Hedges*, 40 L. J., Q. B. 276; L. R. 6 Q. B. 687; 25 L. T. 155; 20 W. R. 60.

Set-off.]—To an action for freight, a plea, on equitable grounds, that the plaintiff, in the course of his employment by the defendant, undertook to carry his coals, and by his negligence and unskilfalness the coals were lost, and that the cost price of the coals was equal to the plaintiff's demand, and claiming equitably to set off one against the other, is a bad plea. Stimson v. Hall, 1 H. & N. 831; 26 L. J., Ex. 212; 5 W. R. 367.

- Loss of Cargo-Neglect to Insure. ]-By a charterparty A. agreed to pay B., master of a ship, one-third of the freight at the final sailing the ship, to be returned to A. if the cargo should not be delivered at the port of destination, A. insuring at the owner's expense, and 4 Jur. (N.S.) 169. eleducting the costs out of the first payment. A. paid the one-third freight, deducting the costs of insurance. The ship and cargo were lost, and A. brought an action to recover back the onethird freight. B. pleaded that the loss of the one-third freight was a loss which A, was to be insured against; that A. insured so negligently that the insurance was useless, and that by such negligence A. became liable to B. for the same amount which he claimed from B., and to make good the same to B.:—Held, that the plea was bad; that the conclusion of law as to A.'s liability was not warranted by the facts stated, as the amount to be recovered by B. as damages for A.'s negligence was not necessarily identical with that sued for by A. Charles v. Alton,

— Payment of Freight—Unseaworthiness of Ship.]—A declaration stated that a charter-party was made by the owners of a ship then at Sunderland and the defendant, whereby it was Profit made by some Plaintiffs from Breach.] agreed that the ship, being tight, staunch and strong, and every way fitted for the voyage, should at Sunderland load a cargo from the merchant's factory, and, being loaded, should therewith proceed to Constantinople for orders, to deliver there or at other places named, being paid freight at rates named, "one-fourth of the freight to be advanced to the owner's agent in London on the ship having sailed, less 51, per cent, for insurance, interest and commission and that the defendant caused the ship to be loaded, and she sailed for Constantinople, and that all things necessary happened and were done to entitle the owners, by their agent in London, to receive from the defendant the fourth part of the freight, yet he had not paid it. A plea, that the ship was not, at the commencement of the voyage, tight, staunch and strong, and every way fitted for the voyage, and that, by reason of the premises, the ship and the cargo were wholly lost is a good plea; for the sailing of the ship in a seaworthy condition was made by the charterparty a condition precedent to the payment of the fourth of the freight; but the plea could not be supported on the ground of avoiding circuity of action. Thumpson v. Gillespy, 5 El. & Bl. 209; 24 L. J., Q. B. 340; 1 Jur. (X.S.) 779; 3 W. R. 505.

Covenants to Repair-Demise and Re-Demise. ]-In an action by a reversioner against an assignee on a covenant to repair and yield up in repair, a plea by way of equitable defence, that the defendant had re-demised the premises to the plaintiff for the residue of the term, wanting thirty days, under a similar eovenant, the defendant finding timber for repairs, that he had found such timber, that the plaintiff broke the covenant, and that the non-repair sued for was the same non-repair, and that the damages were identical, is bad, either as a plea of equitable sef-off, or as a legal defence by way of avoidance of circuity of action; because, notwithstanding the express allegations of the plea, it was manifest upon the pleadings that the covenants of the parties differed as to the duration of the time over which they extended, and also as to the degree of liability they respectively imposed, so that it was impossible that the measure of damages could in each case be the same. Minshull v. Oakes, 2 H. & N. 793; 27 L. J., Ex. 194;

Measure of Assessment altered by Act of Party—Contracts.]—If a party entitled under a contract to receive a profit from another by his own act so confounds the measure of that which he was to receive that it can be no longer ascertained, he vacates his whole claim. Pringle v. Taulor, 2 Taunt, 150.

Therefore, where A, agreed to find sufficient coal for B,'s engine, to draw water from A,'s mine and B.'s little coal, as they then stood, and B. sank to a lower seam, in draining which he drained the other two seams, but consumed for his engine more coal than before :- Held, that A. was no longer bound to furnish any coal, because B. had destroyed the measure of sufficiency. Ib.

In Case of Wrongdoers.]-Where a wrong has been committed, the wrongdoer must suffer from the impossibility of accurately ascertaining the amount of damage. Leeds (Duke) v. Amberst, 20 Bear, 239.

Proportion of Liability of Joint Tort Feasors. -Where two persons are jointly sued for false imprisonment, one of whom has acted from improper motives, the damages ought not to be assessed with reference to the act and motives of the most guilty or the most innocent party, but the true criterion of damage is the whole injury the party has sustained from the joint act of trespass, Clark v. Newsam, 1 Ex. 131; 16 L. J., Ex. 296.

Damages cannot be severed where the count is for a joint trespass, and the jury finds the defendants guilty accordingly. Hill v. Goodchild, 5 Burr. 2790.

See TORT.

#### g. Prospective.

When Recoverable, -A plaintiff sued the defendant for himry to his buildings by mining operations of the defendant on the land of the defendant. A special referee having found that the plaintiff, in addition to injury already in-curred, would incur injury in the future, and having assessed the prospective damages in respect of such injury at 1501. —Held, that the prospective damages were recoverable: *Lamb* v. *Walker*, 47 L. J., Q. B. 451; 3 Q. B. D. 389; 38 L. T. 643; 26 W. R. 775.

Case in which compensation for damage done to an estate was awarded once for all, so as to take away any right of action for subsequent damage against the defendants, who were held to be not wrongdoers, but persons exercising of the plaintiff, subject to paying compensation for the permanent injury thereby occasioned to the said estate. Great Laxey Mining Co. v. Clayue, 4 App. Cas. 115; 27 W. R. 417—P. C.

Second Action.]-" When the cause of action is complete, it would be increasing litigation to say You shall not have all you are entitled to in the first action, but you shall be driven to a second, third, or fourth, for the recovery of your damages." Per Best, C.J., in Richardson v. Mellish, 2 Bing. 240.

When damages have been awarded of an insufficient character, another action does not lie for the same cause. Fetter v. Beale, 1 Ld. Raym. 339.

Time of Service. ]-In an action for injuring the plaintiff's apprentice, whereby he was disabled from serving, the jury may give damages for the loss of service, not only before action brought, but afterwards down to the time when. as it appears in evidence, the disability may be expected to cease. Hodsoll v. Stallebrass, 11 A. & E. 301; 3 P. & D. 200; 9 Car. & P. 63; 8 D. P. C. 482; 9 L. J., Q. B. 132.

#### h. Double or Treble Damages.

Calculation of . - Where a statute gives by way of penalty for withholding duties, double or any other multiple of the sum withheld, the sum found by the jury is to be taken as the amount due in point of fact. Att. Gen. v. Hatton, McClcl. 214; 13 Price, 476.

Where a statute gives treble damages, the plaintiff is entitled to three times the full amount of the damages found by the jury, and treble costs; and the damages are not to beealculated in the manner treble costs usually are. Buchle v. Bewes, 6 D. & R. 1; + B. & C.

### 4. Costs of Action when Recoverable.

Separate and Independent Contracts. ]-B., a carrier, having contracted with H. to carry his pictures to Paris, made a second contract (containing different stipulations) with a railway company that the company should carry them to Calais. The pictures having been injured on the journey through the negligence of the railway company, H. brought an action against B. for the damage, claiming 1,000l. The railway com-pany, being requested by him to defend the action, refused, repudiated all liability, and told him he must deal with the action as he thought fit. He defended the action, and H. recovered against him a vendict of 650%, for the damage to the pictures. He, B., having sucd the railway company to recover the costs he had paid and incurred in defending H.'s action :- Held, that the two contracts being different and independent, he could not recover the costs, since they were neither the natural and proximate consequence of the railway company's default, nor ncurred at the request of the company, or for their benefit. Baxendale v. L. C. & D. Ry. 44 L. J., Ex. 20; L. R. 10 Ex. 35; 32 L. T. 330; 23 W. R. 167-Ex. Ch.

The plaintiff contracted with a tramway company to construct a tramway for them in a public road, and made a sub-contract with an asphalte company, under which the latter nudertook to lay the asphalte and to keep it in good repair and condition for twelve months. In consequence of the defective state of the asphalte within that period, H., who was driving along the road was thrown out of his cart and injured. H. theremon brought an action against the tramway company, who gave notice to the plaintiff. The plaintiff then called upon the asphalte company plaintent then cannot upon the aspirate company to defend H.'s action, but they declined to have anything to do with it. The plaintiff resisted H.'s claim, and ultimately compromised it for 701., but was obliged also to pay 401, for the costs of H.'s attorney, and expended 181. more for the costs of defending the action. The jury found that the course taken by the plaintiff in resisting and ultimately compromising H.'s action was a reasonable and proper one :- Held, that the asphalte company was liable for the 70/., but not for the 40%, or the 18%, these latter charges not being the natural or necessary consequence of." their default, the contracts between the plaintiff [O. B. 58; 20 O. B. D. 79-C. A. Sec also Stroud and the trainway company and between the v. Austin, aute, col. 276. plaintiff and the asphalte company being separate Travers Asphalte Co., 45 L. J., C. P. 479; 1 C. P. D. 511; 35 L. T. 366.

Notice of Sub-sale-Profits-Costs of Action by Sub-vendee. |- The defendants contracted with the plaintiff to deliver goods to him of a particular shape and description at certain prices and by instalments at different times. When the contract was made the defendants knew that except as to price, it corresponded with and was substantially the same as a contract which the plaintiff had entered into with a French customer of his, and that it was made in order to enable the plaintiff to fulfil such last-mentioned contract. The defendants broke their contract, and there being no market for goods of the description contracted for, the plaintiff's customer obtained damages against him in the French court to the amount of 281, :- Held, in an action against the defendants for their breach of contract, that the plaintiff was not only entitled to recover as damages the amount of profit he would have made had he been able to fulfil his contract with his customer, but also damages in respect of his liability to such customer, and that in estimating such last-mentioned damages the 281, which the French court had given might be treated as not an unreasonable amount at which such damages might be assessed. Elbinger Action Gesellschaft v. Armstrong (L. R. 9 Q. B. 473) approved of. Grébert-Bargnis v. Nugent, 54 L. J., Q. B. 511; 15 Q. B. D. 85—C. A. Affirming 1 Cab. & E.

The defendant contracted for the sale of coal of a particular description to the plaintiffs knowing that they were buying such coal for the purpose of re-selling it as coal of the same description.
The plaintiffs did so re-sell the coal. The coal delivered by the defendant to the plaintiffs under the contract, and by them delivered to their subvendees did not answer such description, but this could not be ascertained by inspection of the coal, and only became apparent upon its use by the sub-vendees. The sub-vendees thereupon brought an action for breach of contract against the plaintiffs. The plaintiffs gave notice of the action to the defendants, who, however, repudiated all liability, insisting that the coal was according to contract. The plaintiffs defended the action against them, but at the trial the verdiet was that the coal was not according to contract, and the sub-vendees accordingly recovered damages from the plaintiffs. The plaintiffs therenoon sned the defendant for breach of contract, claiming as damages the amount of the damages recovered from them in the action by their sub-veudees, and the costs which had been incurred in such action. The defendant paid the amount of the damages in the previous action into court, but denied his liability in respect of the costs :- Held, that the defence of the previous action being, under the circumstances, reasonable, the costs incurred by the plaintiffs as defendants in such action were recoverable under the rule in Hadley v. Baxendale (9 Ex. 341), as being damages which might reasonably be supposed to have been in the contemplation of the parties, at the time when they made the contract, as the the time when they made the contract, as the prespect of the simple of the inner low domains, such probable result of a breach of it. \*Baxendale\* v.\* damages not being contemplated by the additional L. C. & D. Ry. (L. R. 10 Ex. 35), discussed and clause. \*Sully v. Duranty, 3 H. & C. 270; 33 distinguished. \*Hammond v. \*Bussey, 57 L. J., [L. J., Ex. 319.

Indemnity-Costs of Action. ]-Under a covenant to indemnify against all actions and claims in respect of the covenants of a lease, costs properly incurred in reasonably defending an action brought for a breach of one of the covenants are recoverable as damages. Murrell v. Fysh, 1 Cab. & E. 80.

In consideration of B. promising to assign to A, all his interest in an agreement by which he held certain premises, A, undertook to indemnify B. against breaches of the covenants and con-ditions in the agreement. No assignment was executed, but A, entered and held possession of the premises till the expiration of B,'s term (letting them fall out of repair), when B, was sued by his landlord for dilapidations. After giving A. notice of the action, B. paid money into court, which the jury found to be enough :-Held, in an action brought by B, against A, on his promise to indemnify him, that a good consideration appeared for the promise, and that B. was entitled to recover as damages the extra costs necessarily incurred by him, over and above the taxed costs paid to him in defending the former action, Howard v. Loregrore, 40 L. J., Ex. 13; L. R. 6 Ex. 43; 23 L. T. 396; 19 W. R. 188.

- Construction of. ]-A. chartered B.'s ship to carry a cargo of merchandise from Liverpool to Puerto Cabello, in Venezuela. Afterwards the parties added to the charterparty a clause by which the charterer was to have the option of sending a portion of the cargo to Maracaibo, and "that any and every expense the vessel might incur in consequence of this additional clause should be borne by the charterer." The charterer londed the vessel with a cargo, part for Puerto Cabello, and the residue for Macaraibo, and made out two separate manifests. On the arrival of the vessel at Puerto Cabello, the master. at the request of the custom-house officers, shewed to them both manifests, and they prohibited the discharge of that part of the cargo assigned to Puerto Cabello, on the false ground that there were contraband goods on board by which the cargo was confiscated, and they imposed on the master a fine of 500 dollars for having two manifests, instead of a manifest on one sheet only, and detained the ship because the fine was not paid. The master appealed to the tribunals of the country, and claimed compensation for delay of the ship. He was told that, if he paid the fine, the necessary order for the clearance would be given, but he had no funds out of which he could pay it. About the same time a revolution occurred in Venezuela, which prevented all commercial and legal proceedings. quently the government agreed to pay the master 5,000 dollars as compensation for the detention of the ship, and 164 dollars for expenses of law suits, which sums were never paid. After some further delay, the ship proceeded to Maracaibo:

-Held, that B. was not entitled to recover from A. under the additional clause in the charterparty, either the loss sustained by reason of the detention of the ship at Puerto Cabello, or the expenses incurred in repairing the damage incurred in and about the legal proceedings in respect of the ship, or the fine of 500 dollars, such

Reasonableness of defending, Question for injuries to the workman were the natural conse-Jury.]—When an action is brought against A. to quence of the defendant's breach of warranty, recover unliquidated damages for which he has become liable through the default of B., notice being given to B., who declines to intervene, A. is justified in defending the action, and is not bound to let judgment go by default, or to pay money into court. Morse-Le-Blanch v. Wilson, L. R. S C. P. 227: 21 W. R. 109.

The proper questions for the jury in such a case are, whether it was a reasonable thing to defend the action, and whether the defence was conducted

in a reasonable manner. 10.

A., a broker, contracted with B., for the purchase, on behalf of C., of certain goods. refusing to accept the goods, B. sued A. for the breach of contract. C. had notice of the proceedings, but repudiated his liability, and A. defended the action unsuccessfully. In an action by A. against C. for the damages and costs paid and incurred by him in the first action, C. paid into court enough to cover the damages only, and it was left to the jury to say whether A., in defending the former action, had pursued the course which a prindent and reasonable man would have done in his own case. The jury, having found for the plaintiff:—Held, that A. was entitled to recover the costs. Brown v. Hall, 7 C. B. (N.S.) 503.

Sum paid in settlement of Action. ]-A "boat-staging," or suspension platform, put up for the plaintiffs by the defendant under a contract between them, to enable the plaintiffs to paint a a house, fell, through being insecurely fastened by the defendant, and hurt a painter in the employ-ment of the plaintiffs. He brought an action under the Employers' Liability Act, 1880, against the plaintiffs for injuries sustained in consequence of the defective state of the boat-staging. The plaintiffs settled the action by paying to the painter 1251, and then sned the defendant for breach of his contract :- Held, that the defendant was liable under the contract; but that, inasmuch as the plaintiffs had employed a competent contractor to put up the boat-staging, and there was, on the facts, no evidence of negligence by the plaintiffs, they were not liable to their servant for the injury he had sustained, and therefore the money which they had paid to settle his action was not recoverable as damages from the defendant for his breach of contract. Kiddle v. Locett. 16 Q. B. D. 605; 34 W. R. 518.

- Negligence-Contract-Breach of Implied Warranty. ]-The plaintiffs, stevedores, agreed to discharge a cargo of deals from the defendant's ship, and, in accordance with the custom of the port, the defendant undertook to provide them with all necessary derricks, cranes, chains, &c., reasonably fit for the purpose. A chain so supplied was defective and broke, and caused injuries to one of the plaintiffs' workmen, who sued them under the Employers' Liability Act, 1880. The plaintiffs settled this action for 1251., a sum which it was not suggested was an unreasonable one, and then sought to recover the amount so paid from the defendant. It was admitted by the defendant on the one hand that there had been a breach by him of an implied warranty that the which it was supplied, and by the plantiffs on the other hand that they might, by the exercise of reasonable care, have disconnect that

upon which the plaintiffs were cutitled to rely. Marchray v. Merryweather, 65 L. J., Q. B. 50; [1895] 2 Q. B. 630; 14 R. 757; 73 L. T. 459; 44 W. R. 49; 59 J. P. 804-C. A.

Wrong-doer-Extra Costs incurred by Mistake.]-A wrong-cloer cannot be heard to complain that in proceedings harriedly taken to stop the wrong the plaintiff has not accurately stated his title, and in such a case the defendant will not be relieved from the payment of the extra costs occasioned by the plaintiff's mistake as to his title. Att.-Gon. v. Timbino, 46 L. J., Ch. 654; 5 Ch. D. 750; 36 L. T. 684; 25 W. R. 802.

Occasioned by Fraud of Defendant's Manager. A customer deposited for safe custody the certificates of certain railway shares with his bankers, with whom he had an account, on which they charged a commission. The certificates were placed in a strong box, of which the manager of the bank had uncontrolled care. The manager sold the shares and forged transfers. The customer instituted a suit in equity against the railway companies and the purchasers, for the purpose of having his name restored as holder of the shares. He obtained a decree, but without costs, the costs being refused principally upon the ground that the railway companies had sent letters to him informing him that the transfers had been addressed to him, in accordance with his instructions, to the care of the manager of the bank; to which letters the manager forged answers. He afterwards claimed against the bankers for the amount of the costs which he had thus incurred :- Held, that though the bankers were bailees for reward, and had committed gross negligence in leaving the certificates in the unwatched control of their manager, still the costs were not the natural and necessary consequences of their neglect, and therefore could not be charged against them. United Service Co., In re, Johnston, Ex parte, 40 L. J., Ch. 286; L. R. 6 Ch. 212; 24 L. T. 115; 19 W. R. 457.

Of Agent. |- A defendant, professing to have anthority from T. and J., verbally made an agreement with the plaintiff for the lease of a house belonging to T, and J, for seven years, and put the plaintiff into possession, no proper lease having been executed. He had, in fact, no authority from T. and J., and they brought ejectment against the plaintiff, which he defended unsuccessfully, after consulting the defendant and his attorney, and being guided by their advice. The jury found that he acted reasonably in defending the ejectment. In an action against the defendant for the breach of his warranty of authority :- Held, that the costs of the ejectment were not a damage naturally flowing from the defendant's breach of warranty, masumch as, if the had had authority, the plaintiff being tenant at will only, would have been defeated in the ejectment. Pao v. Davis, 1 B. & S. 220; 30 L. J. Q. B. 257; 7 Jur. (N.S.) 1010; 4 L. T. 399; 9 W. R. 611.

of reasonable care, have discovered the defect in occupy the same during the term " without any the chain :- Held, that the damages sought to be interruption whatsoever from or by the defenrecovered were not too remote, inasmuch as the dant, his executors, administrators or assigns, or any other person or persons lawfully claiming by, from or under him or them." An action frrespass was afterwards brought by a person claiming under the defendant against the plaintiff, who gave notice of it to the defendant. The defendant paid no attention to the notice, and the plaintiff, acting on his own judgment and without express authority, defended the action. A verdict was eventually found against him, and he was obliged to pay damages and costs. In an action against his landlord for breach of the covenant for quiet enjoyment contained in the denies — Held, that the plaintiff was entitled to recover from the defendant the costs and damages he had paid, and also the expenses he had himself incurred in defending the action of trespass. Robe, v. Crusch, 37 L. J., Ex. 8; L. R. 3 Ex. 44; 17 L. T. 249; 16 W. R.

The plaintiff, a lessee of land, brought an action against the lessor and against other lessess who claimed a right of way over the plaintiffs land under a grant from the same lessor, deaying the right and claiming an injunction against the lesses; or, if the court should hold that they had a right of way, then damages from the lessor under his covenant for quite enjoyment. At the trial the other lessess established their right of way, and judgment was given against the lessor for damages for the loss sustained by the plaintiff by reason of the exercise of the right of way:—Held, that the measure of damages payable by the lessor was not the permanent injury to the land, but only the damage sustained at the comnencement of the action; but that the lessor, being the cause of the whole litigation, must pay the costs of the plaintiff and the other lessees. Child v. Senning, 48 L. J., Ch. 302; 1 Ch. D. 302; 2 TV. R. 462.

Trespass—Setting aside Judgment.]—In trespass for solving the plaintiff goods under colour of a judgment, the declaration alleged that, by means thereof, the plaintiff was forced to pay costs in setting aside the judgment.—Held, that the plaintiff was not entitled in this form of action to recover the costs incurred by him in setting aside the judgment. Hullmany v. Therner, 6 Q. B. 928, 14 L. 3 Q. B. 148; s 9 Jur. 100.

Injunction.]—In an action of trespass for taking possession of the plaintiff's land, he cannot recover costs incurred by him in preparing a bill in equity for an injunction. Abthorp v. Bedford and Cambridge Ry., S L. T. 200.

### DANCING.

Sec DISORDERLY HOUSE.

## DAY.

See TIME.

# DEAN.

Sec ECCLESIASTICAL LAW.

#### DEATH.

Change of Parties by Death.]-See PRACTICE,

During Arbitration. ]-See ARBITRATION.

During Criminal Proceedings.]—See CRIMI-NAL LAW.

Effect on Partnership.]-See PARTNERSHIP.

Duties. |- See REVENUE.

Effect on Guarantee.]—See PRINCIPAL AND SURETY.

Evidence of Death ]-See INSURANCE.

Proof and Presumption of.] -See EVIDENCE.

# DEBTORS ACT.

- 1. GENERAL APPLICATION OF ACT, AND EXCEPTIONS, 306.
- 2. COMMITTAL IN DEFAULT OF PAYMENT, 308.
- 3. PERSONS IN FIDUCIARY CAPACITY.
  - a. Generally, 312.
- b. Effect of Bankruptcy Law, 318.
- 4. SOLICITORS, 319.
- 5. PRACTICE, 321.
- 6. ARREST OF PERSON ABOUT TO QUIT ENG-LAND.
  - a. Under Debtors Act, 325.

NEY.

- Under Law before Debtors Act, 326.
- 7. JUDGE'S ORDER BY CONSENT. 327.
- DISCHARGE FROM CUSTODY, 329.
   COGNOVITS AND WARRANTS OF ATTORNEY—See WARRANT OF ATTORNEY—See
- 10. PUNISHMENT OF FRAUDULENT DEBTORS
  —See BANKRUPTCY.
- 1. GENERAL APPLICATION OF ACT, AND EXCEPTIONS.

Scope and Policy.]—The policy of the Debtors Acts, 1869 and 1878, in leaving a defaulting trustee exposed to the penalty of imprisonment, is not vindictive; the object of the penalty is simply to produce payment of the money. *Bur*vet v. *Haumond*, 48 L. J., Ch. 249; 10 Ch. D. 285; 27 W. R. 471.

The policy and effect of the Debtors Acts, 1869 and 1878, considered. *Marris* v. *Ingram*, 49 L. J., Ch. 123; 13 Ch. D. 338; 41 L. T. 613; 28 W. R. 491

The Debtors Act, 1869, while abolishing the penalty of imprisonment for debt in the case of an honest debtor, is intended for the punishment of a fraudulent or dishonest debtor, and is in that sense vindictive. Burrett v. Hammond (48 L. J., Ch. 249; 10 Ch. D. 285) not followed. Ib.

Sums Recoverable before Justices, ] — Costs L. J., Q. B. 243; 15 R. 91. And see Mayon's awarded by quarter sessions against one of the Count. parties to an appeal, and which by the Quarter Sessions Act. 1849, 12 & 13 Viet. c. 45, s. 5, and the Summary Jurisdiction Act. 1848, 11 & 12 Vict. c. 43, s. 27, may be enforced before a justice by warrant of distress, and in default of distress by warrant of commitment, are within the exception of s. 4, in the Debtors Act; and the defaulter is therefore not protected from imprisonment. Rog, v. Pratt, 39 L. J., M. C. 73; L. R. 5 Q. B. 176; 18 W. R. 626. S. C., nom. Cole, Ex parte, 21 L. T. 750.

Ireland. - Debtors Act, 1869, applies to application under 41 Geo. 3, c. 90, s. 6, to enforce order of Irish Court of Chancery. Ferguson v guson, 44 L. J., Ch. 615; L. R. 10 Ch. 661. Ferguson v. Fer-

The 32nd section of the Debtors (Ireland) Act, 1840, 3 & 4 Vict. c. 105, does not repeal the 42nd section of the Real Property Limitation Act, 1833, 3 & 4 Will. 4, c. 27, but the two are to be construed together. *Hughes* v, *Kelly*, 5 Ir. Eq. R. 286 : 3 Dr. & War, 482.

Discretion of Court. ]-In a case excepted from the operation of s. 4 of the Debtors Act, 1869, for making default in payment of a sum of money, the court has no discretion to refuse an application for leave to issue a writ of attachment against the person making default. Erans v. Bear, L. R. 10 Ch. 76; 31 L. T. 625; 23 W. R. 67.

On application for an attachment against a defaulting trustee, the court has jurisdiction to inquire into the circumstances of the case, and where there has been no actual fraud or embezzlement, but merely an erroneous application of the trust fund, may refuse the application for an attachment. Burrett v. Hammond (10 Ch. D. An actachingin.

Barries V. Hammon (15 Ch. D. 388)
distinguished.

Marries V. Ingram (13 Ch. D. 388)
distinguished.

Molroyde v. Garnett. 51 L. J.,
Ch. 663; 20 Ch. D. 532; 46 L. T. 801; 30 W. R. 604.

Debt incurred by Fraud. -Seet. 13 of the Debtors Act, 1869, applies to persons not bankrupts or in liquidation, who, therefore, may be convicted under sub-s. 3 for fraudulent concealment of property. Reg. v. Rombinds, 51 L. J., M. C. 51; S Q. B. D. 530; 46 L. T. 286; 30 W. R. 444; 15 Cox, C. C. 31; 46 J. P. 437.

- Obtaining Meal at Restaurant without Means to pay for it. ]-A person who orders and consumes a meal at a restaurant without being possessed of the means to pay for it, does not obtain goods by false pretences under s. 88 of the Larceny Act, 1861, but incurs a debt or liability by fraudulently obtaining credit, and therefore commits an offence under sub-s, 1 of s, 13 of the Debtors Act, 1869. Reg. v. Jones, 67 L. J., Q. B. 41; [1898] 1 Q. B. 119; 77 L. T. 503—C. C. R.

Conviction of Infant. Conviction of infant bankrupt for absconding with property within meaning of s. 12, held bad. Reg. v. Wilson, 49 L. J., M. C. 13; 5 Q. B. D. 28; 41 L. T. 480; 28 W. R. 307; 14 Cox, C. C. 378; 44 J. P. 105. And see BANKRUPTOY.

Mayor's Court, Jurisdiction of, to Commit. ]-The jurisdiction of the Mayor's Court to commit a person for nonpayment of a judgment debt, conferred by ss. 36 and 38 of the Mayor's Court Act, 1867, is not affected by s. 5 of the Debtors Act, 1869. Washer v. Elliott (1 C. P. D. 169) considered and followed. Schuller v. Wood, 64

Writ of Ne exeat Regno.]—The plaintiff, a mortgagee of a German ship which had been lost, commenced an action in the Chancery Division against the owner on the covenant contained in the mortgage deed, and applied for a writ of ne exeat regno, alleging by affidavit that the defendant was about to leave England, and that the debt would be in danger of being lost if he was not prevented from so doing, but not showing that the defeudant's absence would prejudice the plaintiff in the prosecution of the action :- Held, that the writ must be refused, for that the claim was a mere legal demand for which the plaintiff could not before the passing of the Judicature Act have sued in the Court of Chancery, and that the defendant could only be prevented from leaving England in the case pronevented from teaving angulard in the case provided for by the Debtors Act, 1869, s. 6. Draver v. Beger, 49 L. J., Ch. 37; 13 Ch. D. 242; 41 L. T. 393; 28 W. R. 110.

Held, further, by the Master of the Rolls, that the result would have been the same as to an equitable debt before the passing of the Judicature Act. Ib. See NE EXEAT REGNO.

Procedure, When Obligatory. ]-A man whomakes default in payment of a sum of money which he has been ordered by the court to pay. cannot be attached for contempt, but must be proceeded against under the Debtors Act, s. 5. Esduile v. Visser, 13 Ch. D. 421; 41 L. T. 745; 28 W. R. 281,

Rut where a judge made an order for the committal of a defaulting party under the Debtors Act, and the order was drawn up by the registrar in the presence of the debtor in the form of an attachment for contempt, from which the debtor appealed, the court dismissed the appeal, and directed the order to be rectified. Ib.
Held, also, that as a general rule, when a judge-

has been judicially satisfied of the ability of a debtor to pay the amount in which he has made default, the Court of Appeal will not interferewith his conclusion, Ib

Driving of Debtor into Bankruptcy, and so causing Forfeiture of his Estate. —The court, being satisfied that a debtor had the means to pay, ordered payment of the debt by instalments (although the payment of such instalments would, it was alleged, drive the debtor into bankruptcy and cause a forfeiture of the income from which such instalments were obtainable), or, in default, committal to prison. Imperial Mercantile Credit Association, In re. Lewis's Case, 42 L. J., Ch. 379; 28 L. T. 396; 21 W. R. 505.

Grown Debts.]-The act does not apply to Crown debts. A defendant at the suit of the Crown is liable to arrest as if it had not passed. Att.-Gen. v. Edwards, 22 L. T. 667. S. P., Smith, In re, 46 L. J., Ex. 73; 2 Ex. D, 47; 35 L. T. 858.

Unsuccessful appellant to House of Lords, arrested on estreat of recognizance for costs, is a Crown debtor and therefore not entitled to discharge. Smith. In rc. supra.

# 2. COMMITTAL IN DEFAULT OF PAYMENT,

Order of Commitment-Duties of Sheriff. ]-An order of commitment under the Debtorsudgment debt is not an "attachment for debt" —Arrears of payments of alimony payable by within the meaning of s. 14 of the Sheriffs Act, a Insband by vitrae of an order of the Divoce 1887, which provides that "where an officer being a sheriff, under-sheriff, buildff, sergeant-atmace, or other officer whatsomer are constituted a debt onforces." mace, or other officer whatsoever, arrests or has in custody any person by virtue of any action, writ, or attachment for debt, such officer shall 

Married Woman-Judgment against Separate Estate. - A married woman cannot be committed to prison under s. 5 of the Debtors Act, 1869, for nonpayment of a judgment debt recovered against her, payable out of her separecovered against her, payable out of her separate estate, under s. I, subss. 2, of the Married Women's Property Act, 1882. Form of order upon such a judgment. Scott v. Marley, 57 L. J., Q. B. 43; 20 Q. B. D. 120; 57 L. T. 919; 36 W. R. 67; 4 Morrell, 286; 52 J. P. 230-

Where an order was made that a married woman should pay by instalments the amount should be made. Otway, Ex parte, Otway, In re, 58 L. T. 885; 36 W. R. 698; 5 Morrell, 115. of a judgment against her, out of her separate estate not subject to restraint in anticipation, or which, being so subject, was liable to execution under s. 19 of the Married Women's Property Act, 1882, the court, apon her default in payment of the instalments, made an order for committal. Johnstone v. Browne, 20 L. R. Ir. 443.

If in the judgment execution is limited to separate estate which she is not restrained from anticipating, quære, whether s. 5 of the Debtors Act, 1869, applies at all. Meaner v. Pellew.

- Separate Estate with Restraint on Anticipation. I—Judgment for a debt and costs was recovered against a married woman, execution being, by the terms of the judgment, limited to her separate property not subject to any restraint | 34 W. R. 47. men anticipation, unless by reason of the Married Women's Property Act, 1882, such property should be liable to execution, not withstanding such restraint. Upon an application for an order of committal against her under s. 5 of the Debtors Act, 1869, the only evidence of her ability to pay was, that since the date of the judgment she had received sufficient income of separate property subject to a restraint apon anticipation :- Held, that no order could be made against her apon that evidence, because s. 5 did not upply to the judgment. Drageatt v. Harrisan, 17 Q. B. D. 147; 34 W. R. 546.

An order, under the Debtors Act, for payment by instalments, will not be made against a married woman whose only separate estate is subject to restraint on anticipation, even though, since the date of the judgment against her she has received income of the separate estate. Morgan v. Eure, 20 L. R. Ir. 541—Q. B. D.

Upon a judgment summons issued under s. 5 of the Debtors Act, 1869, against a married woman who has only separate estate which she is restrained from anticipating, an order for payment cannot be made unless it is shewn that since the date of the judgment she has received some of her separate income. Meager v. Pellew 14 Q. B. D. 973; 53 L. T. 67: 33 W. R. 573c. 52, constitute a deot enforceanic under 8, 5 of the Debtors Act, 1869. Linton, Exparte, Lin-ton, In rr, 54 L. J., Q. B. 529; 15 Q. B. D. 239; 52 L. T. 782; 33 W. R. 714; 49 J. P. 597— C. A.

Where in an order for payment of alimony the periods for payment are specified, an absolute order for an attachment under the Debtors Act. may be made, without any preliminary order for payment by instalments. Daly v. Daly, 17 L. R. Ir. 372

- Payment by Instalments. ]-On January 30, 1888, an order for alimony pendente lite, and on February 1, 1888, an order for permanent alimony, was made in the Probate and Divorce Division. The sum of 130%, being due under these orders, a judgment summons in respect thereof was issued by the wife :- Held, that a receiving order in lies of committal could not be made by the court against the husband under

s. 5 of the Debtors Act, 1869, and that an order directing payment by monthly intalments of 10%.

Damages-Nonpayment in Divorce Matter. ]-The court having ordered damages to be paid into the registry, and proceedings in default being impracticable, as there was no one to institute them, the court ordered the damages to be paid to the petitioner, he undertaking to pay them into court. Gyte v. Gyte, 10 P. D. 185; 34 W. R. 47.

Security for Costs in Divorce Matter. |-Notwithstanding the provisions of the Debtors Act, 1869, a husband is liable to attachment if he does not find security for his wife's costs of suit. Lynch v. Lynch, 54 L. J., P. 93; 10 P. D. 183;

Security for Wife's Costs.]—In a wife's petition for judicial separation the husband was ordered to pay a sum of money into court as security for her costs. He made default in payment:—Held, that this was not "default in payment of a sum of money" within s.4 of the Debtors Act, 1869, and that he was liable to attachment for disobeying the order of the court.

Lynch v. Lynch (10 P. D. 183) approved.

Butes v. Butes, 14 P. D. 17; 60 L. T. 125; 37 W. B. 230-C A

Nonpayment of Costs-Married Woman-No Separate Estate. - A married woman without separate property cannot be imprisoned for nonpayment of the costs of an action. Walter, In re, 55 J.P. 551,

Nonpayment of Costs by Husband, ] — A respondent being in contempt for non-obedience of an order for restitution of conjugal rights, the petitioner applied for a writ of attachment against him —Held, that the writ could not issue for nonpayment of costs. Weldon v. Weldon, 54 L. J., P. 60; 52 L. T. 233; 33 W. R. 427; 49 J. P. 517—C. A. Affirming 10 P. D. 72.

Nonpayment of Costs Generally. ] - An order of the court for payment of costs constitutes a prison for a term not exceeding six weeks, under the Debtors Act, 1869. s. 5, in default of payment of the debt or instalments. Hevitson v. Sherwin, L. R. 10 Eq. 53; 22 L. T. 576; 18 W. R. 802.

Husband's Establishment kept up on Wife's Estate. |-The plaintiff moved to commit the defendant for default in payment of a judgment debt of 291, for goods supplied to him, the appli-cation being supported by an affidavit that the defendant kept up a large establishment, and was to all appearance a man of means. The defendant made an affidavit stating that he was an undischarged bankrupt, had no money, and was unable to pay the plaintiff's demand, and that his wife's property was settled to her separate use. Stephen, J., made an order committing the defendant for six weeks, or until payment, and this order was affirmed by a divisional court. The defendant appealed, and filed a further affidavit shewing that he was living in a very small way, and that the expenses of the establishment were all paid by his wife out of her separate estate. The Court of Appeal being satisfied that the defendant had no means of payment discharged the order for committal. Scrimgeour (5 C. P. D. 366), and the observation of James, L.J., in Esduile v. Visser (13 Ch. D. 421), observed upon. Chard v. Jercis, 9 Q. B. D. 178; 51 L. J., Q. B. 442; 51 L. J., Ch. 429; 30 W. R. 504—C. A.

The defendant was committed to prison for six weeks for default in payment of an instalment of 101, pursuant to an order under the Debtors Act, 1869, upon an affidavit by the plaintiff that the defendant was residing in a large, well-furnished house, keeping horses, carriages, a groom, and other servants, and living in the style of a country gentleman of means; that he had been seen on several occasions at different towns and places with his horse and carriage, and always appeared to have money at his command; and that the plaintiff was informed and believed that he had ample means to pay the debt and costs in the action :- Held, that the order of commitment must be affirmed, although the defendant swore that all the furniture, horses, carriages, and effects at the house above mentioned belonged to his wife, and were bought and maintained by her separate money and estate; that the groom and other servants were the servants of his wife and maintained at her sole expense; that he had no horse or carriage or any other property of his own, nor had he money at his command that would enable him to attend court to answer the application, and his wife declined to supply him with any; and that he was nuable to pay the debt and costs in the action. Harper v. Scrim-geour, 5 C. P. D. 366; 29 W. R. 264.

"Default in Payment of a Sum of Money" Order to Pay Money in pursuance of Under-taking — Contempt of Court.] — An execution creditor gave, in interpleader proceedings, an undertaking to make good any deficiency on sale, which was embodied in an order directing the sheriff to sell the goods seized. There was a deficiency, and the Master ordered the execution creditor to pay the amount to the claimant, This order not being obeyed, an order was made attaching the execution creditor for contempt of court; but there was no proof of means to pay: Ch. D. 3.

—Held, that the case was one of "default in the 6—C. A.

debt capable of being enforced by committal to payment of a sum of money" within s. 4 of the prison for a term not exceeding six weeks, Debtors Act, 1869, and that there was, therefore, no jurisdiction to make the order for attachment. Buchley v. Crawford, 62 L. J., Q. B. 87; [1893] 1 Q. B. 105; 5 R. 125; 67 L. T. 681; 41 W. R. 239 : 57 J. P. 89,

> Judgment Debt—" Execution"—Irish Judgment Registered in England.]—The Judgments Extension Act, 1868, gives no jurisdiction to commit a judgment debtor to prison under the Debtors Act upon the certificate of a judgment obtained in Ireland and registered in England under the former act, inasmuch as such committal is not a process of "execution," and the general words of s. 1 of the Judgments Extension Act, giving jurisdiction to the English courts upon such a judgment, are controlled by s. 4 and limited to "execution" under that act. Watson, In re, Johnson, Ex parte, 62 L. J., Q. B. 85; [1893] 1 Q. B. 21; 4 R. 90; 67 L. T. 519; 41 W. R. 34

> Contributory.]-The court, being satisfied that a debtor, being a contributory in respect of calls, had the means to pay, ordered payment of the debt by instalments (although the payment of such instalments would, it was alleged, drive the debtor into bankruptcy and cause a forfeiture of the income from which such instalments were obtainable), or, in default, committal to prison. Imperial Mercantile Credit Association, In re, Lewis's Case, 42 L. J., Ch. 379; 28 L. T. 396; 21 W. B. 505.

> Disobedience of Order.]—A person who disobeys an order of court to deliver up bills of exchange and cheques, or the moneys received in respect thereof, may be committed for contempt of court. Harrey v. Hall, 23 L. T. 391.

> The fact of the alternative in the order being a money demand does not bring it within the Debtors Act, 1869, 82 & 33 Vict. c. 62. Ib.
> A debtor had been ordered to pay into court

> a sum under 50%, found due from him to the plaintiff in a cause, and had made default in payment. On a motion under the Debtors Act, 1869, s. 5, an order was made for his committal until he should pay the sum, in payment of which he had made default, and also a gross sum for costs fixed by the court in lieu of taxed costs. Rogers v. Rogers, 23 L. T. 796; 19 W. R. 817.

# 3. PERSONS IN FIDUCIARY CAPACITY.

#### a. Generally.

Periods to be Considered.] — To ascertain whether a person ordered to pay and making default fills the character of (a) trustees, (b) persons acting in a fiduciary capacity, or (e) solicitor, within the exception of the Debtors Act, 1869, s. 4. sub-ss. 3 and 4, three periods may possibly be material—namely, (1) when the act on which the order was founded was done, (2) when the order was made, (3) when the default was committed—in cases (a) and (b) the period to be looked at is the first; in case (c), if not the first, at the latest the second period. Per Fry, L.J., in cases (a), (b), and (c), the proper period is the first. String, J. re, 55 L. J., Ch. 553; 25 Ch. D. 342; 55 L. T. 3; 34 W. R. 614; 51 J. P. Meaning of Term.]—A "person acting in a diford, Ex parte, Hincks, In re, 45 L.J., Bk. 127; fiduciary capacity" (Debtors Act, 1869, s. 4, 34 L.T. 666; 24 W.R. 931. sub-s. 3) means a person who stands in a fiduciary relation towards any other person who may be entitled to call upon him to pay, whether such other person is or is not the plaintiff, or one of the plaintiffs, in the action in which the order for payment has been made. Marris v. Ingram, 49 L. J., Ch. 123; 13 Ch. D. 338; 41 L. T. 613; 28 W. R. 434.

A son in the course of management of one of his father's farms sold part of the farming stock, and received the proceeds. Upon the father's death an action was brought by parties interested in his estate against the son for payment of the moneys received by him, and for accounts. The son having failed to comply with an order made in the action for payment of a sum of money into court:—Held, that he was a "person acting in a fiduciary capacity," within s. 4, sub-s. 3, of the Debtors Act, 1869; and, accordingly, the court not being satisfied that he had not the means of payment, leave was given to the plaintiffs to issue a writ of attachment against him for nonpayment. Ib.

Deterrent Object of Act.]—It is immaterial that a defaulting trustee, against whom an attachment is sought to be obtained under s. 4, sub-s. 3, of the Debtors Act, 1869, and s. 1 of the Debtors Act, 1878, is unable to pay the moneys in respect of which he is in default, if the court is of opinion that his breach of trust is of such a character as to constitute a fraud. The object of granting attachments in such cases is not only to recover the money, and to punish fraudulent trustees, but to deter other trustees from committing fraudulent breaches of trust. Knowles, In re, Doodson v. Turner, 52 L. J., Ch. 685; 48 L. T.

Application for Writ by Person not in Position of Cestui que Trust.] — The special remedy afforded by the Debtors Act, 1869, in respect of default in payment by a trustee, is a remedy intended to be given only as between trustee and restni que trust, and is not a remedy for a mere reditor, where the person against whom the remedy is sought to be asserted is not a trustee for such creditor. Firmin, In re, London and County Bunking Co. v. Firmin, 57 L. T. 45.

Hearing of Debtor. - An attachment ought not to issue under any of the exceptions in s. 4 of the Debtors Act, 1869, ex parte, but the debtor should have an opportunity of shewing that he is not within the exception. Ferguson v. Ferguson, 44 L. J., Ch. 615; L. R. 10 Ch. 661.

" Possession or Control." ]--Though the exception of the Debtors Act, 1869, as to imprisonment for default by a trustee to pay "any sum in his possession or under his control," applies where a trustee had improperly parted with the fund, it does not apply where, although through his wilful default, he never had it in his possession. Ib.

For the purpose of bringing a trustee within the 3rd exception of s. 4 of the Debtors Act. 1869, it must appear that money ordered to be paid by him had at some time been in his possession or under his control, and the fact that a trustee has upon his appointment promised to make good the deficiency of a former trustee does not make him liable to committal for non-compliance with an order directing him to pay. Cud- against a defaulting trustee where, owing to the

One of two partners was appointed trustee under a liquidation, and, before the affairs were wound up, died. At the time of his death he was indebted to the estate in 2017. The surviving partner was then appointed trustee on his giving an undertaking in writing to make good any deficiency. The latter never received anything on behalf of the estate. An order of court was made for payment of the 2011, and on its being disobeyed an application was made to commit the surviving partner:—Held, that no order to-commit could be made, because it was not shewn that the debtor had ever had the money in his

possession. Ib.

A trustee who has received trust money is deemed to have it in his possession until he discharges himself of his trust, and he may be attached, as being within the 3rd exception to s. 4 of the Debtors Act, 1869, for making default in payment of a sum so received, and ordered by in payment of a sum so received, and ordered by a court of equity to be paid by him, notwith-standing that he may have parted with the actual possession of or control over the money prior to the order for payment. Middleton v. Chichotzer A D. J., Ch. 237; L. R. 6 Ch. 152; 24 L. T. 173; 19 W. R. 299, 889.

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But interest due from him in respect of trust money so received is not money in his possession or under his control, and an attachment will not issne for non-compliance with an order directing payment of such interest. Ib.

Trustees were held liable for a breach of trust in improperly selling certain bonds forming part of their trust funds. By the judgment in the action they were ordered to make good the valueof the bonds at the date of the judgment. The value of the bonds at the date of the judgment was greater than the value of such bonds at the time of the sale :- Held, on an application to commit the defendants for contempt in not complying with the order, that the difference between the value of the bonds at the time of sale and their value at the date of the judgment was not in the possession of the defondants or under their control within the meaning of s. 4, sub-s. 3, of the Debtors Act, 1869, and therefore that the order could not be enforced by attachment. Walker, In re, Walker v. Walker, 60 L. J., Ch. 25; 63 L. T. 237; 38 W. R. 766.

Attachment.]—A defaulting trustee, who has disregarded an order for payment of trust moneys into court, is not protected from attachment under the Debtors Act. Young v. Dallimure, 22 L. T. 119; 18 W. R. 445.

Loan to Cestui que Trust.]—Where a trustee had sold out trust funds and lent them to a cestui que trust, and an order was made for payment of the same into court by the trustee, the court, under the circumstances of the case, and being satisfied that the trustee was wholly unable to refund the trust moneys, exercised the discre-tion conferred by the Debtors Act, 1878, and refused an application for a writ of attachment for non-compliance with the order. Street v. Hope, 10 Ch. D. 286; 27 W. R. 470.

Trustee without Means.]—Under the discretion conferred upon the court by the Debtors Amendment Act, 1878, the court will refuse to grant an application for a writ of attachment

defaulter being wholly without means, no useful object would be gained thereby. Mackenzie, I Executor.]—Letters of administration had been Eq. 44 L. 7. 618.

Admission by Debtor, afterwards becoming Trustee. By an order of June, 1878, com-promising an action brought to recover from B. moneys which he had borrowed from A. at interest, B. "by his counsel admitting that the principal sum in his hands claimed in the action amounted to ——l." it was ordered in action amounted to effect that he should hold 1,700%, part thereof, on certain trusts, and should be at liberty to retain it during the life of C., paying interest for it, and liberty was given to apply for payment of the principal and interest if default was made in payment of interest. Default having been made, B., in 1887, was ordered to pay the money into court, and on his failing to do so, leave to issue an attachment was applied for. He deposed that when the order of 1878 was made he had not in his hands any money or investments representing the sum owing from him or any part thereof :- Held, that although B. up to the order of 1878 was only a debtor and not a trustee, he must, having regard to his admission, be held, upon the making of that order, to have had the money in his hands as trustee-that he therefore came within the exception in s. 4, sub-s. 3, of the Debtors Act, 1869. and was liable to attachment for nonpayment, Preston v. E. herington, 57 L. J., Ch. 176; 37 Ch. D. 104: 58 L. T. 318: 36 W. R. 49—C. A.

Culpable Negligence-Attachment-Inability to Pay-Discretion of Court. ]-Where a trustee had failed to comply with an order to pay into court large sums which had been disallowed him on passing his accounts, it was shewn that he had by cultable negligence left the trust moneys entirely to the management of agents, and he was unable to prove that the sums disallowed had been applied by them for purposes author-There was no charge of any dishonesty, and the trustee alleged on oath that the moneys had in fact been applied on behalf of the cestui que trust, though under a mistaken view of the trustee's duties. The trustee had no means of replacing the sums. The court, in the exercise of its discretion under the Debtors Act, 1878, s. I. refused to attach the trustee-(1) because he had not been guilty of anything in the nature of a criminal offence; (2) because it did not appear that there was any contumacions refusal to comply with the order. Aglosford (Earl) v. Poulett (Earl), 61 L. J., Ch. 406; [1892] 2 Ch. 60; 66 L. T. 484; 40 W. R. 424-North, J.

Misapplication by Co-trustee.] — Where a trustee, without any dishonesty or fraudulent breach of trust, hands over money to his co-trustee, who misapplies such money, the former is not liable to attachment under s.4, subs. 3, of the Debtors Act, 1869. Smith. In rr. Hands v. Andrewce, 62 L. J., Ch. 363 (§ 1883) 2 Ch. 1; 2 R. 309; 68 L. T. 337; 41 W. E. 289; 57 J. P. 516

Representative of Deceased Person.]—Upon default by the personal representative of a deceased person to pay a sum of money which he has been ordered to pay by the court, sequestration may issue without arrest under 32 & 33 Viot. c. 62, s. 8. Sphes v. Dysan, 39 L. J., Ch. 288; L. R. 9 Eq. 228; 21 L. T. 606.

Order on Administratrix to Pay over to Executor.]—Lecters of administration had been granted to the widow of a deceased person upon the suggestion of intestacy, and she had received a sum of money, part of the deceased! property. The letters of administration were subsequently called in, in an action propounding a will of the deceased, and in that action she was ordered to pay the sum of money to the administrator pending suit, which order she had not obeyed!—Held, that she was not protected by the Debtors Act, 1809, and therefore was liable to attachment. Transchi v., Smartl, 54 L. J., P. 92: 10, P. D. 184; 34 W. R. 46.

Defaulting Executor-Possession or Control-Principal and Interest, ]—An executor making default in payment of a sum of money found due from him in an administration action, and which he has been ordered to pay into court, is within the 3rd exception to s. 4 of the Debtors Act, 1869, notwithstanding that the sum consists of a debt which had been owing to the testator during his life, if the executor had been in a fiduciary relation to the testator in respect ordered to be paid in had been in the executor's possession or under his control. Therefore, where the order directs payment of a sun composed of principal and interest not distinguished, an attachment cannot be issued because so much of the sum as represents interest cannot be said to have been in his possession or under his control. Hickey, In re, Hickey v. Colmer, 55 L. T. 588; 35 W. R. 53.

One of Two Executors.]—In order to bring a trustee within the Brd exception of s, 4 of the Debtors Act, 1869, 82 & 33 Vict. c. 62, it is not mecssary that the money should have been in his sole possession or under his sole control. Therefore, where a sum of money, forming part of the assets of a testator's estate, was paid into a lault to the joint account of two excentors, with power to one of them to draw checutes, and he drew out the money and misuppiled it, and an order was made against both executors for payment of the money into court:—Held, that the other executor was within the exception, and that a writ of attachment might be issued against him for manpayment of the money. Econs v. Bear, L. R. 10 Ch. 76; 31 L. T. 625; 23 W. R. 67;

Manager of Testator's Business-Disobedience to Order to pay Money into Court-Member of Parliament. - A member of parliament was appointed receiver and manager of the business of a testator in an administration action, but was afterwards discharged and ordered to pass his accounts and pay the balance due from him into Subsequently an order was made by which he was directed to pay a certain sum found due from him into court. A motion to attach him for default in payment was made; but on payment of part of the sum due from him the motion stood over by arrangement. On the motion coming on for hearing, he made an affidavit to the effect that the amount paid was raised by a friend; that he had no means, and if a writ of attachment were issued against him he should be unable to pay; and that he was a member of parliament and claimed privilege as such :—Held, that he was liable to imprisonment as a person acting in a fiduciary capacity within

s. 4, sub-s. 3, of the Debtors Act, 1869; that it was not a case in which the centr would refuse to attach, acting on the discretion given it by the Debtors Act, 1878, s. 1; and that parliamentary privilege had no application to such a case. Gent, In re, Gent-Ducis v. Hurris, 58 L. J., Ch. 162; 40 Ch. D. 190; 60 L. T. 355; 37 W. R. 151.

— Non-lodgment of Certified Balance—No Educiary Relation.]—In an action to administer the personal estate of P. T., deceased, the judgment on further consideration ordered defendants, who were administrators with the will annexed of the widow of the deceased, to lodge in couri 310%, the balance certified to be due by her to the estate. The defendants having failed to comply with the order, the plaintiff moved that they might be committed for compense time parties had been established, and therefore that an order for attachment could not be granted. Transfe v. Fitzsimons, [1894] 1 fr. R. 63.

Partner.]—One of two partners receiving money on account of the firm does not receive it "in a fiduciary capacity" so as to be within the 3rd exception to s, 4 of the Debtors Act, 1869. Pidducke v. Burt, 63 L. J., Ch. 246; [1894] I Ch. 343; S IL, 104; 70 L. T. 558; 42 W. R. 248.

Austioneer—Money received from Sale, ]—An auctioneer is a person acting in a fiduciary capacity within the meaning of the Debtors Act, 1869, S. 4, sub-s. 3, and if he makes default in payment of the money produced by the sale of goods entrusted to him for sale when ordered to pay it by a court of equity he is liable to attachment, whether he still holds the money or has parted with it. Cranther v. Elgond, 5 c L. J., Ch. 416; 34 Ch. D. 601; 56 L. T. 415; 35 W. R. 399—C. A.

Company—Director, ]—A divector of a company was ordered, under s. 165 of the Companies Act, 1869, to pay the full value of shares received by him from the promoter, upon which no money had been paid by Held, upon motion to commit him to prison for nonpartment of the money, that his case was not that of a defaulting trustee, within the meaning of the Debtors Act, 1869, s. 4, but of a shareholder who had not paid the full amount due from him. Motion to commit refrased, Dimonol Fuel Co., In re, Metcalfe's Class, 49 L. J., Ch. 347; 13 Ch. D. 815; 42 L. T. 178; 28 W. R. 435.

— Promoter. ]—A sale by a promoter to his company was set asiste for fraud, and the promoter ordered to repay the purchase-money to the company. The promoter instituted proceedings in liquidation under s. 125 of the Dankrappey Act, 1860, and a receiver of his property was applicted. No part of the sam ordered to be regard to the company was paid. The company months of the condition of the promoter field, that the condition of the promoter field, that the condition of the promoter field, that promoter was not a "trastee or personating in following capacity" within s. 4 of the Defeors Act, 1869; and secondly, because he was protected by s. 12 of the Bankruptey Act, 1869. Phamitate Sewage Co. v. Hartmort, 25 W. R. 743.

b. Effect of Bankruptcy Law.

Trustee—Effect of Bankruptey—Jurisdiction.]
—The court has jurisdiction, under s. 4, sub-s. 3,
of the Debtors Act, 1869, to order the attachment
of a trustee who has made default in payment of
a sum of money which he has been ordered to
pay into court, notwithstanding that a receiving
order in bankruptey has been made against him.
Smith. In ve. Hands v. Andrews, 62 L. J., Ch.
336; [1893] 2 Ch. 1; 68 L. T. 337; 41 W. R.
289; 57 J. P. 516—C. A.

Non-compliance with Order to Pay Cash into Court as Trustee. - By an order made on the 5th April, 1889, the defendant was directed, as trustee, to pay two sums of cash, which he was alleged to have misapplied, into court on or before the 6th May, 1889. He failed, however, to comply with that order. On the 13th May, 1889, a receiving order was made against him on his own petition, and he was adjudiented a bankrupt, and he had not yet obtained his discharge. The plaintiffs moved for liberty to issue a writ of attachment against him, the notice of motion being dated the 22nd April, 1890:— Held, that the property and person of the debtor were protected by s. 9 of the Bankruptey Act, 1883; and that the court had no jurisdiction to direct a writ of attachment to issue against him. Simes, In re, Simes v. Newbery, 62 L. T. 721; 38 W. R. 570.

Fraudulent Preference.]—A person who has been ordered to repay to the trustee of a bank-rupt's estate money which he has received by way of frandulient preference does not hold the money in a fiduciary capacity within the meaning of s. 4 of the Debrors Act, 1869, and cannot, therefore, if he make default in payment of the money, be committed to prison under that section. Howard, Experter, Chapman, Let e, 42 L. J., Bk. 19; L. R. 8 Ch. 231; 28 L. T. 4; 21 W. R. 152.

Sect. 9 of the Debtors Act, 1869, is only intended to preserve to the Court of Bankruptcy the special powers of Imprisonment conferred upon it by saidt sections as the 19th, 70th, and 92td of the act of 1869, and is not intended to preserve to the Court of Bankruptcy any powers of imprisonment for debt which have been taken away from other courts by the Debtors Act, 1869.

Money received by a creditor, who was a married woman, by way of fraudulent preference, does not constitute a trust fund for the benefit of the bankrupt's estate, and the non-compliance by the creditor with the order of the court to pay the fund over to the trustee in the bankruptcy does not subject such creditor to imprisonment, as being within the 3rd exception to the 4th section of the Debtors Act, 1869. Wood, Be parte, Chapman, La re, 21 W. B. 7.1

Disobedience of Order for Costs, ]—A trustee in liquidation was ordered to pay the taxed costs of the solicitor and the costs of the motion upon which the order was made. On default, he was committed to prison for his contempt of court in disobeying the order :—Held, that the order of committal was wrong, for that the costs of the motion could not be said to be moneys in his hands as a trustee within s. 4, sub-s. 3, of the Debtors Act, 1869. Sharp, Ew parte, Hind, In re, 37 L. T. 168.

Trustee Protected. ]-A trustee, who had been | agency :- Held, that the defendant was liable to ordered in a suit to pay into court an amount imprisonment under s. 4, sub-s. 3, of the Debtors admitted to be due from him, and mixed with Act, 1869, as a person acting in a fiduciary his own moneys, was adjudicated bankrupt :-Held, that although the debt was one from which an order of discharge would not release him, still, as it was a debt provable under the bankruptcy. he was, pending the bankruptey proceedings, protected by the Bankruptey Act, 1869, s. 12, from attachment for disobedience to the order. Colliham v. Dalton, 44 L. J., Ch. 702; L. R. 10 Ch. 655; 23 W. R. 865.

Discharge Refused.]-Leave was given to issue an attachment against a defendant for nonpayment of money, being a default by a person acting in a fiduciary capacity. He was attached and put in prison. He then filed a declaration of insolvency and was adjudicated bankrupt, and applied for his discharge. Malins, V.-C., refused the application, saying that the bankrupt, if so advised, might renew his application after he had passed his final examination:—Held, that this refusal was right. Lewes (Earl) v. Barnett, 47 L.J., Ch. 144; 6 Ch. D. 252; 26 W. R. 101—

#### 4. Solicitors.

Solicitor-Order for Payment of Money-Subsequent Bankruptcy—Jurisdiction.]—The court has jurisdiction to order a writ of attachment to issue against a solicitor for default in payment of a sum of money which he has been ordered to pay in his character of an officer of the court, notwithstanding that he has subscquently become bankrupt, Edye, In re, 63 L. T. 762; 39 W. R. 198.

Default in Payment by Solicitor-Attachment, notwithstanding Part Payment.]-A writ of attachment against a solicitor for nonpayment of a sum of money due from him as an officer of the courts may be executed, although the client has since the issue of the writ accepted a sum of money in part payment. Harrey v. Hall (L. R. 16 Eq. 324) distinguished. Fereday, In re, 64 L. J., Ch. 894; [1895] 2 Ch. 437; 13 R. 639; 73 L. T. 56.

A solicitor received money belonging to a client, and paid it in to his own banking account. Afterwards an order directing him to pay the money to the client was made by the court. After the making of this order the client signed an agreement to accept payment by instalments. Default was made in payment of the instalments, and a further order for payment was made. This order having been disobeyed, an order for attachment against the solicitor was made. No order had been made calling on the solicitor to answer affidavits, but the matter had been referred to the Master, who had reported that the money was due to the client:—Held, that the case was within the 4th exception in the Debtors Act, 1869, s. 4, and therefore the solicitor was liable was rightly made, and the order of attachment was rightly made, and must be restored. Dudley, In re, Monet, Ex parte, 53 L. J., Q. B. 16; 12 Q. B. D. 44; 49 L. T. 737; 32 W. R. 264—C. A.

Act, 1869, as a person acting in a fiduciary capacity, but not liable under s. 4, sub.-s. 4, as a solicitor ordered to pay in his capacity of officer to the court. *Litelefield* v. *Jones*, 57 L. J., Ch. 100: 36 Ch. D. 530: 58 L. T. 20: 36 W. R. 397.

Nullification of Order by Arrangement. order made against a solicitor under the Debtors Act, for payment of money by a certain day, with notice that in default his property would be liable to sequestration and himself to be arrested and committed to prison, was followed by the issue of a fi. fa., under which the sheriffs took possession. An arrangement was then made by which the sheriffs withdrew from possession, upon an engagement by him to pay the amount, costs, charges, and interest by monthly instalments. and in default that they should re-enter under the original order and proceed with the execution of the warrant as if they had not withdrawn from possession. Default having been made in payment of the instalments :- Held, that, after the arrangement for withdrawing from possession and payment by instalments, the debter could not be attached for default. Harvey v. Hall, 48 L. J., Ch. 95; L. R. 16 Eq. 324; 28 L. T. 734; 21 W. R. 783.

Order on Solicitor to Pay Costs. ]solicitor was ordered under r. 112 of the Bankruptcy Rules, 1886, to repay to the trustee certain costs together with the costs of the order, and the solicitor repaid the costs but not the costs of the order, the court refused to commit him, being doubtful whether he had been ordered to pay the money in his character of solicitor,

Byrne, Ex parte, Apelt, In re, 6 Morrell, 102.

Default by a solicitor in payment of the balance found due from him to his client upon taxation, under the common order in chancery. is default in payment of a sum of money when ordered to be paid by a solicitor in his character of an officer of the court, and an attachment may be issued against him. White, In re, 23 L. T. 387; 19 W. R. 39.

An order was made against a solicitor for delivery of his bill of costs and taxation. He moved to discharge this order, and the application was dismissed with costs. He afterwards appealed, and the appeal was also dismissed with costs :-Held, that the nonpayment of the costs of the appeal was not a default in payment of a sum of money by a solicitor as an officer of the court within the Debtors Act, 1869, s. 4, sub.-s. 4, and that an attachment could not be issued against him. *Hope, In re*, 41 L. J., Ch. 797; 7 Ch. D. 523; 26 L. T. 814; 20 W. R. 694.

The default by a solicitor in payment of a balance found due from him upon taxation of his bill under the common order for that purpose, is a default in payment of a sum of money ordered to be paid by the solicitor in his character of an officer of the court within the meaning of the Debtors Act, 1869, s. 4, sub.-s. 4, and an attachment may be issued against him. Rush, In re, 39 L. J., Ch. 159; L. R. 9 Eq. 147; 21 L. T. 692; 18 W. R. 831.

Town Agent of Country Solicitor. —A solicitor, the London agent of a country solicitor, the London agent of a country solicitor, trade default in payment of a sum ordered to be another solicitor whom he had employed to act paid by him in an action for an account of his for him, is "default by a solicitor in payment of

a sum of money, when ordered to pay the same taken out, and the judge having heard evidence in his character of an officer of the court making and being satisfied as to the defendant's means the order." within the 4th exception to the made an order to commit him to prison for ten Debtors Act, 1869, s. 4, and an attachment may days, but directed that the warrant should be be issued against him. Barfield, In re, 24 L. T. 248; 10 W. R. 466.

Civil Remedies against.]-An attorney having failed to obey a rule of court by which he was ordered to pay over a sum of money received by him in his character of attorney, the court refused to order an attachment, upon the common affidavit. Where the client had elected to take his remedy by a civil proceeding, he must have recourse to an execution under the Judgments Act, I838 (1 & 2 Vict. c. 110), s. 18, or an applica-tion under the Debtors Act, 1869. Bull, In re, 42 L. J., C. P. 104; L. R. 8 C. P. 104. See also

### 5. PRACTICE.

Judicature Act.]—Under s. 76 of the Judicature Act. 1873, the words "the High Court of Justice" should be read in substitution for the Justice should be read in substitution for diversity words "a Court of Equity" in s. 4, sub-s. 3, of the Debtors Act, 1869. Marris v. Ingram, 49 L. J., Ch. 123; 13 Ch. D. 338; 41 L. T. 613; 28 W. R. 434.

Affidavit of Means and Denial of Satisfaction of Debt.]—Upon an application to commit to prison under the Debtors Act (Ireland), 1872, s. 6, for nonpayment of instalments previously ordered to be paid, there must be an affidavit shewing that at the time of such application the debtor is still in a position to pay the instalments. Davis v. Simmonds, 14 L. R. Ir. 364.

Where a party desires to enforce by commitment in the High Court a judgment of a comacuau or satisfaction. Nicholson, Ec parte, Stane, In re, 1 Morrell, 177. petent court, he need not file an affidavit in

"The Means to Pay."]—For the purpose of determining whether a judgment debtor has had "the means to pay" the judgment debt, with the view of making an order for his committal under sub-s. 2 of s. 5 of the Debtors Act, 1869, money derived from a gift may be taken into money derived from a gift may be taken into account. It is not necessary that the "means to pay" should have been derived from the debtor's carnings, or from a fixed income. Per Cotton and Lindley, L.JJ. Koster v. Park, 54 L. J., Q. B. 889; 14 Q. B. D. 597; 52 L. T. 946; 33 W. R. 606; 2 Morrell, 35.

Ability only to Pay Part. - Where a person from whom money is due within the meaning of s. 5 of the Debtors Act, 1869, has means to pay part only of the sum due, and has failed to pay that part, a court is not precluded from making an order under the section by reason only that he is unable to pay the entire sum. Fryer, Exparte, Fryer, In re, 55 L. J., Q. B. 478; 17 Q. B. D. 718; 55 L. T. 276; 34 W. R. 766; 3 Morrell, 231—C. A.

Past Default or Anticipatory Order. |- Judgment having been recovered against a defendant

suspended if the debtor paid instalments of 4*l*, a month, the first payment to be made in fourteen days :- Held, that the order was in reality an order for commitment in respect of the past default in payment of the 201., and not an anticipatory order for commitment in respect of any future default; and that this being so the order was valid under s. 5 of the Debtors Act, 1869. Stonor v. Fowle, 57 L. J., Q. B. 387; 13 App. Cas. 20; 58 L. T. 1; 36 W. R. 742; 52 J. P. 228— H. L. (E.)

Jurisdiction to make Second Order on Cancellation of First.]—A defendant in a county court having made default in payment of 201. due under a judgment, an order was made to commit him to prison. He was, however, never arrested nor imprisoned under the order, which, according to Ord, XXV, r. 33 of the County Court Rules, 1886, expired when a year had elapsed from its date:—Held, upon motion for prohibition, that as no arrest nor imprisonment had ever taken place upon this order before its expiration, and as the defendant was still in default, the county court judge had power to make a second order of commitment. Reg. v. Stoner, 57 L. J., Q. B. 501; 59 L. T. 669-D.

Judgment Summons-Order for Payment by Instalments after Receiving Order against Debtor.]—An order for payment by instalments, under s. 5 of the Debtors Act, 1869, cannot be unuer s. 5 or the Deptors act, 1861, cannot be made in the High Court upon a judgment summons after a receiving order has been made against the judgment debtor. Muthall, In re. Ford v. Authall, 64 L. T. 241; 55 J. P. 565; 8 Morrell, 106-C. A.

Non-application of Chancery Rules to Cases in Exchequer Division,]—A residuary legatee, being cutitled to a sum of money which the trustee of the will admitted that he had received. brought an action against the trustee in the Exchequer Division, and levied execution on the judgment. The execution not having realised enough to satisfy the judgment, the legatee applied to the Exchequer Division for an order to pay the money within a definite time, intending to proceed against the trustee by way of attachment in accordance with the rule of the Court of Chancery of January, 1870, made for working out the Debtors Act, 1869:—Held, that no jurisdiction is given by the Judicature Act, s. 24, sub-s. 1, to the common law divisions of the High Court of Justice to enforce payment of a debt in the manner sought by the plaintiff, Drewitt v. Edwards, 26 W. R. 60. Affirmed, 37 L. T. 622; 26 W. R. 122-C. A.

Election of Remedy.]—Held, that the plaintiff, having pursued the remedy given by the common law divisions, could not subsequently avail himself of the chancery remedy.

Effect of Receiving Order—Arrest.]—Having regard to the terms of s. 9 of the Bankruptey Act, 1883, as to the effect of a receiving order in in a county court, an order for payment of 201. protecting a debtor from arrest, the order must was made. The defendant having made default be deemed to have been "made" on the day it in payment thereof, a judgment summons was was pronounced, and therefore as protecting the

debtor as from that day. Therefore, where a debtor had been arrested under an order of the Chancery Division made after the date of a receiving order pronounced before, but not drawn up and signed by the registrar until after the arrest, he was ordered to be discharged, not withstanding that he had by his counsel submitted to the order of attachment. Muning, In re, 55 L. J., Ch. 613; 30 Ch. D. 480; 54 L. T. 33; 34 W. R. 111—C. A.

After a commitment order had been issued by the Mayor's Court in London against a judgment debtor for default in payment of an instalment of the judgment debt, a receiving order was made against him under s. 9 of the Bankruptey Act, 1883 :- Held, that the commitment order was not a process for contempt of court, but to enforce payment of a debt provable in the bankruptcy, and that after the making of the receiv-Official Reveieer, Exp parte, Ryley, In re, 54 L. J., Q. B. 420; 15 Q. B. D. 329; 33 W. R. 656;

2 Morrell, 171.

Judgment in Superior Court-Jurisdiction of County Court Judge. ]-A county court judge has power to enforce the order or judgment of the High Court, where the High Court has made no order for payment by instalments, by directing payment by instalments of the amount due under such order or judgment, and to commit the debtor in default. But where the High the debtor in default. But where the High Court has made an order for payment by instal-Court das made an order for payment by instancents the country court has no power to vary that order. Addington, Experies, Fee, 51 L. J., 2 B. 246; 16 Q. B. D. 665; 51 L. T. 877; 34 W. R. 598; 3 Morrell, 83. The plaintiff in an action in the High Court Department of the Court of the Parish of the Court of the Court

The defendant having failed to pay, the plaintiff applied to the judge of the county court of the district in which the defendant resided for an order under s. 5 of the Debtors Act, 1869, for payment by instalments, and, upon the judge refusing to make the order upon the ground that he had no jurisdiction, applied to the bankruptcy judge in chambers —Held, that the county court judge had jurisdiction to make the order asked for. Washer v. Elliott (1 C. P. D. 169, and col. 324, infra) explained. Ib.

County Court-Jurisdiction-Committal Order -Prohibition-Non-appearance of Debtor.]-A county court judge has jurisdiction to make a committed order under the Debtors Act, 1869, notwithstanding the non-appearance of the debtor; and a prohibition will not be granted to restrain the proceedings thereunder upon the ground that the debtor had not an opportunity of being heard as to his ability to pay. Pitcher v. Bourn (10 Times L. R. 245) doubted and disapproved. Johnstone v. Kiernan, 10 R. 313.

Power of County Court. ]-Semble, per Bovill, C.J., and Brett, J., that the power of a judge of a county court, under 9 & 10 Vict. c. 95, ss. 98, 99, and 103, to commit more than once for the nonpayment of a judgment debt, is virtually superseded by the Debtors Act, 1869, ss. 4 and 5; and that it is now limited to a single commitment (not to exceed six weeks) for a single default, -each neglect, where the order is for pay-

- Of Mayor's Court. ] - The power of making an order for payment of a debt due on a judgment of a superior court, and of committing the debtor in case of default, which is conferred on inferior courts by the Debtors Act, 1869, s. 5, cannot be exercised by the Mayor's Court of London if the debtor does not reside or carry on business within the city of London at the time he is snummoned on such judgment. Washer v. Elliant, 45 L. J., C. P. 144; J. C. P. D. 169; 34 L. T. 56; 24 W. R. 432.

- Of Inferior Courts.]-The power given to inferior courts by this act to rescind or vary orders, does not enable an inferior court to rescind or vary an order of a superior court on a judgment of the latter. Ib.

Order for Payment by Instalments. - Judgment having been obtained against a wife in an action in which she did not plead coverture, a judge has inrisdiction under the Debtors Act, 1869, to order her to pay the debt by instalments, without being satisfied that she has the means of paying. Dillon v. Cunningham, 42 L. J., Ex. 11: L. R. 8 Ex. 23: 27 L. T. 830.

The court, being satisfied that a debtor had the means to pay, ordered payment of the debt by instalments (although the payment of such instalments would, it was alleged, drive the debtor into bankruptey and cause a forfeiture of the income from which such instalments were obtainable), or, in default, committal to prison.

Imperial Mercantile Credit Association, In re,
Lewis's Case, 42 L. J., Ch. 379; 28 L. T. 396; 21 W. R. 505.

An order directing a judgment debtor to pay by instalments will not be made if it appears to the court that he has not the means of doing so.

Williamson v. Bruans, 8 L. R. Ir. 25.

Order for Payment and Imprisonment in Default not combined. -An order under the Debtors Act will not be made for payment by instalments, the debtor to be imprisoned on default. Anon. 22 L. T. 666.

An application for his commitment must be made when the debtor makes default in payment. Ib.

Only One Committal for same Default. -A county court judge, on the 25th of November, 1872, made an order for the committal of a debtor for forty days for nonpayment of debt and costs under a judgment. The debtor was and costs under a judgment. arrested thereunder on the 30th of December. and discharged by a judge of a superior court on the 6th of January, 1873, on the ground of privilege. The gaoler claiming to retain the warrant for his own protection, and the judge of the county court refusing to issue a second or duplicate warrant, a fresh judgment summons was taken out, under which a second order of committal for forty days for the nonpayment of the same debt and the additional costs was issued on the 7th of March, 1873:—Held, that the issuing of the second order of committal pending the first was an excess of jurisdiction, and a prohibi-tion was granted. Horsmail v. Brace, 42 L. J., C. P. 140; L. R. S C. P. 378; 28 L. T. 705; 21

W. R. 597.
When a debtor has once been committed upon ment by instalments, being deemed to be a fresh default. Horswait v. Bruce, 42 L. J., C. P. 140; 1869, s. 5, for nonpayment of a debt, though for L. R. S. C. P. 378; 2 St. L. 7.05; 2 IV. M. 597. op that section), a second warrant of committal cannot issue against him in respect of the same debt. Econs v. Wills, 45 L. J., C. P. 420; 1 C. P. D. 229; 34 L. T. 679; 24 W. R. 883.

But Committal for Default in Payment of each . Instalment. ]-When, however, the order or judgment makes the debt payable by instalments, the debtor may be committed for the full period of six weeks for default in payment of each instalment. Ib.

Arrest more than Year after Date of Order Valid.]-An arrest made by a sheriff under an order of a judge founded upon 32 & 33 Viet. c, 62 (the Debtors Act, 1869), s, 5, is valid, not-with-standing such order is made more than a year before the date of such arrest. Such an order does not require renewal at the end of a orner does not require remewar as the stat of a year from its date, but remains in force until it is executed. Hermitage v. Kilpin, 43 L. J., Ex. 127; L. R. 9 Ex. 205; 30 L. T. 873; 22 W. R.

Appeal from High Court.]—By the operation of the Bankruptcy Act, 1883, s. 103, the jurisdiction and powers under the Debtors Act, 1869, s. 5, formerly vested in the High Court, are assigned to, and are to be exercised by the judge to whom bankruptcy business is assigned. By s. 104, an appeal is given in bankruptey matters from the order of the High Court to the Court of Appeal. An appeal from an order of the judge to whom bankruptcy business is assigned upon an application under s. 5 of the Debtors Act, 1869, therefore, now lies to the Court of Appeal, and not to a Divisional Court. Genese, Exparte, Lascelles, In re, 53 L. J., Q. B. 578; 32 W. R. 794: 1 Morrell, 183.

Discretion.] — Where a judge, to whom an application for an attachment is made, appears to the Court of Appeal to have exercised upon an erroneous ground the discretion conferred by the Debros Act, 1878, they will review his slecision. Smith, In re, Hands v. Andrews, 62 L. J., Ch. 336; [1893] 2 Ch. 1; 68 L. T. 337; 41 W. R. 289.—C. Å.

When a judge on an application for leave to issue a writ of attachment against a trustee, makes an order for attachment in the exercise of the discretion given to him by the Debtors Act, 1878, the Court of Appeal will not interfere on the merits. Preston v. Etherington, 57 L. J., 'Ch. 176, and col. 315, supra.

## 6. ARREST OF PERSON ABOUT TO QUIT ENGLAND.

### a. Under Debtors Act.

Debt payable in futuro—Default by Trustee,]
-An order was made that a trustee should within seven days after service of the order pay to his cestni que trust, the plaintiff, a sum found due to him by the chief clerk's certificate. The plaintiff could not find the trustee so as to serve the order, and applied for a writ of ne exeat on the ground that the trustee was about to go out of the jurisdiction :-Held, that the case did not of the pursuant that the safe exception in a 4 of the person about to quit England. Launard v. Eige. Debtors Act, 1869, the trustee not being in 3 G. & D. 256; 3 Q. B. 910; 12 L. J., Q. B. 12. default, as the order only directed payment after Jur. 1088.

by that section), a second warrant of committal service and had not been served, and that as the debt was not now due and payable a writ of ne exeat could not be granted. Colverson v. Bloomfield, 54 L. J., Ch. 817; 29 Ch. D. 341; 52 L. T. 478; 33 W. R. 889—C. A.

> Defendant cannot be kept in Prison after Final Judgment. - A debtor who has been arrested and imprisoned under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6, on the ground that his absence from England will prejudice the plaintiff "in the prosecution of his action," cannot be kept in prison after final judgment has been signed. Hume v. Druyff, 42 L. J., Ex. 145; L. R. 8 Ex. 214; 29 L. T. 64,

Applies only before Judgment signed. ]-This section, empowering a judge to order the arrest of a debtor about to leave England, applies only to an action in which judgment has not been signed; and upon final judgment being obtained. the order is annulled. Yorkshire Engine Co. v. Wright, 21 W. R. 15.

The plaintiff arrested the defendant for a debt of 1,500*l*, under a judge's order. The defendant paid into comr 1,500*l*, which he had borrowed from his attorney and a friend, and thereupon was released. He afterwards obtained leave to go abroad to prepare his defence to the action which was an alleged set-off. He subsequently submitted to final judgment for 1,5001. —Held, that the object of s. 6 was merely to secure the presence of the defendant in England until indgment, and that upon judgment being signed the defendant was entitled to have the 1,500%. paid out of the court to him. Ib.

Material Prejudice. ]-To obtain a fiat for the arrest of a debtor about to leave Ireland, it must be shewn that his absence from the comitry will ninterially prejudice the creditor in the prosecution of his suit. M'Blair v. Weir, Ir. R. 7C. L.

# b. Under Law before Debtors Act.

Grounds for believing that Debtor is about to Quit, Sufficiency of .] -It must be shewn that there is reasonable ground to believe that the defendant is about to quit England to avoid the plaintiff's action. Harrey v. O' Meura, 7 D. P. C. 725 ; 3 Jur. 629.

Suspicion merely that he is about to leave England is not sufficient. Ib.

It is not a sufficient excuse to prevent the granting of a capias that the defendant is an officer in the army, and is going abroad to join his regiment. Larchin v. Willan, 4 M. & W. 351; 1 H. & H. 332; 7 D. P. C. 11; 8 L. J., Ex. 19; 2 Jur. 970.

An affidavit, that the defendant was a lientenant in the 78th regiment of foot, which regiment is under orders to embark for India, and deponent believes, and has no doubt, that it is his intention to embark with his regiment and nis intention to empark what his regiment and quit England on military service for India, is sufficient. Arkenheim v. Colegrace, 2 D. & L. 642; 13 M. & W. 620; 14 L. J., Ex. 113; 9

A person domiciled in Ireland, and about to return to that country, after a temporary sojourn in England, is liable to be held to bail as a person about to quit England. Lamond v. Eiffe. on one of his regular voyages, is not. Atkinson cedling case, v. Blake, 1 D. (N.S.) 849; 6 Jur. 1113.

714; 8 Jur. 125; 13 L. J., Q. B. 78.

leave the country. Willis v. Snook 147; 10 L. J., Ex. 266; 5 Jur. 579. Willis v. Snook, S M. & W. C. A.

An affidavit that the deponent has been informed and believes that the defendant is about to leave England, without stating from whom he obtained the information, is not sufficient. Graham v. Sundrinelli, 16 M. & W. 191; + D. & L. 317; 16 L. J., Ex. 67.

But an order may be made on an affidavit of the plaintiff, that he has been informed and believes that the defendant is about to leave England, provided the name and description of the person from whom he has received such information are stated. Gibbons v. Spalding, 11 M. & W. 173; 2 D. (N.S.) 811; 12 L. J., Ex. 185; 7 Jur. 21.

A party was held to bail on an affidavit, that he had obtained money at the Cape of Good Hope by means of a forged letter, and having been charged with such forgery before a magis-trate here, had been discharged, on the ground that the offence was not shewn to have been committed in this country; that it was believed that evidence would be obtained of offences committed in this country; and that the parties therefore believed that it was his intention immediately to quit this country. He applied to the court to be discharged. He did not deny the charges, but swore that he did not intend to quit England. The court refused to discharge him. Ross v. Montefiore, 1 H. & N. 722.

## 7. JUDGE'S ORDER BY CONSENT.

What is. ]-An order made by consent at the trial of an action on a promissory note, that the defence be withdrawn, and that the defen-dant do pay to the plaintiff a specified sum and taxed costs :- Held, not to be a "judge's order made by consent "within 2.776 the Debtors Act, 1869. Lennar, Ex parte, Lennar, In re, 55 L. J., Q. B. 45: 16 Q. B. D. 315; 54 L. T. 452; 34 W. R. 51—C. A.

Failure to file Order-Judgment not void as against Judgment Debtor. - The effect of noncompliance with the requirements of s. 27 is only to render such an order and judgment void as against the creditors of such defendant, but not as against himself; and, therefore, a defendant who has consented to such an order cannot get the judgment signed upon it set aside on the ground that the order has not been filed in accordance with the section. Gowan v. Wright, 56 L. J., Q. B. 131; 18 Q. B. D. 201; 35 W. R. 297—C. A.

Where a judgment obtained by consent is void for non-compliance with the provisions of s. 27. the court will refuse to grant leave to issue

But a captain of a steamer trading between an on the ground that it had not been set aside, English port and Hamburgh, and about to depart Jones v. Jaggar. 54 L. T. 731-D. But see pre-

An attorney about to quit England may be arrested notwithstanding his being an officer of the court. Thomson v. Homeon v. Homeo, I. D. (N.S.) 288: by consent omits to file the judges order in 5 Jur. 1009. S. P., Flight v. Choke, I. D. & L. accordance with s. 27, he is nevertheless cuttled to serve the debtor with a bankruptcy notice It is not necessary for a deponent to swear to founded on such judgment. Guest, Ex purte, his own belief that the defendant is about to Russell, In re, 37 W. R. 21; 5 Morrell, 258—

> Judgment by Consent - Non-registration-Merger.]-Where an order is made by consent for judgment against a defendant in respect of a simple contract debt, such debt is not merged in the judgment, the judgment itself being void. because the consent order has not been filed as provided by the Debtors Act, 1869, s. 27. Vibart v. Culcs, 59 L. J., Q. B. 152: 24 Q. B. D. 364; 62 L. T. 551; 38 W. R. 359—C. A.

Failure to file Order as required by repealed. Bankruptcy Act, 1849 .- A. having commenced an action of debt in the Queen's Bench against B., a trader, B. proposed that a judge's order should be made for a stay of proceedings upon payment of debt and costs, and sent to A. a summons for that purpose, upon which a consent was indorsed by A. A judge's order was there-upon made at the instance of B., directing proceedings to be stayed on payment of debt and costs, in default of payment, judgment to be signed and execution to issue; B. served a copy of this order on A. Neither the original order, nor any copy of it, was filed with the clerk of the docquets and judgments in the Queen's Bench, as directed by the repealed Bankruptey Act, 1849 (12 & 13 Vict. c. 106), s. 137. Judgment was signed, and execution taken out, under the order; and the sheriff paid to A. from the proceeds of the sale of goods of B., the debt and costs for which execution had issued. After the execution and payment B. became bankrupt: -Held, that under 12 & 13 Vict. c. 106, s. 137, the order, judgment and execution were void as against B.'s assignees, the order not having been filed; and that the assignees might recover from A, the amount paid him under the execution as money had and received to their use as assignees. Farrow v. Mayes, 18 Q. B. 816; 17 Jur. 132.

Payment by Garnishee under void Judgment. The defendant in an action consented to a judge's order for judgment against him, which was accordingly signed, and, a garnishee order was accordingly signed, and, a garmine order having been made upon the judgment, the garnishee paid the debt attached to the judgment creditors before the expiration of twenty-one days from the date of the making of the judge's order. The order was not filed as required by s. 27 of the Debtors Act, 1869. The defendant subsequently committed an act of bankruptcy, and was thereupon adjudged bankrupt :- Held, that, although the moneys attached under the judgment had already been paid to the judgment creditors before the act of bankruptey, nevertheless, the judgment being avoided by failure to file the judge's order, the trustee in bankruptey was entitled to recover from the judgment execution upon and in pursuance of Ord. XLII.

r. 23. The defendant against whom the judge—inshee as money received to his use. Brown, ment is sought to be issued is not estopped from Exparte Smith, In re, 57 L. J., Q. B. 212; setting up the invalidity of the judgment merely 20 Q. B. D. 321; 36 W. H. 408—C. A. S. DISCHARGE FROM CUSTODY.

1869, for the discharge of a prisoner who has been in prison a year for contempt of court, Thompson, In re, Nalty v. Aylett, 43 L. J., Ch. 721; 30 L. T., 783; 22 W. R. 857.

Since the Debtors Act, 1869, a defendant who has cleared his contempt by filing his answer

and the detained in prison for non-payment of the costs of his contempt, but the court in ordering his discharge will make it part of the order that he do pay the costs of his contempt, and of the motion to discharge him. Juckson v. Marchy, 45 L. J., Ch. 53; 1 Ch. D. 86.

No order is necessary for the discharge of a prisoner in custody for contempt under any of the exceptions contained in s. 4 of the Debtors Act, 1869, where the writ of attachment has appended to it a note in the following terms:
"Note.—This writ does not authorise an imprisonment for any longer period than one year." It is now the usual practice to append the above note to all writs of attachment issued under the above section. Educards, In re, Brushev, Edwards, 51 L. J., Ch. 943; 21 Ch. D. 230; 30 W. R.

Release on Undertaking to Pay by Instalments. ]-Trustee in a liquidation who had been committed to prison, for non-compliance with an order directing him to pay a sum of money, part of the debtor's property, received by him in his character of trustee, into court, ordered to be released upon his undertaking to pay amount due by quarterly instalments. Hedger, Exparte, Frank, In re, 42 L. T. 192.

Action for Detaining beyond Year.]-In an action in which the plaintiff acted as solicitor and improperly signed judgment and issued execution and received the amount of the levy, an order was made on him to bring that amount into court, and on his non-compliance an order of attachment was made under which he was arrested and committed to the custody of the defendant, then governor of a county gaol. The order was to attach the plaintiff so as to have him before the Common Pleas Division of the High Court of Justice to answer touching an for and obtained his discharge under a judge's order. In an action by him against the defendant for detaining him beyond the year:—Held, that whether the Debtors Act, 1869, s. 4, applied or not, the defendant having complied with the order was not liable to an action, but was protected by the exigency of the writ. Greaves v. Keen, 4 Ex. D. 73; 40 L. T. 216; 27 W. R.

Foreign Attachment.]—A plaintiff in the Mayor's Court of London had sued the defendant by process of foreign attachment. In order to dissolve the attachment he surrendered himself into custody, and remained in prison until the plaintiff obtained final judgment :- Held, that the process of foreign attachment authorised the benefit as guides, but the standards laid down detention of the debtor only until fluid judgment; in them must not be substituted for that which that the Debtors Act, 1869, s. 29, preserving the is laid down in the not. Griffith, Ex parts, custom, did not extend its operation, and did not [Wieszon, Li re, 52 L, J, Cl., 177; 23 Ch. D. 69; the process of foreign attachment authorised the render lawful the detention of the debtor after 48 L. T. 450; 31 W. R. 878.

judgment; and that the defendant was entitled When in Custody for Contempt.]—An order Wilkins, In re. 42 L. J., Q. B. 95; L. R. S. Q. B. 1899, for the Discharge of the Dis

J. M. L.

# DEBENTURES.

See COMPANY.

## DEBTS.

Assignment of.]-See Assignment.

Attachment of. ] - See ATTACHMENT OF

Payment of.] - See PAYMENT.

# DECEIT.

See FRAUD.

Misrepresentation in Prospectus.]-See COM-PANY (PROSPECTUS).

# DECIDED CASES.

Use of Authorities.]—The only use of authorities on decided cases is the establishment of some principle which the judge can follow out in some principle when the ladge can follow out in deciding the case before him—per Jessel, M.R. Hullett's Estate, In re, Knatchbull v. Hullett, 49 L. J., Ch. 415; 13 Ch. D. at p. 712; 42 L. T. 421; 28 W. R. 732.

The only thing in a judge's decision binding

as an authority on a subsequent judge is the principle upon which the case was decided; but it is not sufficient that the case should have alleged contempt, but the order did not shew been decided on a principle, if that principle is what the contempt was. The plaintiff was kept not itself a right principle, or one not applicable in custody for more than a year, and then applied to the case; and it is for a subsequent judge to say whether or not it is a right principle, and, if not, he may himself lay down the true principle. In that case the prior decision ceases to be a binding authority or guide for any subsequent judge, for the second judge who lays down the true principle in effect reverses the decision—per M.R. Osborne and Rowlett, In re, 49 L. J., Ch. 310; 13 Ch. D. at p. 785,

Observations as to the necessity of preserving an uniformity of decision in the different courts. Parkin v. Thorold, 16 Beav. 59; 16 Jur. 959.

In determining whether a transaction amounts to a fraudulent preference, the court ought now to have regard simply to the statutory definition contained in s. 92 of the Bankruptcy Act, 1869. The decisions on the subject before the act may

earlier law and decisions for the purpose of inter-preting the provisions of a statutory code can overrule a decision which has been acted upon preting the provisions of a statutory code can only be just find on some special ground, such as for so long—per Sherr (Lord), M.E. *Licharish*, the doubtful import or previously acquired tech. *Ex-parte*, Wallin, In. m, 59 L. J., 0, B. 500 25 mical meaning of the language used therein, Q. B. D. 176; 62 L. T. 674; 88 W. R. 482. Robinson v. Canadian Pacific Ry., 61 L. J., P. C. 79 : [1892] A. C. 481 : 67 L. T. 505-P. C.

Old Established Cases not to be lightly Overruled. —A case after it has stood for a long period unchallenged should not in the interests of public convenience, and having regard to the protection of private rights, be overruled except upon very special considerations—per Thesiger, L.J. Pugh v. Golden Valley Ry., 49 L. J., Ch. at p. 723; 15 Ch. D. 330; 42 L. T. 863; 28 W. R. 863.

Where an old case is contrary to the principles of the general law, the Court of Appeal ought not to shrink from overruling it even after a considerable lapse of time, but when an olddecided case has made the law on a particular subject, the Court of Appeal ought not to interfere with it, because people have considered it as establishing the law and have acted upon it—per Jessel, M.R. Smith v. Keal, 9 Q. B. D. 352; 47 L. T. 143; 31 W. R. 80.

The court will not overrule eases upon which conveyancers may have relied even though the court does not consider the case a sensible decosion—per Bowen, L.J. Lashmar, In re, Mondy v. Penfold, 60 L. J., Ch. 143; [1891] 1 Ch. 258; 64 L. T. 333.

A rule lauded by the highest legal authorities. and acted upon for centuries, ought not to be disturbed upon appeal. Harrey v. Farquhar, L. R. 2 H. L. Sc. 192.

Although an old decision, which has been long followed as having settled the law, may be shown to have proceeded upon a wrong view of what the case was, it cannot be disregarded. Baker v. Tucker, 3 H. L. Cas. 106; 14 Jur. 771.

Where a decision has been frequently questioned, though not overruled, the fact that it has stood for twelve years without being authoritatively overruled, does not bind a court of error to follow it—per Baggallay, L.J. Peurson v. Peurson, 54 L. J., Ch. 32; 27 Ch. D. 145; 51 T. 311; 32 W. R. 1006.

Where there has been a deliberate unappealed decision of a court with regard to the effect of a condition in a common form of contract which has become known to all persons who have to deal with such matters, and has been acted on for eighteen years, it has always been the legal practice, even of courts of error, to follow such decisions, even though they would not, perhaps, have given the same decision had the case come originally before them-per Brett, M.R. Palmer v. Johnson, 53 L. J., Q. B. 348; 13 Q. B. D. 355; 51 L. T. 211: 33 W. R. 36.

If a contract founded upon a statute has been in daily use and a decision of the courts on that statute has been acted on throughout the country for a long time, the Court of Appeal might feel bound to follow the old decision even though not agreeing with it, on the ground of the number of persons who had acted on it—per Esher (Lord), M.R. Phillips v. Rees, 59 L. J., Q. B. 1; 24 Q. B. D. 17; 61 L. T. 713; 38 W. R. 55; 54 J. E. 29.

When a decision has stood for many years, the

Construction of Code. ]-An appeal to the courts would not have come to the same Morrell, 148,

I think that a doctrine having been laid down so long ago, whether it rests upon any sound basis or not, it would be most improper to depart from it now, because one would be really altering the contract between the parties; for we have a right to suppose that they have entered into it upon the basis of that which for nearly a century has been understood to be the law-per Herschell (Lord) and Morris (Lord). Tancred v. Steel Co. of Scotland, 15 App. Cas. 125.

Where documents are in daily use in mercantile affairs, without any substantial difference in form from time to time, it is most material that the construction which was given to them years ago, and which has from that time been accepted in the courts of law, and in the mercantileworld, should not be in the least altered, because all subsequent contracts have been made on the faith of the decisions. Therefore, whether one thinks that one would oneself have come to the same conclusion as the judges did in the beginning is immaterial. One ought to adhere strictly to the construction which has been put upon such documents—per Esher (Lord), M.R. Pendorf v. Hamilton, 55 L. J., Q. B. 546; 17 Q. B. D. 674; 55 L. T. 499; 35 W. R. 70; 6 Asp. M. C. 44.

If the question were doubtful, I should hesitate very long before I laid down a different rule of construction in relation to sections of the Wills Act which have had for many years a particular construction given to them; because it is impossible to say how many persons may have acted upon the faith that that construction was correct and rested the disposal of their property upon that belief. Of course if it were clear that the construction put by the courts upon the sections was wrong, it would be our duty, disregarding the result, to express a contrary opinion—per Herschell (Lord). Airey v. Bower, 56 L. J., Ch. 742; 12 App. Cas. 269; 56 L. T. 409; 35 W. R. 657.

- Erroneous construction of Statute. - I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for a long time, and which has been sanctioned by high legal anthority. But if it is really founded upon an erroneous construction of an act of parliament, there is no principle which precludes the House of Lords from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the legislature, merely because it has happened, for some reason or other, to remain unchallenged some reason of other, to remain indiantengation for a certain length of time—per Macnaghten (Lovd). Hamilton v. Baker, The Sura, 58 L. J., 17, 57; 14 App. Cas. 209; 61 L. T. 26; 38 W. R. 129; 6 Asp. M. C. 413. And see preceding case.

- Rule of Procedure. - Where a judgment contains a decision on a rule of procedure which has thus been brought before the public, the profession, and the legislature, and remained undisturbed for many years, and has been acted upon and dealt with in statutes and rules of court, When a decision has stood for many years, the even if I dissented from it, I should hesitate to courts always consider that subsequent contracts overrule it—per Brett, M.B. Fruser v. Ehrenhave been entered into subject to it, and even if perper, 53 L. J., Q. B. 78; 12 Q. B. D. 318.

- As to Jurisdiction. ] - The rale that | governs us in not overruling decisions of many years standing, on which persons may have it does not preclude a bill of review. Hosking acted in making contracts or otherwise does not v. Terry, 7 L. T., 52. apply to a decision as to the jurisdiction of another court, and there is no reason why at any distance of time a superior court should not overrule it—per Lord Esher, M.R. Reg. v. Edwards, 53 L. J., M. C. 149; 13 O. B. D. 586; 51 L. T. 586.

Binding Character of old Dicta. ]-If, even in the absence of any judicial decision, a dictum in law has been accepted and has entered into contracts and dealings, so that by not following it I should be actually disturbing anything which had been done in former times over and over again on the faith of this dietum, I should feel myself bound by it—Pearson, J. Rosher, In re, Rosher v. Rosher, 53 L. J., Ch. 722; 26 Ch. D. 821; 51 L. T. 785; 32 W. R. 825.

Examination by Judge of Practice in his Court. — I do not think that a judge would wish any statement which he may have made in the course of a case, merely obiter and casually, to be treated as necessarily being an authority on the subject in question; but when a judge has thought it necessary for the purpose of a case to make a deliberate examination of the practice of his court, and to state such practice, I do not think the authority of such statement can be got rid of merely by arguing that it was not really necessary for the actual decision of the case - per Lord Esher, M.R. Bell Cow or Cow, Ex parte, 57 L. J., Q. B. 103; 20 Q. B. D. 19; 58 L. T. 323; 36 W. R. 213 : 52 J. P. 484.

In House of Lords. - Where a case involves a clear principle which has been decided by the House of Lords, that decision must be followed by every other inferior court. French v. Macale, 2 Dr. & W. 269; 1 Con. & L. 459; 4 Ir. Eq. R. 568.

The decisions of the House of Lords are conclusive declarations of the existing state of the law, and are binding upon itself when sitting judicially, as much as upon all inferior tribunals, and can only be altered by act of parliament. Att.-Gen. v. Windsor (Dean), 8 H. L. Cas. 369; 30 L. J., Ch. 529; 6 Jur. (N.S.) 833; 2 L. T. 578 8 W. R. 477.

The rule of law laid down by the Honse of Lords as the ground of its judgment, sitting judicially as the last and supreme court of appeal must be taken for law until altered by act of parliament. If the law were not binding upon the House it would be arrogating to itself the right of altering the law, and legislating by its separate authority. Beamish v. Beamish, 9 H. L. Cas. 274; 8 Jur. (N.S.) 770; 5 L. T. 97.

A judgment of the House of Lords given on appeal cannot be reversed; but where such appeal and judgment have been obtained by suppression and misrepresentation, the Honse will afterwards discharge the order granting the leave to appeal and the order constituting the leave to appeal and the order constituting the judg-ment thereon. Tommey v. White, 4 H. L. Cas. 313. A decision of the House of Lords once pro-

nounced in a particular case is conclusive in that case, and cannot be reversed, except by act of parliament; but if the House should afterwards be of opinion that an erroneous principle lind been adopted in the first case, the House would not be bound in any other to adhere to such principle. Wilson v. Wilson, 5 H. L. Cas. 40; 20 L. J., Ch. 697.

An order of the House of Lords, affirming a decree in Chancery, is final and conclusive, but

The House of Lords will not reconsider a question which it has once decided. Thellusson v. Rendleshum, 7 H. L. Cas. 429.

A decision of the House of Lords is binding upon every court in the kingdom, including the House itself in its judicial character. Topham

v. Portland (Duke), 17 W. R. 911.
Decisions of the House of Lords upon questions of law, as the construction of statutes and especially of fiscal acts, are binding upon the House in subsequent cases. Inland Receive Commissioners v. Harrison, 43 L. J., Ex. 138; L. R. 7 H. L. 1; 30 L. T. 274; 22 W. R. 559.

- Decision on English Case - Effect on Scotch Case.]-A decision of this House in an English ease ought to be held conclusive in Scotland as well as England, as to the questions of English law and English jurisdiction which it determined. It cannot, of course, conclude any question of Scottish law, or as to the jurisdiction of any Scottish court in Scotland, So far as it may proceed upon principles of general jurisprudence, it ought to have weight in Scotland; as a similar judgment of this House on a Scotch appeal ought to have weight in England —per Lord Selborne, L.C. Ewing v. Orr-Ewing, 10 App. Cas. 499; 53 L. T. 826.

 Elaborate Judgment not dissented from. -Where, in the House of Lords, one of the learned lords gives an elaborate explanation of the meaning of a statute, and some of the other learned lords present concur in the explanation, and none express their dissent from it, it must be taken that all of them agreed in it —per Esher (Lord), M.R. West Durby Union v. Atcham Union, 59 L. J., M. C. 17; 24 Q. B. D. 117; 38 W. R. 361; 54 J. P. 485. S. P., Manchester Overscors v. Ormskirk Union—per Cole-ridge (Lord), C.J., 59 L. J., M. C. 103;24 Q. B. D. 678; 62 L. T. 661; 38 W. R. 778; 54 J. P. 487.

- Conflicting Decisions.]-If two cases decided in this House cannot be reconciled, I apprehend that the authority which is at once the more recent, and the more consistent with general principles, ought to prevail—per Selborne, L.C. Campbell v. Campbell, 5 App. Cas. at

It is the duty of this House to maintain, as far as possible, the authority of all former decisions of this House; and although later decisions may have interpreted and limited the application of earlier, they ought not (without some unavoidable necessity) to be treated as conflicting-per Selborne, L.C. Caledonian Ry. v. Walker's Trus-tecs, 7 App. Cas. 259; 46 L. T. 826; 30 W. R. 569; 46 J. P. 676.

Dicta. - Observations made by members of the House, beyond the ratio decidendi which is propounded and acted upon in giving judgment, are only to be followed in as far as they may be considered agreeable to sound reason and to prior authorities. Att. - Gen. v. Windsor (Dean), 8 H. L. Cas. 369; 30 L. J., Ch. 529; 6 Jur. (N.S.) 833; 2 L. T. 578; 8 W. R. 477.

- Lords equally Divided. |-- Where there is an equal division of opinion among the lords, and in consequence, the judgment of the court below stands, the result is the same as to authority as

Ratio Decidendi, how Discovered. -If five lords give five different sets of reasons, you have the decisions, and you must find out for yourself which of the judgments is to be relied upon as giving the proper reasons. But I think in all these cases you must only look at the judgments of the lords who formed the majority, and who decided the case—per Jessel, M.R. Redgrave v. Hurd, 51 L. J., Ch. 118; 20 Ch. D. 14; 45 L. T. 489; 30 W. R. 251.

Decisions of Courts of Co-ordinate Jurisdiction.]—The Courts of Queen's Bench, Common Pleas and Exchequer followed each other's decisions, as a matter of courtesy; but the vicechancellors did not consider themselves bound by each other's decisions. I have differed frequently from courts of co-ordinate jurisdiction—per Jessel, M.R. Guthercole v. Smith, 44 L. T.

The Court of Appeal is not bound by the decision of the Exchequer Chamber when the latter court were equally divided in opinion, and, in consequence, the judgment of the Queen's Bench was affirmed—per Brett, L.J. Smith v. Lambeth Assessment Committee, 10 Q. B. D. 328.

When the decision of one court is cited to another of co-ordinate authority, the latter has a right to regard it in a critical, and even sceptical spirit; and, while accepting the decision, to decline the reason of deciding, if a better one can be assigned. Tottenham's Estate, In re, lr. R. 3 Eq. 528

The court will not review a decision of a contemporary court of co-ordinate authority, unless there has been a conflict of decision, or such decision is at variance with a long line of authorities.

Buller, In re, 8 Jun (N.S.) 205.

The decision of a co-ordinate branch of the court will be followed until reversed on appeal, in order to avoid an unseemly conflict of decisions. Hotchkiss's Trusts, In re, L. R. 8 Eq. 647. S. P., Times Life Assurance and Guarantee Co., In re, Nunneley, Ex purte, 39 L. J., Ch. 297; 22 L. T. 198; 18 W. R. 404.

Where there is power to appeal, the courts are bound by the decisions of courts of co-ordinate jurisdiction. Casson v. Churchley, 53 L. J., Q. B. 335; 50 L. T. 568. Sec The Vera Cruz, infra.

According to the comity of judicial tribunals in this country, one court of co-ordinate jurisdiction should not, in a case in which there is an appeal, differ from another court of co-ordinate jurisdiction-per Brett, M.R. Palmer v. Johnson, 53 L. J., Q. B. 348; 13 Q. B. D. 355; 51 L. T. 211; 38 W. R. 36.

Though a divisional court is not in every case and under all circumstances absolutely bound by a decision of another divisional court, still according to all the ordinary rules by which the practice of the courts is regulated, such a deciproduce of the courts is regulated, such a decision should be followed—per Pollocis, B. Verwor v. Watson, 60 L. J., Q. B. 205; [1891] I Q. B. 400; 64 L. T. 460; 55 J. P. 454.

Decisions of Lord Chancellor-Judge of First Instance. ]-I think the Lord Chancellor, wherever he is sitting and whatever case he is trying, is still Lord Chancellor, and his decision is binding of the courts in Westminster Hall to hold itself

by a previous decision of a lord chancellor ment. Ib. A vice-chancellor, in deciding a case, is bound or not. Freeman v. Pope, 39 L. J., Ch. 148; L. R. 9 Eq. 206; 21 L. T. 816; 18 W. R. 399.

Where a previous decision, even of the Court of Appeal, is clearly based upon a misapprehension, the court is not bound to follow it. Dogdale v. Dugdale, L. R. 14 Eq. 234.

Whether binding on Court of Appeal. ]-Although the decision of a lord chancellor given before the Judicature Act may be overruled by the Court of Appeal, yet such a course ought only to be taken exceptionally, and in a very strong case. So rarely is that done, that practically the decisions of a lord chancellor and the old lord justices are considered as binding on the Court of Appeal—per Cotton, L.J. Watts, In ro, Cornford v. Elliott, 55 L. J., Ch. 383; 29 Ch. D. 958; 53 L. T. 426; 33 W. R. 885. S. P., Gard v. Sewers Commissioners—per Baggallay, L. J.; 54 L. J., Ch. 707; 28 Ch. D. 509; 52 L. T.

I think I may say that we ought not to lay down as an absolute rule that decisions of lord chancellors, at all events sitting alone, are to be taken as decisions of the Court of Appeal and absolutely binding on this court, so as to prevent us from even looking into the grounds or considering the case which was before the particular lord chancellor. But no doubt the greatest weight ought to be given to such decisious, and, unless they are shewn to be manifestly wrong or manifestly contrary to the general current of authority on the point decided, it appears to me that we ought not to take upon ourselves to over-Tule them—per Thesiger, L.J. Wheeldon v. Burrows, 48 L. J., Ch. 855; 12 Ch. D. at p. 54; 41 L. T. 327; 28 W. R. 196.

I may say that I do not consider the decision of a lord chancellor is absolutely binding upon us, because every lord chancellor's decision was liable to be re-heard, not only by himself, but by his successor—per James, L.J. Askworth v. Munn, 15 Ch. D. at p. 377; 43 L. T. 553; 28 W. R.

Conflicting Decisions of different Lord Chancellors.]—When we have conflicting decisions of two Lord Chancellors, the decision of the subsequent lord chancellor is entitled to the greater weight, because the subsequent Lord Chancellor could overrule the decision of the prior Lord Chancellor—per Jessel, M.R. Henty v. Wrey, 58 L. J., Ch. 674; 21 Ch. D. 332; 47 L. T. 231; 30 W. R. 850.

Power of Full Court of Appeal to overrule Decisions of Smaller Number. ]-The Court of Appeal is one composed of six members, and if at any time a decision of a lesser number is called in question, and a difficulty arises about the accuracy of it, I think the court is entitled, sitting as a full court, to decide whether we will follow or not the decision arrived at by the smaller number—per Lord Esher, M.R. Kellyv. Kellond, 57 L. J., Q. B. 330; 20 Q. B. D. 572; 58 L. T. 263; 36 W. R. 363.

St. Mary, Winton (Vicar), bound by a previous decision of itself or of a Tare, 18 Ch. D. 648; 45 L. T. 136; 29 W. R. 883. | court of co-ordinate jurisdiction. But there is no statute or common-law rule by which one sioners are binding on the Railway and Canal court is bound to abide by the decision of another 'Commission Court. Didon', Newbury and South-of equal runk; it does so simply from what may  $a_0 mpon_0 R_y \dots C_1 W. B_y, 9$  Ry. & Can. Traff. be called the comity of judges. In the same way, there is no common law or statutory rule to oblige a court to bow to its own decisions; it does so again on the grounds of judicial comity. But when a court is equally divided, this comity does not exist, for there is no authority of the court as such, and those who follow must choose one of the two adverse opinions—per Brett. M.R.

The Vera Cruz, 53 L. J., P. 33; 9 P. D. 96; 51
L. T. 104; 32 W. R. 783; 5 Asp. M. C. 270.

Binding Character of Decisions on Construction of Documents. |- Nothing is better settled than that the construction put upon an instrument by a court of law or equity is not binding on another court of law or equity, even of inferior jurisdiction, as regards the construction of an instrument couched in somewhat similar language. New Cullao, In re, 52 L. J., Ch. 285;

22 Ch. D. 488; 48 L. T. 252; 31 W. R. 185, Where the words of a document are not identically the same, the case on a question of construction is not binding on a court of coordinate jurisdiction. Huck v. London Provident Building Society, 52 L. J., Ch. 541; 23 Ch. D. 111; 48 L. T. 250; 31 W. R. 393.

Binding Character of Decisions of Privy Council.]—While attaching great weight to previous decisions in pari materia, the judicial committee will examine the reasons upon which such decisions rest, and will give effect to their own view of the law. Clifton v. Ridsdale (2 P. D. 276), approved. Read v. Lincoln (Bishop), 62 L. J., P. C. 1: [1892] A. C. 644; 67 L. T. 128; 56 J. P. 725—P. C.

It is true that the decisions of the privy council are not theoretically binding on the High Court; but in case of mercantile and admiralty law, where the same principles are professedly followed in the colonies and in this country, it is, to say the least, highly undesirable that there should be any conflict between the decisions of the judicial committee and those of the High Court or Courts of Appeal in this country—per Limley, L.J. The City of Chester, 53 L. J. P. 103; 9 P. D. 207; 51 L. T. 485; 33 W. R. 111; 5 Asp. M. C. 320.

When a decision of the judicial committee has been reported to Her Majesty, and has been sauctioned, it becomes the decree or order of the final Court of Appeal; and it is the daty of every subordinate tribunal to whom the order is addressed to carry it into execution. Pitts v. La Fontaine, 50 L. J., P. C. 8; 6 App. Cas. 482; 43 L. T. 519-P. C.

Decisions of Ecclesiastical Courts.]—I think there is anthority for saying that the temporal court, proceeding in prohibition to restrain excess of jurisdiction in the Court Ecclesiastical, is not bound by a decision of even the highest Court of Appeal in ecclesiastical matters—per Blackburn, Lord. *Machanochie v. Penzance (Lord)*, 50 L. J., Q. B. 611; 6 App. Cas. +43; 44 L. T. 479; 29 W. R. 633; 45 J. P. 584—H. L. (E.)

Decisions of Railway Commissioners. |--- I think we have held that eases before the railway commissioners must not be cited as anthorities to us
—per Bramwell, L.J. G. W. Ry. v. Railway
Commissioners, 50 L. J., Q. B. 489.

Cas. 210.

Scotch and Irish Decisions.]-The courts carefully consider the decisions of the Scotch and Irish courts, though the decisions are not binding on English courts — per Esher (Lord), M.R. Reg. v. Income Taw Commissioners, 58 L. J., Q. B. 196; 22 Q. B. D. 296; 60 L. T. 446; 37 W. R. 294; 53 J. P. 198.

The decisions of the Irish courts, though entitled to the highest respect, are not binding on English judges. Parsons, In re, Stockley v. Parsons, 59 L. J., Ch. 666; 45 Ch. D. 51; 62 L. T. 929; 38 W. R. 712.

A decision of the court of session in Scotland is not binding upon a divisional court in England, not being a court of co-ordinate jurisdiction; and the inconvenience which might result from a difference between English and Scotch courts on the construction of an act of parliament will not prevent the English court from differing from such previous decision. Morgan v. London General Omnibus Co., 12 Q. B. D. 201; 50 L. T. 687; 32 W. R. 416.

Although we ought to pay respect to the opinion of the Court of Session on a point of law common to both England and Scotland, their decisions cannot be considered binding Johnson v. Raylton, 50 L. J., Q. B. 756; 7 Q. B. D. 445; 45 L. T. 374; 30 W. R. 350.

Scotch cases, though not binding as an authority, are, nevertheless, entitled to the greatest respect. Ivay v. Hedges, 9 Q. B. D. 82.

It was said the case cited was an authority, although not strictly binding on us, but yet a very high authority, indeed, of the Court of Session, and one which, if in point, I should pay the greatest possible respect to, although we wish the control of the court of the c might not feel ourselves bound by it—per Field, J. G. W. Ry. v. Railway Commissioners, 50 L. J., Q. B. 486.

As to the case cited to us, we are not bound by it, even if it was not distinguishable-per Cotton, L.J. Ib., 45 L. T. 208.

American Decisions. - An appeal was made to an American case, not of course as an authority, because I take it that a judgment of a court in New York is not an anthority in a case arising in England, but as a decision of learned judges that ought to influence the house to come to the same conclusion in the present case—per Watson, Lord. Custro v. Reg., 50 L. J., Q. B. 507; 6 App. Cas. 249; 44 L. T. 357; 14 Cox, C. C. 561.

Judgment Affirmed on Different Grounds.]-To affirm a judgment upon different grounds from that on which the case was decided in the court below detracts greatly from its value, and makes it no louger a binding authority. Hack v. London Provident Building Society, 52 L. J., Ch. 542; 23 Ch. D. 112; 48 L. T. 250; 31 W. R. 394.

Case Relied on Overruled-Costs. |-- Where a suit is instituted on the authority of a case, and the doctrine upon which the same was founded has been since got rid of, the plaintiff is entitled to have his bill dismissed without costs. Satton Harbour Improvement Cv. v. Hitchens, 1 De G., M. & G. 161; 21 L. J., Ch. 568; 16 Jur. 70.

Barnardiston.] - Lord Mansfield absolutely But cases decided by the railway commis- forbade this book being cited; for it would be only misleading to students, to put them upon B. FORM AND EFFECT. reading it. Woolston v. Woolston, 2 Burr. 1142.

Dyer.]—Marginal notes in Dyer are good authority. Milward v. Thatcher, 2 Term Rep. 84; 1 R. R. 432, S. P., Jones v. Handcock, 4 Dow, 202; 16 R. R. 53.

Moseley.]-A book possessing a very considerable degree of accuracy. Mills v. Farmer, 1 Mer. 92; 19 Ves. 487, n.

Weekly Notes.]—The Court of Appeal does not allow the Weekly Notes to be read as an authority-per Cotton, L.J. Pooley's Trustee v. Whethum, 33 Ch. D. 77.

Case in "The Times"—Verification by Affidavit.]—It was proposed on the hearing of a 1. In General. case in the Court of Appeal to refer to a report of a case from "The Times," but it was only allowed to be read after having been verified by an affidavit of the barrister who had acted as "The Times" reporter. Walter v. Emmott, 54 L. J., Ch. 1061, n.-C. A.

Manuscript Note.]—As to the authority of Ms. notes cited at the bar, see Hawley, Ex parte, Richards, In re, 2 Mont. & Ayr. 435

Citing Text-books.]—It is to my mind much to be regretted, and it is a regret which I believe D. PAROL EVIDENCE. every judge on the bench shares, that text-books are more and more quoted in court-I mean of course text-books by living authors-and some judges have gone so far as to say that they shall not be quoted. Union Bank v. Manster, 57 L. J., Ch. 124; 87 Ch. D. 51; 57 L. T. 877; 52 J. P. 453.

J. M.

# DECLARATION.

Statutory. ]-See EVIDENCE.

Dying.] -See CRIMINAL LAW.

Against Interest.]—See EVIDENCE.

Of Trust.]-See GIFT-TRUST,

# DECREE.

See JUDGMENT - PRACTICE (JUDGMENTS).

# DEED AND BOND.

[BY A. E. RANDALL.]

- A. VALIDITY AND OPERATION.
  - 1. General Principles, 341.
  - 2. Parties, 356.
  - 3. Consideration, 361.
  - 4. Merger-See MERGER.

- - 1. Date, 363,
  - 2. Execution.
    - Presumptions respecting, 365.
      - b. Manner of, 367.
      - c. Escrows, 370. d. Agents, 373.
      - e. Non-Execution, 374,
      - f. Order of the Court to Execute—Sec-PRACTICE.
      - g. By Infants—See Infant.
         h. By Lunatics—See Lunatic.

    - i. By Partner—See Partnership. j. Proof of -See EVIDENCE.
  - Indorsements, Plans and Schedules, 375.

- 1. In General, 380.
- 2. Recitals, 392,
- 3. Purvels and Description, 407.
- 4. Habendum and Reddendum, 412.
- 5. Proviso, 417.
- 6. Particular Words, 417.
- 7. Inconsistent Clauses, 421. Consideration—See col. 361, and cols. 425, 453,
- 8. Covenant-See Covenant.

- 1. To Explain, 422.
- To supply Consideration, 425.
- E. STAMPING—See REVENUE.
- F. PARTICULAR DEEDS AND BONDS.
  - 1. Post Obits, 426.
  - 2. Voluntary Deeds and Bonds, 427. 3. Of Indemnity, 427.
  - 4. Title Deeds, 431. 5. Release.
    - u. Power to Give, 440.
    - b. What Amounts to.
      - i. In General, 442.
      - Consideration, 453. iii. Fraud and Ignorance of Rights,
    - 454

    - c. Construction and Operation. i. In General, 459.
  - ji. Joint or Separate Claims, 469.
     d. Pleading and Evidence, 472.
  - 6. Administration Bond—See WILL.
  - 7. Annuity-See Annuity.
  - 8. Arbitration—See Arbitration.
  - 9. Bottomry—See Shipping.
  - 10. Cohabitation-See Contract.
  - 11. Companies-See Company.
  - 12. Composition Deeds-See Bankruptcy,
  - 13. Compromise of Criminal Proceedings See CONTRACT.
  - 14. To the Crown-See CROWN.
- 15. Guarantee—See Principal and Surety.
- 16. Infants-See Infant.
- 17. Lloyd's-See Company.
- 18. On Marriage See HUSBAND AND WIFE.
- 19. Replevin-See REPLEVIN.
- 20. Resignation-See ECCLESIASTICAL LAW.

- 21, Surety-See PRINCIPAL AND SURETY.
- 22. Trade, Restraint of-See Contract.
- 23. Foreign Bonds-See NEGOTIABLE IN-STRUMENTS.
- 24. Separation Deeds—See Husband and Wife.
- G. REGISTRATION, 475.
- H. PROCEEDINGS ON BONDS.
  - 1. When Maintainable, 485.
  - 2. Under 8 & 9 Will, 3, c. 11, 486.
  - 3. Under 4 & 5 Anne, c. 3, 488.
  - 4. What Recoverable, 488.
  - 5. Penalty-See PENALTY.
  - 6. Pleading.
  - - a. Claim, 493. b. Defence, 494.
    - c. Assignment of Breaches, 499. d. Other Subsequent Pleadings, 501,
  - 7. Staying Proceedings, 502.
  - 8. Paument into Court, 505.
  - 9. Eridence, 505
  - 10. Statutes of Limitation-See Limitation (STATUTES OF).
- I. ALTERATION, 507.
- J. CANCELLATION AND RECTIFICATION.
  - 1. Cancellation. a. By Court, 511.
    - b. In Other Cases, 520.
- 2. Rectification, 522.
- K. REVOCATION AND CONFIRMATION, 529.

#### A. VALIDITY AND OPERATION.

#### 1. GENERAL PRINCIPLES.

Blanks.]-A deed, executed with the name of a transferee or vendee, in blank, is void at common law. Hibblewhite v. M. Morine, 6 M. & W. 200; 9 L, J., Ex. 217; 4 Jnr. 769.

A deed signed in blank is not executed, and in an action for calls the point arises mider never indebted. Consuls Insurance Co. v. Newall, 3 F. & F. 130.

This principle is applicable to transfers of stock under ss. 14 and 15 of the Companies Chuses Act, 1845. Parcell v. London and Provincial Banh, 62 L. J., Ch. 795; [1893] 2 Ch. 555; 2 R. 482; 69 L. T. 821; 41 W. R. 545—C. A.

When filled up. - It is not necessary that the attesting witness should be able to state that blanks were filled up at the time of execution. England v. Roper, 1 Stark. 304.

Incidents Unknown to Law.]—Where a canal company demised land adjoining the canal to A., and also granted to him the exclusive right to let pleasure-boats for hire upon the canal + let pleasure-boats for hire upon the canal + led, that, on the ground that the owner of property cannot attach to it incidents hitherto Held, thirdly, that the plea was bad, as not unknown to the law, the grant of such exclusive shewing that the condition was performed as far the state of the s

Conditions Void in Part. ]-A bond conditioned for the performance of several things, if one of them is void at common law, yet may be good for the others; as where it was conditioned to pay money, and to do an act which was perhaps simony. Newman v. Newman, 4 M. & S. 66; 1 Stark. 101; 16 R. R. 386. S. P., Cusse v. Corfe, 6 L. J. (o.s.) K. B. 140.

Where the condition of a bond is entire, and the whole unlawful, it is in most eases void; but where it consists of different parts, some of which are lawful, and others not, it is good for so much as is lawful and yold for the rest. Yale v. Rew

(in error), 6 Bro. P. C. 31.

Inconsistent with Estate Granted.]-A covenant in a fee-farm grant of 1858 that the grantee, his heirs and assigns, might assign, sublet, or otherwise part with the possession of the demised premises, provided he did not divide them into more than four divisions or lots, unless with the consent in writing of the grantor, his heirs and assigns, is absolutely void and inoperative, as being repugnant to the free power of alienation necessarily implied by the fee-farm grant. Lunham's Estate, In re, Ir. R. 5 Eq. 170.

- Becoming Impossible.]-Where there is a condition to do one of two things, and one becomes impossible, it is no reason for not performing the other. Da Costa v. Davis, 1 Bos, & P.

242; 4 R. R. 795.

Where the condition of a bond is originally impossible, the bond is absolute. Where the condition is originally illegal, the bond is vold. Where the condition subsequently becomes impossible by the act of the obligor, or of a stranger. the bond is forfeited. Where it becomes impossible by the act of the obligee, the bond is saved. Anon., 5 N. & M. 378.

By a local act, a treasurer of a turnpike was when required, to account to the trustees, and pay the balance to them. Action on a bond conditioned that C., treasurer of the turnpike roads. should account and pay according to the directions of the local act, and of 3 Geo. 4, c. 126. Plea, that so much of 3 Geo. 4, c. 126, as is referred to in the condition, was repealed by 4 Geo. 4, c. 95, and that C. duly accounted and paid up to the time of the repeal. Replication. assigning breaches: first, that C. received money and did not account for it, though after the repeal of 3 Geo. 4, c. 126, he was required by the trustees to render an account to persons appointed by them to receive it; and secondly, that C. received money which he had not paid over, and which still remained in his hands :- Held, that so much of the condition as related to accounting under 3 Geo. 4, c. 126, having become impossible by the act of the legislature, the obligation, as far as related to that, was saved; but that so far as related to accounting under the local act, the condition remained possible. Davis v. Cary, 15 Q. B. 48; 15 Jur. 310.
Held, secondly, that the first breach was bad, at the local act, the tendency of the local act, the condition of the local act, the local act

as the local act did not require the treasurer to

executed it, it was not yet binding on the others though they had executed it. Peto v. Peto, 16 Sim. 590; 13 Jur. 646.

plea that the Thames Conservancy Act had transferred all control of the tolls to a corporation called the Conservators of the River Thames is a good plea, as the performance of the condition had become impossible by the act of law. Brown v. London Corporation, 9 C. B. (N.S.) 726; 30 L. J., C. P. 225; 7 Jur. (N.S.) 755; 3 L. T. 813; 9 W. R. 336. Affirmed, on appeal, 13 C. B. (N.S.) 828; 31 L. J., C. P. 280; 8 Jur. (N.S.) 1103; 10 W. R. 522—Ex. Ch.

To a suggestion of breaches on a bond, entered into by a barony eess collector, with two sureties, for the due collection of the public moneys presented for, alleging that the collector did not duly collect, or pay, or cause to be paid to the plaintiffs, two clear days before the first day of the assizes, all the public moneys that he was by warrant required to collect, but that there was still a portion uncollected and unpaid, the defendant pleaded, that by reason of complete paralysis he was rendered permanently ineapable of collecting the said moneys, or of appointing a deputy to collect them, and as a further defence pleaded that the breaches in the suggestion alleged took place before the entering up of the judgment on the bond, and not after. On demurrer by the plaintiffs :-Held, that the defences were bad. Belfast Bunking Co. v. Hamilton, 12 L. R., Ir. 105-C. A.

Non-Execution.]—It is no objection to title that assignment of term was executed by one executor only, though deed was prepared as an assignment by two, one executor being competent to assign. Simpson v. Gutteridge, 1 Madd. 609;

16 R. R. 276.

R. G. having died intestate, possessed of eonsiderable personal property, and entitled after the death of his wife to the principal of eertain bank stock standing in the name of a trustee; his brother, by letter, expressed his intention of relinquishing his share of the intestate's estate to the widow, executed to the trustee (transferring to the widow) a release of the bank stock, and directed the preparation of a release of the general personal estate, the execution of which was prevented by his death, but his wish to execute it continued to his last hour: the release of the stock is effectual in favour of the intestate's widow; but the intention to relinquish the share of the general personal estate, not being perfected, amounts not to a gift; and she, as administratrix, must account to the representatives of the brother, but without interest. Hooper v. Goodwin, 1 Swanst. 485; 1 Wils. 212; 18 R. R. 125.

The eight children of A. being entitled to a fund equally, in the event of their surviving B., seven of them, in pursuance of an arrangement made amongst themselves, whilst the eighth, whose name was James, was in India, executed a deed by which they and he were made to covenant with each other, reciprocally, that, in case any of them should die in B.'s lifetime, leaving a child or children, such child or children should be entitled to the share or shares of his, her or their parent or parents, in such manner as if such parent or parents had survived B. James never executed the deed, but he and six of those who did execute it survived B. The other left children, and those children claimed to be entitled under the deed to their parent's share: -Held, that the deed was made upon the

Where agreement of reference provides that award shall be made by four persons, or any three of them, and award purports to be made by four, but is signed by three only, it is void. Thomas v. Harrop, 1 Sim. & S. 524; 24 R. R. 221.

A recital showing that a prior absolute conveyance was in fact a mortgage was held not to be conclusive on the party claiming the benefit

of the prior deed, though he entered under the second, inasmuch as he had not executed it. Tull v. Owen, 4 Y. & Coll. 192; 9 L. J., Ex. Eq. 33 : 4 Jur. 503

Where funds came to the wife after marriage, the husband being in India, a contract of settlement of those and of other funds, by her father, was prepared and executed by the latter, and sent out for execution by the husband, who in the meantime had given instructions for a settlement in different terms :-Held, that the husband not being bound to execute the former, the father was not bound by it, although executed by him, and containing covenants for the benefit of an infant, Woodcock v. Monchton, 1 Coll. 273.

One of two partners procured the discount of a promissory note of the firm, on an agreement for a mortgage of shares belonging to the firm in certain ships and their freight, and of the policies of insurance effected by the firm on the shares. A mortgage deed was prepared, purporting to be made by both partners, but was only executed by the one. At the time of the execution of the deed one of the ships was lost, but this fact was not then known to the parties :- Held, that the security was binding on the firm notwith-standing the execution of the deed by one partner only, and passed the insurance money, although the deed was not registered according to the shipping acts. Bosanquet, Ex parte, 1 De G. 432.

A mortgage made to A., B. and C., was paid off. The deed of release recited that the sum of 3,000%, part of the mortgage debt, was not the money of A., B. and C., but belonged to D. and E., upon a joint account, D. and E. were parties to the deed, and purported to acknowledge the receipt of the money. The deed was not excented by D., and E. received the 3,000%. The estate being subsequently sold :- Held, that the purchaser could not refuse to complete, on the ground that there was no sufficient discharge of the 3,000l. mortgage debt. Matson v. Denis, 10 L. T.

391; 12 W. R. 596.

Where the creditor had prepared the deed so as to shew on the face of it that it was intended to contain a joint and several covenant by two co-sureties, and had sent it in that form to be executed by one of such sureties, but had not procured the execution of it by the other surety, and had not informed the surety who had executed it of this fact; but had, on the contrary, written to him as "one of sureties," the principal debtor having become insolvent: Held, that the surety who had executed the deed was entitled in equity to be relieved from all liability on the covenant. Evans v. Brembridge, 2 K. & J. 174; 25 L. J., Ch. 102: 2 Jur. (N.S.) 311; 4 W. R. 161. Affirmed 8 De G., M. & G. 100; 25 L. J., Ch. 334; 2 Jur. (N.S.) 311; 4 W. R. 350.

assumption that all the persons named as parties deed of marriage settlement is drawn up as would execute it; and as one of them had not between the intended husband and wife, and their respective fathers; and the father of the wife secures to the father of the husband a sum of money as the portion of the wife, according to a provision of the deed, but neither he nor his daughter execute the deed, and it is executed only by the intended husband and his father : it is binding upon, and as between the parties who execute, and creates efficient rights for the objects of the settlement. M. Veill v. Cubill. 2 Bligh, 228,

Assignee of leaseholds accepting the benefit of an assignment :- Held, in equity liable to the covenants on his part contained in the assignment, though he did not execute it. Willson v.

Lennard, 3 Beav, 373.

D., in 1824, agreed with S. for the purchase of an estate, and that the purchase deed should contain a covenant by D. that he, his heirs, and assigns would pay to S., his executors, adminis-trators, and assigns the sum of 6s. for each chaldron of coals gotten out of the estate and shipped for sale. The purchase deed was subsequently executed by S., but not by D. D., however, entered upon the land, and he and his devisees and their assigns enjoyed the property. Coal was also got and shipped for sale :- Held, that the execution by D. of a counterpart of the deed containing the covenant could not be presumed, and that although the persons who had taken and enjoyed the coal with notice of the covenant might be liable, there was no liability in D. or his representative under the covenant. Witham v. Vane, 44 L. T. 718.

By deed made between A, of the first part, and B. of the second, and other parties, reciting the title of A to some lands and of B. to others, A. and B. purported to convey to trustees some of A.'s lands, and by a separate testatum A. alone conveyed the remainder of them, and also purported to convey to B.'s lands. A. alone covenanted for title. There were powers of sale and exchange, including all the lands and premises, and to change the trustees, which were introduced with the usual words of agreement by all the parties to the deed :- Held, that the deed bound B.'s land, at all events in equity; and, semble, was an effectual conveyance of them at law. Hill v. Mill, 12 Ir. Eq. R. 107.

- Action to Set Aside-Parties.]-A person named (jointly with others) as a party to a deed, but who did not execute it, cannot alone maintain an action to have the deed declared invalid. Luke v. South Kensington Hotel Co., 7 Ch. D. 789.

If it was intended that the deed should not be binding in equity unless all the joint parties should execute it, those who did execute it are capable of joining in an action to have it declared invalid, and in an action for that purpose they ought to be named as plaintiffs. Ib.

- Power to Disclaim.]—A tenant in tail in possession of au estate executed a disentailing deed, purporting to be a grant of the estate to A. and B, and their heirs, free from all estates tail of the grantor, to the use of A. and B. and their heirs upon trust to the grantor. The deed was enrolled but not executed by A. and B., who sub-sequently executed a deed of disclaimer:—Held, that the disentailing deed operated as a grant and not by the Statute of Uses; that it was rendered inoperative by the subsequent disclaimer by the grantees; and that the estate tail was not barred. Peacock v. Eastland, 39 L. J., Ch. 534; L. R. 10 Eq. 17; 22 L. T. 706; 18 W. R. 856.

Qualified Execution - Power to Repudiate. Not every attempt by a form of execution to restrain the full operation of a deed can be treated as a non-execution of it. Where a deed of assignment by debtors to a trustee for the benefit of all creditors who should execute the deed was executed by the plaintiffs, who appended a note that they executed only in respect of certain claims scheduled to the deed and amounting to \$73,531, and it appeared that sub-sequently thereto they received a sum of money from the trustees by virtue of their execution of the deed :-Held, that the plaintiffs were bound. The note did not amount to a refusal to execute; and the plaintiffs having received payment under the deed could not be heard to repudiate it, and deny their execution. Wilkinson v. Anglo-deny their execution. Wilkinson v. Anglo-Californian Gold Mining Co. (18 Q. B. 728) held to be inapplicable. Turnuouth Erchange Bunk v. Bletken, 54 L. J., P. (2. 27; 10 App. Cas. 293; 53 L. T. 537; 33 W. R. 801—P. C.

Escrow-From what Date Operative. - Bond delivered to a third person, to be delivered to the obligee on performance of a condition, takes effect on performance from the original scaling, though both obliger and obliger be dead. bond by a feme, delivered to a stranger before marriage as an escrow to be delivered on condition, is good, though the condition is performed after marriage. Graham v, Graham, 1 Ves. J.

— Death of Executing Party before Performance of Condition.]—A railway company, after serving notice to take land, agreed in writing with the owner to accept the title, and the conveyance was executed by him and delivered to his solicitors as an escrow with a written authority to the company to pay the money to them. The owner died, having made a will and appointed executors, and the company requiring the land, but the executors not having proved, paid the money into the bank under the 8 & 9 Viet. c. 18, and took possession. The executors filed a bill to restrain such taking possession, and for an injunction:—Held, that the escrow could have been made effectual upon the condition upon which it was authorised to be delivered, but that the authority died with him by whom it was given; and there being a contract, the case was withdrawn from the opera-tion of 8 & 9 Viet. c. 18, and the injunction refused on the terms of the company bringing the purchase-money and interest, provided for by the contract, into court. Newton v. Metropolitan Ry., 1 Dr. & Sm. 583; 8 Jur. (N.S.) 738; 5 L. T. 542; 10 W. R. 102.

Retention of Deed by Party Executing. Where a deed has been formally delivered with apt and proper words, its retention by the grantor, after such delivery, will not render it inoperative. Hall v. Palmer, 3 Hare, 532; 13-L. J., Ch. 352; 8 Jur. 459. S. P., Due d. Gurronss v. Knight, 5. B. & C. 671; 8. D. & R. 348; 4 L. J. (cs.) K. B. 161; 29 R. R. 355. Xenne, Whichken, 36 L. J., C. P. 313; L. R. 2 H. L. 296; 16 L. T. 800; 16 W. R. 38.

A person entitled to an equitable reversionary interest in stock made a voluntary assignment of it by deed to trustees. No notice was given of this deed, either to the trustees named in it, or to any person interested in it, or to the original trustees of the stock; the assignor

retained the deed, and subsequently destroyed it, and made a different disposition by will of the fund, which was still standing in the names of the original trustees:—Held, that unless the deed could be successfully impeached on the ground of frand, mistake, or surprise, it operated as an effectual disposition of the fund, notwithstanding the absence of notice, and the retention and destruction of the deed by the assignor. Way's Trusts, In re, 2 De G., J. & S. 365; 34 L. J., Ch. 49; 10 Jnr. (N.S.) 1166; 11 L. T. 495; 13 W. R. 149.

An instrument purporting to be a deed was executed in the presence of an attesting witness, but had never been out of the possession of the grantor :- Held, in an action against the executor of the grantor, that the jury might properly find that it was delivered. Hope v. Harman, 11 Jur. 1097

An unstamped deed conveying a house of the grantor upon trust to apply the profit rent to the payment of two life annuities was found in his possession after his death. It was signed and sealed by him; and the attestation clause stated that it was signed, scaled, and delivered by him in the presence of two witnesses, one of whom said that he remembered witnessing the deed, that the grantor after signing put it in his pocket, not delivering it to anyone, but he could not recollect whether the grantor said that he signed, sealed, and delivered, or used any words on the occasion. Subsequently the grantor conveyed this same house by a deed duly executed and stamped, upon trusts inconsistent with the former deal, and by his will made the next day he devised the house, "subject to two life annuities charged thereon by me." By a codicil he made another provision for one of the annuitants.—Held, that there was sufficient evidence of the delivery of the first deed, and that it prevailed over the second. Evans v. Gray, 9 L. R. Ir. 539.

A deed (which by arrangement was to be executed in duplicate, one to be prepared by each party, and to be interchanged between them) was executed by the grantee, but not attested, and was by him sent to the solicitor of the grantors to procure their execution; and they accordingly signed, sealed, and delivered it :-Held, that this was a complete delivery, whereby the estate passed; and that the arrangement did not render the deed an escrow until the duplicates were interchanged. Kidner v. Keith, 15 C. B. (N.S.) 35.

A person executing a voluntary settlement passes the estate out of himself, though he retained the deed in his own possession; and such settlement is not affected by a subsequent voluntary deed, delivered over to the party in whose favour it is made. The court, in the absence of special circumstances, will give effect to the first legal instrument in favour of the party claiming under it. Roberts v. Williams, 4 Hare, 130; 11 L. J., Ch. 65; 5 Jur. 1057.

A voluntary covenant by a party to pay a sum of money to persons therein mentioned, either in his lifetime or in a certain time after his decease, is a valid covenant, and creates a valid debt, though the deed was kept in the covenantor's possession till his death, and its execution was unknown to the covenantees or cestuis que trustant. Alexander v. Brame, 19 Beav. 436.

Hassel, 32 Beav. 217.

A voluntary deed, never parted with, executed for purpose that has never been completed, is considered in equity as an imperfect instrument. Cecil v. Butcher, 2 Jac. & Walk. 573; 22 R. R. 213.

- By Agent.]-Where a party executed a mortgage to his bankers, but the deed was not delivered over by his attorney nutil a month after his bankruptcy :- Held, a good delivery to the mortgagee. Grugeon v. Gerrard, 4 Y. & Coll.

- By Third Person.]- Delivery to a third person for the use of the party in whose favour the deed is excented, where the grantor parts with all control over the deed, makes the deed effectual from the instant of the delivery, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made. Doc d. Garnons v. Knight, 5 B. & C. 671; 8 D. & R. 348; 4 L. J. (o.s.) K. B. 161; 29 R. R. 355.

Successive Deeds. ]-The question whether several deeds are part of the same transaction or are separate and distinct transactions depends on the surrounding circumstances, and not simply upon the fact whether the deeds are, or are not, by express reference grafted into or connected with each other. Harman v. Richards, 10 Hare, 81; 22 L. J., Ch. 1066.

Evidence of surrounding circumstances on which the court held a settlement, that standing alone would have been fraudulent against creditors, to be connected with and made part of the same transaction with several purchasedeeds of even date, to which some only of the same persons were parties. Ib.

On a marriage, two separate sums were provided by two separate deeds, for the portions of younger children, and each deed contained a hotchpotch clause :- Held, that these clauses were separate and distinct, and operated only on the fund contained in each settlement respectively. Montague v. Montague, 15 Beav. 565.

Four deeds, though bearing date on four consecutive days, held to be necessarily connected together, and to form one transaction. Ford v. Stuart, 15 Beav. 498; 21 L. J., Ch. 514.

W. R. and A. his wife, by deed dated the 30th June, appointed to the sole appointment of W. R., and subject theremito to certain uses. W. R., by deed dated the 1st July, again subjected the estate to the joint appointment of himself and his wife; and by a deed of the 2nd July, W. R. and his wife appointed the estate by way of mortgage. The intermediate deed was on paper. The dates of the other deeds were filled in, and the last deed was much interlined, the wife being by such interlinentions made a party subsequently to the engressment of the deeds:—Held, that the three deeds formed one transaction, and therefore that the last deed was not voluntary. Whithread v. Smith, 3 De G., M. & G. 727; 2 Eq. Rep. 377; 23 L. J., Ch. 611; 18 Jur. 475; 2 W. R. 177.

The execution of two deeds at several times, the one granting aunuities to seven parties, and the other granting different amusities to five of the same parties, affords no presumption that the one is substituted for the other. Benham v. Newell, 24 L. J., Ch. 424; 3 W. R. 333.

A viduntary deed, though retained by the lating to the same subject-matter are executed v. on the same day, the court will inquire which of Construction.] - When two deeds rethem was executed first; but if there is anything either that they shall take effect pari passu, or .Held, that the indenture was a deed, and not a that one should take effect in priority to the testamentary paper. Jeffrios v. Alexander, 8 other, the court will presume that they were H. L. Cas. 594; 31 L. J., Ch. 9; 7 Jur. (S.S.) excented in such an order as to give effect to the 22; 2 L. T. 768. See Patch v. Shore, 2 Drew. manifest intention. Halden or Gartaide v. Silk. & Sm. 589; 32 L. J. Ch. 185; 9 Jur. (S.S.) 63; stone and Dudsworth Coul and Iron Co., 51 L. J., 11 W. R. 142. Benham v. Newell, 24 L. J., Ch. 328; 12 Ch. 176; 14 L. T. 76; 31 W. R. 35. Ch. 424; 3 W. R. 333.

Incorporation by Reference. - If a man is bound to execute a deed containing particular covenants, and, by the desire of those who have a right to call on him to execute that deed, he executes another deed containing a covenant that he will obey, observe and perform all the covenants in the principal deed, he becomes bound by the principal deed. North of England Banking Co., In re., Straffor's Excentors' Case, 1 De G., M. & G. 576; 22 L. J., Ch. 194; 16 Jur.

A reference to a deed of a specified date, there being two of the same date, one executed at that time, the other subsequently, was, in the absence of positive evidence, and aided by circumstances, applied to the former. Wudeson v. Richardson. 1 Ves. & B. 103.

Operative as Agreement. ]-A bond void in law may be enforced as an agreement in equity, subject to the effect of the equitable circumstances under which it was made. Squire v. Whitton, 1 H. L. Cas. 333; 12 Jur. 125.

An instrument purporting to be a bond, executed by an obligor, with blanks for the name of the obligee, and therefore void in law, is inoperative in equity as an agreement, there being no second contracting party. Ib.

A party joining as surety in a bond ought to be informed of the nature of the obligation, name of the obligee, and the relation in which he stands to the principal obligor. Ib.

An instrument, which in terms purported to be a conveyance of land, but not being by deed could not operate as such, and which contained a stipulation not to disturb the party intended to take the premises, was held to operate as an agreement, and not as a deed. Rew v. Ridgwell, B. & C. 665; 9 D. & R. 678; 5 L. J. (o.s.) M. C. 67.

Whether Deed or Will.]-A person being possessed of some pure personalty, but of considerable property in mortgages, executed some years before his death an indenture, by which, declaring a wish to found certain charities, he covenanted to pay, or that if he did not pay during his lifetine, his executors should, within twelve months after his death, subject to his debts and legacies, pay to certain persons therein named 60,0001, to be invested in their names on the trusts thereby declared; the trusts were charitable trusts. This deed was never enrolled in chancery. On the same day he made a will, giving certain legacies, and appointing executors, most of whom were the persons named in the deed. These papers were never communicated by him to anybody. Just before his death he caused the papers to be produced from the drawers, and handed them to the persons attending his death-bed. They were tied up with a memorandum, which declared that they had been prepared in that form, under advice, to save the legacy duties, and in order that, if probate duty was paid, in the first instance, it might be got back again in consequence of the covenant sideration of the lessee's expenditure on certain

in the deeds themselves to shew an intention creating a debt to be paid out of the assets:either that they shall take effect pari passu, or Held, that the indenture was a deed, and not a

> Covenant constituting Specialty.]—A debtor by simple contract executed a deed, in which he admitted the amount of his debt, and secured it by an assignment of property to his creditor. The deed contained no covenant or agreement to pay :- Held, that this deed did not make the debt a specialty. Marryat v. Marryat, 28 Beav. 224; 29 L. J., Ch. 665; 6 Jur. (N.S.) 572; 2 L. T.

> A covenant to bequeath a sum of money constitutes a specialty debt against the covenantor's estate, and is not satisfied by the mere insertion of such a bequest in his will. Graham v. Wick-ham, 1 De G., J. & S. 474; 9 Jur. (N.S.) 702; 8 L. T. 679; 11 W. R. 1009.

> A. being indebted to B. on simple contract, gave a promissory note for the amount, and executed a deed by which, after reciting the debt and the note, he, as further scenrity, charged certain property with the payment of it, and agreed to execute such a mortgage of the property, with all powers, covenants and clauses incidental thereto, as B, should require :- Held, that the deed converted the debt into a specialty debt. Saunders v. Milsome, L. R. 2 Eq. 573; 15 W. R. 2.

> Although a debt is acknowledged under seal, and a security given, yet, if there is no covenant for repayment, the acknowledgment does not nor repayment, the acknowledgment does not necessarily create a general specialty debt. *Jackson* v. X. E. Ry., 47 L. J., Ch. 303; 7 Ch. D. 573; 37 L. T. 664; 26 W. R. 513.

> Incorrect Recitals. ]-A man cannot be required to execute a deed containing incorrect recitals. Hartley v. Burton, L. R. 3 Ch. 365.

- Remedy.]-A deed which incorrectly recites the consideration of a contract on which a conveyance was executed, does not thereby warrant a suit in equity to set aside the contract, but only to reform the conveyance. Harrison v. Guest, 8 H. L. Cas. 481.

Estoppel by Recitals. ]-See col. 392, post.

Necessary Operative Words-Exchange. ]-A deed or conveyance could not operate as an exchange without the word "exchange." Eton College (Provost) v. Winchester (Bishop), 3 Wils. 458, 485; Lofft, 401; 2 W. Bl. 936.

— Feoffment, Exchange, &c.]—As to the operation of 8 & 9 Vict. c. 106, s. 4, see Due d. Starling v. Prince, 20 L. J., C. P. 223; 15 Jur.

— Grant.]—The words "limit and appoint" may operate as words of grant, so as to pass a reversion. Shore v. Pincke, 5 Term Rep. 124, 310. And see Brudenell v. Elwes, 1 East, 442; 6 R. R. 310; and Beard v. Westcott, 5 Taunt. 394, 403; 5 B. & Ald. 801 : 24 R. R. 553.

Grant or Licence.]-A canal company, in con-

lease thereof, with licence to take ice from a part of the canal :- Held, that the licence was not exclusive, but that it was a grant of sufficient ice to enable the lessee to fill the icehouses, and that, so long as the lessee was able and willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licences which would interfere with it. Newly, W. Harrisson, 1 John & H. 393; 4 L. T. 397; 9 W. R. 849. Affirmed, 4 L. T. 424; 9 W. R. 849.

Estate of Conveying Party Passes. ]-A conveyance of land passes running water, unless expressly excepted, which is not to be presumed. Canham v. Fisk, 1 Price's P. C. 148.

When a person, having several estates or interests in land, joins in conveying all his estate errests in Bunt, joins in conveying at an escute and interest in the land to a purchaser, every estate or interest vested in him will pass by the conveyance, although not vested in him in the character in which he became a party to the conveyance. Drew v. Norbury (Earl), 3 Jo. & Lat. 267; 9 Ir. Eq. R. 171, 524. S. P., Youde v. Jones, 13 M. & W. 534; 14 L. J., Ex. 70. S. C., 14 Sim.

131 : 8 Jur. 547.

A person having a legal estate in certain premises as trustee, and an equitable and beneficial interest in the same estate, executes a deed which might be construed as purporting to pass either both estates, or only the equitable estate which alone he has a right to convey :-Held, that the instrument should be construed as intending to pass only the estate which he had a right to convey; for a party shall be presumed to have intended to do only that which he had a right to do, provided the instrument be fairly and reasonably capable of that construction. Fausset v. Carpenter, 2 Dow & Cl. 232; 5 Bli. (N.S.) 75—H. L. (Ir.)

A deed which could not operate as a release, because it purported to convey an estate in futuro, held to operate as a covenant to stand seised. Roe d. Wilkinson v. Traumarr, 2 Kcn. 239; Willes, 682; 2 Wils, 785. S. P., Haberg-ham v. Vincent, 2 Ves. J. 226; 2 Bro. C. C. 353.

Scully v. Scully, 12 Ir. Ch. R. 153,

A deed in the ordinary form of a grant in fee without any recitals does not contain any statement of the grantor's seisin in fee sufficiently precise to create an estoppel in a case where the granter had no title at the date of the deed, but subsequently acquired an estate in fee. General Finance, Mortgage, and Discount Co. v. Liberator Permanent Building Society, 10 Ch. D. 15; 39 L. T. 600; 27 W. R. 210.

Covenants for title contain no such statement, being merely a bargain by the covenantor to pay damages if he has no such title, Ib,

Prima facie, when a person conveys or settles an estate, he means to include in the conveyance every interest which he can part with, and which

be does not except. Johnson v. Webster, 4 De G., M. & G. 474; 3 Eq. R. 99; 24 L. J., Ch. 300; 1 Jur. (N.S.) 145; 3 W. R. 84. When the owner of an estate has also a charge

upon it, and there is some intermediate charge or estate between his own charge and his ownership in fee, it may be reasonable to say, that without some special act, no presumption can be made of an intention to merge the charge in the fee, for that might be against the interest of the owner, by letting in the intermediate estate; but

icehouses on the banks of the canal, granted a act of the owner himself, this reasoning has no application. Ib.

A., the devisee in fee of real estates subject to a trust to raise 6,000l. for B., which the testator directed, in the event of B.'s death without children, to sink into the residue of his personal estate, and to go to A., on his marriage, conveyed the estates to the trustees of his marringe settlement, subject to the trust to raise the 6,0001., and died, living B. On B.'s death without children, the representatives of A. filed a bill to establish the charge :- Held, under the circumstances, that it had merged in the inheritance. Ib.

— Agricultural Fixtures, ]—A, purchased a farm from the devises in trust of the father of B., and the premises were conveyed by a deed, to which B. was a party, as one of the devisees. A. demised the premises to C. immediately after the conveyance, and B., who was in the occupation of the farm at the time of the conveyance, under a lease from the devisces, removed some rick staddles, a threshing machine and a granary from the premises after the demise to C. The deed conveyed the land and all fixtures; the articles in question had been put on the land by B.'s father :- Held, that everything attached to the land having passed by the deed, B. had no right to remove the articles as fixtures removable by an outgoing agricultural tenant. Wiltsheer v. Cottrell, 1 El. & Bl. 74; 22 L. J., Q. B. 177; 17 Jur. 758.

Trees. ]-Chapter not being entitled tofell timber on the deanery lands, except for the purpose of repairs, a lease granted by them of certain "woods, groves, hedgerows and springs, was construed not to include the right of felling timber; and a bill by the lessee for an account was dismissed with costs. *Herving* v. St. Paul's (Dean), 3 Swanst. 492; 2 Wils. Ch. 1; 19 R. R. 259. of timber felled during the lease by the lessors,

- Where General Words are used.]-General words in a grant must be restricted to what the grant or had power to grant at the date of the grant. Booth v. Alevoh, L. R. 8 Ch. 663; 29 L. T. 231; 21 W. R. 748.

Covenant that notwithstanding any former

grant of 1,500%, charged upon the whole estate of the covenantor, the lands of Blackacre and White-acre shall stand exonerated therefrom, and that all his other lands and estates shall stand charged therewith, creates a charge on the lands of which he was then seised or possessed, though not specified by name. Falkner v. O'Brien, 2 Ball & B.

Distinction between a covenant that all the estates of a covenantor are charged with a sum of money, and that he will charge his estates; the former is a charge upon all covenantor's lands,

the latter is not. Ib.

An assignment, in general terms, of personal estate will pass promissory notes in the possession of the settlor, although not indorsed to the dones, Richardson v. Richardson, L. R. 3 Eq. 686; 15 W. R. 600,

E., by a voluntary deed, in 1858, assigned certain specific property, and "all other the personal estate, whatsoever and wheresoever, of her, E., to R. absolutely"; and appointed him, his executors, administrators, and assigns, her attorney where the intermediate estate is created by the and attorneys in her name, but for the sole benefit of R., to sue for and recover the assigned predeeds as should be necessary for deriving the full theest as shount on necessary and certaing to the benefit of the assignment. At the date of the assignment, E. was possessed of certain promis-sory notes, given to her to secure the repayment of advances made by her. These were not specifically mentioned in the deed. Upon R.'s death, in 1864, these notes were found in his possession, but not indorsed to him. There was no evidence as to any delivery of the notes by E. to R.:—Held, that the property in the notes passed by the deed to R., on the principle that the deed of assignment operated as a complete declaration of trust by E. of all her property in favour of R. Ib.

A., who, under a deed made by his father, was entitled upon his father's death to a moiety of his personal estate, assigned to trustees in these words, "all the property of which he now is or may stand possessed, both real and personal, and now consisting of one note of hand for 1201., one other note of hand for 40*l*., one cottage in his own possession, sold to S. at his decease for 155*l*., two other cottages in the occupation of F. and W.," upon certain trusts, for his wife and relations. A, afterwards died in the lifetime of his father. Upon the death of the father:—Held, that the trustees under A.'s assignment were entitled to take under that instrument the moiety of the father's personal estate. Choyce v. Ottey, 10 Hare, 443.

A deed purporting to settle a sum of money, portion of moneys to which the settlor was entitled under the Statute of Distributions," passes chattels real coming to the settlor in the manner described. Newitt v. Robinson, 15 W. R. 77.

Where the owner of certain lands, by deed, describing them as in the possession of himself. A. B., granted, assigned, transferred, and set over, directed, limited, and appointed the same to C. D. for life, but no livery of seisin was made : Held, that the deed operated as a valid grant of the reversion of that part of the premises in the occupation of A. B. Doe d. Were v. Cole, 7 B. & C. 243; 1 Man. & Ry. 33; 6 L. J. (0.8.) K. B. 20.

A person who executes a deed of inspection as a creditor, if there is nothing in the deed to shew that he executed it in respect of a particular claim, is to be taken to have executed it in respect of whatever is due to him. Graham v. Achroyd, 17 Jur. 657; 1 W. R. 107.

Means of enjoying Property passes. ]-A deed of conveyance made under the anthority of an act of parliament must be read as if the sections of the act were incorporated in it. A conveyance granting land for a special purpose must be construct as conveying all the rights necessarily incident to the due execution of that purpose, Elliot v. North Eastern Ry., 10 H. L. Cas. 333; 2 N. R. S7; 32 L. J., Ch. 402; 9 Jur. (N.S.) 555; 8 L. T. 337; 11 W. R. 604.

Whether the conveyance is a voluntary bar-gain between the parties, or is made because the act gives the grantee the power of compelling a grant, these rules are applicable. Ib.

Where two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which was granted, must be considered to follow from the grant. Eleart v. Cochrane, 4 Macq. H. L. 117; 7 Jur. (N.S.) 925; 5 L. T. 1; 10 W. R. 3.

An owner of two adjoining properties, consistmises, and to do and execute all such acts and ing of a tan-vard and a house and garden, madea cesspool in a corner of the garden, and a drain to carry the water into it from the tan-yard, which gradually sloped down towards the gar-den. Afterwards he sold the two properties to different persons. The conveyances made no allusion to the existence of the drain and cesspool:—Held, that the easement passed by an implied grant with the tan-yard. Ih.

A grant by lease of premises last held under the grantor as bleach works, implies a licence to use the same as such. Hull v. Lund, I H. & C. 676; 32 L. J., Ex. 113; 9 Jur. (N.S.) 205; 7 L. T.

692: 11 W. R. 271.

- Reservation.]-Under a reservation of mines with liberty to sink pits, the right of erecting a steam engine and other machinery necessary for driving them, with all proper accessories, passes as incident thereto. Dand v. Kingscote, 6 M, & W. 174; 9 L, J., Ex. 279.

Right of Support. - A conveyance of land to a railway company, for the purposes of the line, gives a right by implication to all reasonable subjacent and adjacent support connected with the subject-matter of the conveyance, and therefore, although in a conveyance to the railway company, the minerals are reserved, the grantor is not entitled to work them even under his own land, in any manner calculated to endanger the railway. Caledonian Ry. v. Spret, 2 Macq. H. L. 449; 2 Jur. (N.S.) 623; 4 W. R. 659; S. P., Caledonian Ry. v. Belhacen (Lord), 3 Macq. H. L. 56; 3 Jur. (N.S.) 573; G. W. Ry. v. Cefn Cribber Brick Co., 63 L. J., Ch. 500; [1894] 2 Ch. 157; 8 R. 178; 70 L. T. 279; 42 W. R. 493.

On the same principle, if an owner of a house conveys the upper storey, reserving all below, the purchaser will be entitled, on general principles, without stipulation, to prevent any damage to the walls underneath. Ib.

But if I grant a meadow to A for grazing purposes, retaining the minerals and the adjacent land, and if A., having no warranty against sub-sidence, thinks fit to build a house on the edge of the meadow, and the house falls, he is without remedy against me, and has himself alone to blame for the consequences, Ih.

If, however, the grant was made expressly for building purposes, there would then be an implied warranty of support, both subjacent and

adjacent. Ib.

In the case of a grant to a railway company for the purposes of the railway, if the line which divides the land granted from the land retained traverses a quarry, it may be that no adjacent support is necessary, and that the grantor may dig or remove the whole contiguous soil. Ib.

But if the dividing line traverses a bog or a bed of sand, it will be incumbent on the grantor to leave untouched such an intervening measure of lateral support as will prevent any part of the

land granted from retreating. Ih.

Amount of, in Case of Railway.]— Whether a conveyance of land for the purpose of a railway being constructed thereon is volumtary or compulsory, every grant carries with it all that is necessary to the enjoyment of the subject-matter of it, and a certain amount of lateral support, being essential to the safety of way crosses a river, then the abutments of the bridge will require a greater support than the other parts of the railway, and the conveyance will carry such support as an incident. Elliot will earry such support as an incident. v. N. E. Ry., supra.

Certain reservations of minerals contained in a railway act: Held, not to vary the ordinary rule at common law as above stated. Ib.

Receipt for Purchase Money. ]-The absence on a deed of a receipt for the consideration. though it is notice of its non-payment, is not constructive notice of other irregularities in the transaction. Greenslade v. Darc. 20 Beav. 284. And see Burnhart v. Greenskields, 9 Moore, P.C. 18.

When a purchase deed contained a recital that the purchase money had been paid or accounted for, but there was no receipt for the purchase money on the back of the deed :—Held, that the vendor, in respect of his lien for impaid purchase money, was entitled to priority over a mortgagee of the purchaser. Boven v. Cobb, 19 W. R. 614.

A joint and several receipt for purchase money, given by three persons, only one of whom had power to give a receipt :-Held, a valid receipt by such one who had power. Miller v. Pridden,

18 L. J., Ch. 226 If the consideration expressed by the deed to be paid in money for an annuity, or interest in expectancy, and acknowledged to be received in money by the receipt endorsed on the deed, be not paid in money, or proved to be ready to be so, and held over at the request of the grantor or vendor (in which case ultimate non-payment will not affect the primary contract), the court will, on that ground, cut down the grant or purchase to a loan, without reference to the question of inadequacy, which, nuless very gross, would not per se avail; and disregarding the fact, that a life assurance was effected, because such insurance is res inter alios, etc., and besides leaves contingency sufficient to exclude usury. makes no difference that the contract for the annuity is between near connections, there not being one equity for ordinary money-brokers, and another for relations; and on a bill to set it aside, the court has no jurisdiction to reform the contract, but only to sustain or subvert it. Courts of equity acted on the principle of the Annuity Act, 17 Geo. 3, previously to that act. its object being, not to frame an entirely new protection for grantors of annuities, but to preserve evidence, to provide positive rules, and to give courts of law jurisdiction in cases previously falling within the jurisdiction of courts of capity. which the Annuity Act facilitated, but neither added to, nor affected in substance. Drought v. Eustace, 1 Moll, 328.

A. and B., respectively the first and second mortgagees in fee of an estate, were induced, through the fraud and misrepresentation of W., who acted as solicitor for both, to execute to him a conveyance of the estate, free from both mortgage debts; the deed was endorsed with receipts for the mortgage money by A. and B., in the usual form, although in reality no money whatever was paid. W, then entered into possession, and became the reputed owner of the estate. Subsequently he executed an equitable mortgage of the estate, by covenant and deposit of the title paid, an annuly to R for his life in names deeds, to C, who had no notice whatever of the lollowing, namely, one molety by E, during his prior mortgages not having been in fact paid off: life, and the other molety by E, his executors or

the railway, is a necessary incident of the grant, —Held, that C. was entitled to stand in priority The amount of support depends on the special to A. and R. Hunder v. Walters, L. R. 11 Eq. (orcumstances of the locality; thus, if the rail, 292; 24 L. T. 27.6. Affirmed L. R. 7 Ch. 7. 25 L. T. 765.

Where it appears that the acknowledgment of and release for the purchase money is not in respect of an actual payment, parol evidence may be given to show that the purchase money is still unpaid. Lampon v. Corke, 5 B, & Ald. 606; I Dowl. & R, 211; 24 R. R. 488. Bottrell v. Summers, 2 Y. & J. 407; 31 R. R. 613.

- Since 44 & 45 Vict. c. 41, s. 55.]-To constitute a receipt within s. 55 of the Conveyancing and Law of Property Act, 1881, there must be express words acknowledging the receipt of the consideration money. Renner v. Tolley, 3 R. 633 : 68 L. T. 815.

Where a purchase deed does not contain a receipt clause for the purchase money in the body of the deed, or a receipt endorsed, the purchaser must pay the expense of proving that there is no vendor's lien for unpaid purchase money should be insist upon such proof. Scott & Alvarez's Contract, In re. 64 L. J., Ch. 376; [1895] 1 Ch. 596; 12 R. 474; 72 L. T. 455—

#### 9 PARTIES

Who may Convey.]—A person out of possession cannot convey anything to a stranger; he can only give a release to one in possession. Underwood v. Courtown (Lord), 2 Sch. & Lef. 65.

Liability of Infants. ]-A deed executed by an infant to secure advances made to him for expenditure upon necessaries is not bluding upon him when he becomes of age. Martin v. Gale, 46 L. J., Ch. 84; 4 Ch. D. 428; 36 L. T. 357; 25 W. R. 406.

Where a person represents to another that he is of age, and executes to him a release upon which the other acts, he cannot afterwards impeach the validity of the release on the ground of his minority, and it is immaterial whether he was or was not aware of the incorrectness of the representation. Wright v. Suowe, 2 De G. & Sm. 321.

Whether Joint and Several. ]-A., as principal, and three sureties, B., C. and D., executed a bond to E. for the fidelity of A, in certain duties for which he was employed by E., the bond being in the following form :- "We, A., B., C. and D., are held and firmly bound to E. in the sum of 50%, each, to be paid to E., his executors, administrators, and assigns; to which payment, well and truly to be made, we hereby bind us, and each of us, our and each of our heirs, executors, and administrators, and every of them, by these presents":—Held, that the bond was the separate bond of each obligor, binding each to pay the sum of 50%, in the event of default by the principal; and that, therefore, the payment of 50%, by B., one of the obligors, after breach, was no answer to an action on the bond against another obligor, C. Armstrong v. Cahill, 6 L. R., Ir. 440.

E. and F. entered into a joint and several bond. of which the condition was, that if they or either of them, their or either of their heirs, &c., duly bond should be void :- Held, that the liability under this bond was joint and several, and that F, having failed after the death of E, in paying the annuity, the estate of E, was liable on his default. Church v. King, 2 Mylne & C. 220.

A bond by three, whereby they bound themselves jointly, and their respective heirs, executors, and administrators respectively, to pay, which was conditioned to be void, if they or either of them, their or either of their heirs, exeentors, or administrators, paid: —Held, that it was a thereby discharged. Ib. died, that his assets were liable, Tinning V Coutes, 18 Benv. 401.

There is no settled rule of equity that la contract which at law would be construed as joint, is to be treated in equity as joint and several. Kendull v. Hamilton, 48 L. J., Q. B. 705; 4 App. Cas. 504; 41 L. T. 418; 28 W. R. 97.

An action and a judgment against two persons who had borrowed money from the plaintiffs (though the judgment is unsatisfied) constitute a bar to another action brought by the same plaintiffs against a third person, who is afterwards discovered to have been really interested as a partner with the two debtors in the business for the purposes of which the money had been borrowed. King v. Houre (13 M. & W. 494) adopted. Ib.

This doctrine does not depend on the doctrine of estoppel. Ib.

The expression that partnership debts were treated in equity as joint and several explained.

A surety bond by three obligors, for the payment of 1,000L, worded, "for which payment to here of 1,000%, worded, for which payment to be well and faithfully made, we bind ourselves, and each of as for himself, for the whole and entire sum of 1,000% each," is a several, and not a joint and several bond, and may be enforced against the obligors severally; and the tearing off of the seal of one of the obligors of such a boud by the obligees does not avoid it as against the others. Collins v. Prusser, 3 Dowl, & R. 112; 1 B, & C. 682; 1 L. J. (6.8.) K. B. 212; 25 R. R. 540. S. P., Collins v. Everett, 3 Dowl. & R. 122.

Joint bond considered, from intention, as joint and several. Thomas v. Fraser, 3 Ves. 399. S. P., Burn v. Burn, 3 Ves. 573,

Where a bond was in form only a joint bond, but it was suggested to have been the intention of the parties to make it joint and several, the court referred it to the Master, to inquire whether this was the intention of the parties. Where such intention appears on the face of the bond the court will treat it as a joint and several bond, although it is only a joint boud in form. Symonds, Ex parte, 1 Cox, 200.

A. and B. were obligors in a joint bond. A., who was alleged to be the principal debtor, died :- Held, that his assets were not in equity liable upon the bond, but that the liability survived to B. Richardson v. Horton, 6 Beav. 185; 12 L. J., Ch. 333; 7 Jur. 1144.

A partnership composed of three persons, A., B. and C., gave a joint and several bond to a bank to cover advances to be made to them by the bank on a cash credit, and in that bond two

administrators, during the life of E.; after the and the security, so far as his estates were condeath of E. the whole by F. his heirs, excentors, cerned, was no further continued, no arrangement or administrators, during the life of B. then the between the surviving partners, or between them and the bank, for the purpose of settling the general accounts being capable of affecting that security. Bank of Scotland v. Christie, 8 Cl. & F.

> After the death of A., the bank continued as before its dealings with the partnership then constituted by B. and C., and at a certain period payments made to the bank entirely balanced the debt due to it at the time of A.'s death :-Held, that the separate liability of A.'s estate was

- Execution by whom, |- If the plaintiff shews on his declaration in an action on a boud against two, that the bond is executed by three, it is good matter of plea in abatement, or in arrest of judgment, but is no ground of nonsuit on non est factum. South v. Tunner, 2 Tannt, 254: 11 R. R. 556.

If in an action on a bond against one, it is declared on as the joint bond of him and two others, it is no variance that the bond is likewise the separate boud of each of the obligors. Middleton v. Sandford, 4 Camp. 34.

If the defendant pleads that it is not his deed, it is only necessary to prove that the bond was executed by him. Ib.

Where a man executes a bond, meaning it to be the joint bond of himself and another, who does not execute, it is the several bond of the former, but he may have it delivered up, as contrary to intention. Underhill v. Horwood, 10 Ves. 225.

A. executed a bond as the joint and several bond of himself and B., and signed it "A, and B.," having no authority from B. so to do:— Held, that the bond was good, as the several bond of A. Elliot v. Davis, 2 Bos. & P. 338; 5 R. R. 616.

Discharge, ]—If an obligee in a joint and several bond makes one of the two obligors his executor, with others, the action on the bond is discharged as to both. Cheetham v. Ward, 1 B. & P. 630; 4 R. R. 741.

Though an obligee of a bond covenants not to sue one of two joint and several obligors, and if he does, that the deed may be pleaded in bar, he may still sue the other obligor. Dean v. Newhall, 8 Term Rep. 168.

Parties to Sue on. ]-Although a deed poll may be formed so as to give a right of action against a party executing it, yet no one can bring an action on an indenture except a party or one claiming through him. Gurdner v. Luchlan, 4 Myl. & C. 129; S L. J., Ch. 82; 2 Jur. 412, 1056. And see 6 Sim. 407.

When a deed is made inter partes, no one who is not expressed to be a party can sue on a covenant contained in it; and this is not a mere rule of construction, but a rule of positive law. Chesor construction, but a rule of positive law. onesteepfold and Midland Silkstone Colliery Co.v. Hawkins, 3 H. & C., 677, 34 L. J., Ex. 121; 11 Jur. (N.S.) 468; 12 L. T. 427; 13 W. R. 841; Barford v. Stuckey, 2 Br. & B. 383; 5 Moore, 23

Action as for a total loss upon a policy of insurance, in which the declaration set out the estates held by A. were specially named as part policy in the form of a deed-poll, scaled with the securities for these advances.—A. died —Held, seal of a corporate company, in which deed its that by his death the partnership was dissolved, iwas recited that K., one of the plaintiffs, held. represented that he was interested in the subject- inheritance of the hereditaments and premises matter, or duly authorised as owner, agent, or would have belonged in case the deed had not matter, or duly authorised as owner, agent, or was agreed that the capital, stock and funds of the company should, according to the provisions of the deed of settlement of the company, be liable to make good, and applied to pay and make good all losses on the ship; but it was provided that the capital, stock and funds of the company should alone be liable, and that no shareholder of the company should be liable to any claims or demands, nor in anywise charged by reason of the policy; the declaration averred that the company became insurers to the plaintiffs for a certain sum on the ship, and that the plaintiffs were always interested :-Held, that all the persons assured might well be joined as co-plaintiffs in an action on the policy with K., though they were not specifically named in the deed-noll, for it is not absolutely necessary, in order that a person may be joined as a co-plaintiff in an action on a deed-poll, that he should be specifically named in the deed as a person interested in it, if he is so designated that it cannot be mistaken that it was he who was interested. Sunderland Marine Insurance Co. v. Kearney, 16 Q. B. 925; 20 L. J., Q. B. 417; 15 Jur. 1006.

- Parties Intended. - Where a composition deed is made between parties, a person who is not named a party to it, but is so described that he can be ascertained, may sue upon the covenants contained in it. Recres v. Watts, 7 B. & S. Jan. (N.S.) 565; 14 L. T. 478; 14 W. R. 672. S. P., Maughan v. Sharpe, 17 C. B. (N.S.) 443; 34 C. P. 19; 10 Jur. (N.S.) 989; 10 L. T. 870; 12 W. R. 1057: Gresty v. Gibson, 4 H. & C. 28; 35 L. J., Ex. 74: L. R. 1 Ex. 112; 12 Jur. (N.S.)

319; 13 L. T. 676; 14 W. R. 284.

In 1801, by a deed since lost, after reciting the conveyance to the defendants by A, by a deed of even date, of land in consideration of an annual rent of 105%, to be paid "to A, or the person or persons to whom the freehold or inheritance of the premises thereby released should for the time being belong in case the deed had not been made," the defendants covenanted, "to and with A. and the person or persons to whom the freehold or inheritance of the hereditaments and premises thereinbefore recited to be released should for the time being belong," to pay the rent-charge. In 1827, by another deed, reciting the above-mentioned deed, and that A. was dead, and that "the freehold and inheritance of the hereditaments and premises mentioned and comprised in the deed of 1801, or the rent-charge or yearly sum of 105L," were vested in B., and that the rent-charge had been duly paid to A. during his life, and to B. after his death, the defendants proceeded to ratify and confirm the deed of 1801, and declared that it should be good, valid and effectual to all intents and purposes according to the true intent and meaning thereof, notwithstanding its loss. The plaintiff afterwards became entitled, under a conveyance from B, to all his interest in the rent-charge. An action having been brought by the plaintiff for arrears of the rent-charge :- Held, that it appeared with sufficient clearness, looking at the whole of the deed of 1801, that the operative words were intended to designate as the grantees of the rent-charge the same person or class of persons as that referred hands of the person to whom they were originally to in the recitals of that deed, namely, A., and given may be valid in the hands of an innocent the person or persons to whom the freehold or holder for value. South Essex Estuary and Ro-

otherwise, to make the insurance; and that it been made; and that any difficulty which might have arisen in determining the persons who after A.'s death would have answered this description was surmounted by the deed of confirmation, by which the defendants declared that the rentcharge had become vested in B., whose title the plaintiff had, and that the plaintiff was therefore entified to recover. Gwyn v. Neath Canal Navi-gation Co., 37 L. J., Ex. 122; L. R. 3 Ex. 209; 18 L. T. 688; 16 W. R. 1209.

An action lies at the suit of A. against C. on a bond, by which C. acknowledges himself to be bound to A. in 100L, to be paid to A. or B. White v. Hancock, 2 C. B. 830; 15 L. J., C. P.

A. may declare upon such a bond without noticing B., although the alternative mode of payment appears by the bond being set out, and although the declaration negatives payment to A., but is silent as to non-payment to B. Ib.

- Cestui que trust. -To entitle a third person not named as a party to a contract deed, to sue either of the contracting parties, that third person must possess an actual beneficial right which places him in the position of cestui que trust under the deed. Gandy v. Gandy, 54 L. J., Ch. 1154; 30 Ch. D. 57; 53 L. T. 306; 33 W. R. 803

Particular Officers. ]-A bond given to the doctor, canon, master, fellows, &c., of Sidney Sussex College, with a solvendum to the master, &c., is a bond taken in their corporate capacity, Sidney College v. Darenport, 1 Wils. 184.

An officer of the Palace Court entered into a bond with spreties to the knight-marshal of that court, conditioned for the due performance of the duties of his office; and that he should take sufficient bail from all defendants arrested, and should obey the lawful orders of the court, Having taken insufficient bail from a defendant, arrested in an action in that court, an order was made requiring him to pay the amount of debt and costs in that action, which he disobeyed :-Held, that the knight-marshal was entitled, as a trustee for the plaintiff in the action, to recover on the bond the full amount of the debt and costs. Lamb v. Vice, 6 M. & W. 467; 8 D. P. C. 360; 9 L. J., Ex. 177; 4 Jur. 341.

The churchwardens and overseers for the time being may sue upon bonds given under 59 Geo. 3, c. 12, s. 7, for the due performance of the duties of assistant overseer in a parish within a union, the effect of the 7 & 8 Vict. c. 101, s. 61, being only to substitute in such cases the board of guardians for the vestry, as the body who is to direct the bond to sne upon. Skelton v. Rushby,

4 Ex. 545 : 19 L. J., M. C. 29.

- Innocent Holder for Value. ]-A bond given for the purpose of enabling the obligee to raise money passes to an assignee for value, subject to the subsisting equities in favour of the obligor, unless the intention with which it is given is expressed on the face of it. Graham v. Johnson, 38 L. J., Ch. 374; L. R. 8 Eq. 36; 21 L. T. 77; 17 W. R. 810.

Bonds of a company which are void in the

A company gave bonds to H., who transferred 695-C. A. to an innocent purchaser for value, the transfer-being registered in the books of the company. The purchaser brought an action against the company upon the bonds. It was arranged be-tween the plaintiff and the company that judgment should be signed, but not nutil the expiration of three months. In the meantime a petition was presented to wind up the company, upon which an order was subsequently made. The which an order was subsequently made. bonds were alleged to be ultra vires, and void as between the company and H. :-Held, that without entering into the question of the validity of the bonds as between the company and H., they money was borrowed for S. H. S., who was were, under the circumstances, good in the hands tenant in tail of the S. estates in remainder of the purchaser. Ih,

Company when Estopped from Setting up Equities. ]-An insurance company having power to issue bonds and other securities, issued to S. a. bond conditioned to be void on payment to him. his executors, administrators, and assigns, of 2501, on a future day. The bond was assigned for value to B., and notice of the assignment given at the office of the company and accepted, but the assignment was never registered. No inquiry was made as to the validity of the instrument before B. took the assignment. Before the bond fell due, the company went into liquidation :-Held, or an application by B.'s executors to prove against the company, that the company had, by accepting notice of the assignment, prechided itself from setting up against the assignce equities between them and the original obligor attaching to the instrument itself. Hercules Insurance Co., In re, Brunton, Ex parte, 44 L. J., Ch. 450: L. R. 19 Eq. 302; 31 L. T. 747; 23 W. R.

— Railway Bond.]—On an assignment of a railway bond, under the Companies Clauses Act 19 L. J., Ex. 235.

- Scotch Bond. ]-The assignce of a Scotch bond may maintain an action against the obligor in his own name. Innes v. Dunlop, 8 Term Rep.

- Default of Assignee.]-Where a bond is assigned by the obligee towards satisfaction of a debt, owing from him to another person, the assignee is chargeable for wilful default in forbearing to sue the obligor to the amount of any loss incurred by such forbearance. Mure, Ex parte, 2 Cox. 63.

#### 3. Consideration.

What is.] - An assignee for value of an equitable interest in the money payable under a voluntary bond, is entitled to rank as a specialty absence of direct proof, to form a reasonable ereditor for value against the assets of the judgment, by way of inference from the circumstolligion. Paynev. Morthmar, 4 De G. & J. 447; stances shewn to have existed, whether or not

Articles of elerkship given by a solicitor to a minor, is a sufficient consideration for a bond

clamation Co., In re. Chorley, Ex parte, 40 L. J., clerk will not practise, after his admission within Ch. 153; L. R. 11 Eq. 157; 19 W. R. 430.

A charge created by C. S. npon his estates to secure the payment of a sum of money borrowed for S. H. S. is a good consideration, not only for a collateral charge upon the estates of S. H. S., to indemnify C. S. and his estate from payment of the money borrowed, but also for the settlement of the S. estates upon his family. A. H., being a trustee for the younger children of S. H. S., advanced a sum of 5,1851. 3s. 4d. upon the security of certain estates in Berkshire, which C. S., on the 20th of January, 1832, demised to A. H. for 300 years to secure the repayment. The expectant on the death of his mother, the tenant for life; and on the 21st of January, 1832, S. H. S. demised the S. estates to C. S. for 2,000 years, to indemnify him and the Berkshire estates from the 5,185l, 3s, 4d, and interest secured to A. H.; and by deeds dated the 23rd and 24th of January, 1832, in further compliance with an agreement recited in this deed, he settled the S, estates upon various uses for the benefit of his family. On the death of the tenant for life, S. H. S., being greatly indebted to G. S. F., executed a disentalling deed, and conveyed the S. estates to G. S. F., giving him a power of sale over the estates as a security for the money due; this was subsequently confirmed by another deed; and in a suit instituted by G. F. S. insisting that the settlement of the 23rd and 24th of January, 1832, was voluntary and void against the subsequent alienation for value made to G. F. S., who had notice of the settlement :- Held, that the agreement made by S. H. S. with C. S., to indemnify him against the 5,1851. 3s. 4d. and to settle the S. estates, was such as this court would specifically perform, and that it was a consideration sufficient to support the settlement; that the recital in the deed of 24th of January, 1832, of the agreement between S. H. S. and C. S., was sufficient is the assignee. Vertue v. East Anglian Rg., 6 if evidence to disprove it could have been enter-Railw. Cas. 252; 5 Ex. 208; 1 L. M. & P. 302; tained; that S. H. S. and C. S. were, by excenting the deed, estopped from alleging that the recital was false; that the plaintiff, G. S. F., was in the same position as S. H. S.; that the deeds of the 23rd and 24th of January, 1832, were valid and not voluntary and void against a subsequent purchaser for value. Ford v. Stuart, 21 L. J., Ch. 514,

> Ex post facto Consideration-Marriage. - The court, having come to the conclusion, as a matter of fact, that the marriage of W. had taken place upon the faith of a previous voluntary settle-ment made by his father:—Held, first, that the marriage supplied an ex post facto consideration for the settlement. Guardian Assurance Co. v. Aconmore (Viscount), Ir. B. 6 Eq. 391.

Held, secondly, that, in such a case, there is no presumption as to whether or not a marriage had taken place on the faith of the voluntary deed, but that it is the duty of the court, in the 28 L. J., Ch. 716; 5 Jur. (N.S.) 749; 7 W. R. the parties did know of the deed and act on it. Ib.

Receipt in Body of Deed-Purchaser without entered into by a third person that the articled Notice. - A building lease was granted by the have been expended by the lessee in the construction of the dwelling-house and erections hereby demised and in consideration of the reut hereinafter reserved and the covenants by the lessee hereinafter contained" :- Held, that there was no sufficient receipt for the consideration in the lease to entitle the plaintiff to the benefit of s. 55 of the Conveyancing Act, 1881, and that in order to constitute a receipt within that section, there must be express words acknowledging the receipt of such consideration. Renner v. Tolley, 3 R. 623; 68 L. T. 815.

Release from.]-Where it appears that the acknowledgment of the release for the purchase money, is not in respect of an actual payment, parol evidence may be given to show that the consideration money is still unpaid. Lampon v. Corke, 5 B. & Ald, 606 : 1 D. & R. 211 : 24 R. R. Bottrell v. Snamers, 2 Y. & J. 407; 31 R. R. 613.

Legality.]—A bond given to persons to whom the obligor had lost bets on horse-races, which he was muchle to pay, in order to prevent them from taking the steps which, under the conventional code established among betting men, they were entitled to take, and which would have been followed by consequences involving the obligor in considerable pecuniary loss, is valid, and provable against the obligor's estate. Bubh v. Yelverton, 39 L. J., Ch. 428; L. R. 9 Eq. 471; 22 L. T. 258; 18 W. R. 512.

To an action on a bond against an executor, he pleaded that the plaintiff had seduced and committed adultery with the wife of his testator, between whom and the plaintiff it was agreed. that in consideration that the testator would not expose and make public the conduct of the plaintiff, he would not sue on the bond :- Held, that there was no valid consideration for the that there was no valid consideration for the agreement, and that the plea was bad. Bruch v. Brine, 45 L. J., Ex. 129; 1 Ex. D. 5; 33 L. T. 703; 24 W. B. 177. Compare cases sub tit. CONTRACT.

Burden of Proof. -- A post-nuptial settlement purported to have been made in consideration of natural love and affection, and for divers other good and valuable considerations :- Held, that the onus of proving that some valuable considerathe deed. Kolson v. Kolson, 22 L. J., Ch. 745; 17 Jur. 129; 1 W. R. 196.

False Statement of-Effect, -A deed which incorrectly recites the consideration of a contract on which a conveyance was executed does not thereby warrant a suit in equity to set aside the contract, but only to reform the conveyance. Harrison v. Guest, 8 H. L. Cas. 481.

#### B. FORM AND EFFECT.

#### 1. DATE.

Effect of ]—A deed must be taken to speak from the time of its execution, and not from the date apparent on the face of it. Browne v. Burron, 5 D. & L. 289; 2 B. C. Rep. 220; 17 L. J., Q. B. 49.

Where, by a deed made on the 29th of August,

mortgagor" in consideration of the moneys which February next ensuing, the words "29th of Febrnary then next" were construed to mean the 29th February in the next leap year. Chapman v. Beecham, 3 G. & D. 71; 3 Q. B. 723; 12 L. J., Q. B. 42.

Where a deed has no date, or an impossible date, as the 30th of February, and in the deed reference is made to the date, that word must be construed delivery; but if it has a sensible date, the word "date," occurring in other parts of the deed, means the day of the date, and not of the delivery. Styles v. Wardle, 7 D. & R. 507; 4 B. & C. 908; 4 L. J. (0.8.) K. B. 81; 28 R. R.

By deed dated the 27th of October, 1827, between the defendant and the plaintiff, after reciting that copyhold premises were surrendered to the plaintiff for securing repayment of 300%. by him that day lent to the defendant, the plaintiff covenanted, on repayment of that sum and interest on the 27th of April, 1828, to surrender the premises to the defendant, and the defendant covenanted to pay the 3007, and interest at the time appointed for payment. There was also a stipulation, that, in default of payment, the plaintiff might take possession of the premises. The deed was in fact executed on the 23rd of August, 1834. No principal, interest or rent had ever been paid by the defendant. In February, 1854, the plaintiff brought ejectment:—Held, that the deed was a sufficient acknowledgment, within 3 & 4 Will. 4, c. 27, s. 14, of the plaintiff's title at the time of the execution of the deed, and consequently his right of entry was not barred. Jayne v. Hughes, 10 Ex. 430; 24 L. J., Ex, 115; 3 C, L. R, 188; 3 W, R, 65,

A lease, dated two days before a release, is good to support a release which refers to a lease dated the day next before the day of the date of Ramsbottom v. Tunbridge, 2 M. & S. the release.

434 : 15 R. R. 302.

For Payment of Bond. ]-A bond, dated on a certain day, in a penal sum, conditioned for payment of a lesser sum generally, without naming any day of payment, is payable on the day of the date. Furgular v. Morris, 7 Term Rep. 124.

A bond, conditioned for the payment of a certain sum with interest, may be put in suit without a previous demand of payment. Glbbs v. Southam, 3 N. & M. 155; 5 B. & Ad. 911.

Loan Payable by Instalments. ]-The plaintiffs lent money to S. upon his bond, under which the principal was to be paid in five years by instalments, in case the debtor should so long live, the instalments being calculated so as to cover the principal of the loan, interest thereon, the expenses of negotiating it, and a margin representing a premium for the insurance of the debtor's life. The condition of the bond made it void ; first, if the instalments were regularly paid till the expiration of the five years, or till the death of the debtor, whichever should first happen; secondly, if all the instalments which would have become payable at the expiration of the five years, if the debtor lived so long, were at any time paid ap, the balance of instal-ments being at once payable on the failure of any single instalment. The defendant as surety executed the bond, and default having been made in payment of one instalment, the plain-1832 (being leap year), a party covenanted to pay tiffs brought an action claiming the entire balance a sum of money, with interest, on the 29th of of unpaid instalments:—Held, that the amount

49 L. J., O. B. 812; 5 Q. B. D. 592; 43 L. T. 564; (E.) 45 J. P. 172-C. A.

A bond conditioned to pay money by instalments, is forfeited by making any one default.

Coates v. Hewit, 1 Wils. 80. S. P., Judd v. Erans, 6 Terni Rep. 399,

— Forfeiture.] — A bond, conditioned for payment of principal in 1820, with interest in the meantime half-yearly : an action having been brought for the penalty upon a breach of the condition in nonpayment of half a year's interest on the 29th September, 1817, the court refused to stay proceedings before judgment on payment of the interest due and costs, although the nonpayment of the interest was owing to a slip. Van Sandan v. -- , 1 B. & Ald. 214; 18 R. R. 473. Tighe v. Crafter, 2 Taunt, 387.

A bond, conditioned to pay costs on the 29th November, in Cumberland, when taxed by the Master, is forfeited by nonpayment, though in fact the costs were only taxed on the 25th November, of which the defendant had no notice on or before the 29th; for he might have had them taxed before, and thus have known their amount in time. Bigland v. Skelton, 12 East,

436.

A bond, executed in March, 1832, was conditioned for the payment of 51, interest on 2001. on the 1st March, 1833, and 51, on the 1st March, 1834, and 2051, on the 1st March, 1835. The first year's interest was not paid till March 30th, 1833: -Held, that the bond had become forfeited. Skinners' Company v. Jones, 4 Scott, 271: 3 Bing. (N.C.) 481; 3 Hodges, 18; 6 L. J., C. P. 113.

Filling up Blank for Date. ]-Filling in the date of a warrant of attorney, when left in blank, after execution, is not such an alteration as will avoid the instrument. Keane v. Smallbone, 17 C. B. 179; 25 L. J., C. P. 72; 4 W. R. 11.

Filling in by a mortgagee of the date, the period for redemption, and the names of the tenants of mortgaged premises, after the execution of the deed of the mortgagor, are not such alterations as to invalidate the deed. . Adsetts v. Hires, 9 Jur. (N.S.) 1063; 9 L. T. 110.

Where a deed purported to bear date on the 20th November, and was executed by one of two parties on the 16th of that month, and by the other on a previous day :- Held, to be immaterial, it not appearing that a blank was left for the date at the time of the execution. Cockell v. Gray, 6 Moore, 482; 3 Br. & B. 186.

## 2. Execution.

### a. Presumptions respecting.

Of Counterpart. ]-D., in 1824, agreed with S. for the purchase of an estate, and that the purchase-leed should contain a covenant by D. that he, his heirs and assigns, would pay to S., his executors, administrators, and assigns, the sum of 6s. for each chaldron of coals gotten out of the estate and shipped for sale. The purchasedeed was subsequently executed by S., but not by D. D., however, entered upon the laud, and he and his devisees and their assigns enjoyed the property. Coal was also got and shipped for sale: Held, that the execution by D. of a counterpart of the deed containing the covenant must be presumed, and that the words "shipped execution of a settlement by indentures of lease

claimed was not a penalty, and could be re- for sale" in the deed meant coal actually shipped covered. Protector Endowment Loan Co. v. Grice, for sale. Withom v. Vane, 32 W. R. 617—H. L.

In an action for money received, the defendant, as an answer to the action, put in one part of a deed executed by the plaintiff, whereby the defendant covenanted to pay over all moneys received by him on account of the plaintiff; notice having been given to the plaintiff to produce the counterpart of this deed :-Held, that the possession by the defendant of the plaintiff's part of the deed was presumptive evidence that he had executed the counterpart; and that this was equally a ground of nonsuit, whether the counterpart had been lost or not. East India Co. v. Lewis, 3 Car. & P. 358; 33 R. R. 680.

Deeds Executed on same Day-Priority of Operation. - When two deeds relating to the same subject-matter are executed on the same day the court will inquire which of them was executed first. But if there is anything in the deeds themselves to show an intention either that they shall take effect pari passu, or that one should take effect pari passu, or that one should take effect in priority to the other, the court will presume that they were executed in such an order as to give effect to the manifest intention. Holden or Gartside v. Silkstone and Dodsworth Coul and Iron Co., 51 L. J., Ch. 828; 21 Ch. D. 762; 47 L. T. 76; 31 W. R. 86. And see col. 348, ante.

Absolute or Conditional Operation. -A. having received moneys belonging to B., privately and without any communication with B., prepared and executed a mortgage to him for the amount. A. retained the deed in his custody for twelve years, and then died insolvent. After his death the deed was discovered in a chest containing his title deeds :-Held, that the deed was not an escrow, there being no evidence to shew that it was executed conditionally, but that it took effect from its execution, and was good against A.'s creditors. Exton v. Scott, 6 Sim. 31.

A deed, the possession of which was not delivered, held complete, and not merely an escrow, when it was complete on the face of it, and the memorial was duly registered treating it as executed at the time of its date, and the non-delivery accounted for by delay respecting a mortgage which was part of the consideration. Blennerhasset v. Day, Beat, 468.

Deeds of appointment of a sum of 30,0001, for younger children's portions having been properly executed, and being found in the custody of the family solicitor:-Held, that the onus was thrown upon the party disputing them, to prove their invalidity as escrows. Rowley v. Rowley, 1 Kay, 242; 23 L. J., Ch. 275; 18 Jur. 306.

Sealing.]—A document, purporting to be a bond, bore the words "sealed with my seal," and the attestation clause was to the effect that the document had been "signed, sealed and delivered" by the obligor. The document was properly stamped as a bond. It did not appear that a seal had in fact ever been affixed, and there was no mark, wafer or scal visible upon the face of the document :- Held, that the court could not, under the circumstances, presume that the document had been scaled. Smith, In re, Oswell v. Shepherd, 67 L. T. 64—C. A.

From Circumstances. ] - The existence and

pally the existence of the drafts: the statement in an abstract of the title, and the existence of 339. the lease for a year of other estates appearing to have been included in the same place of settlement, Word v. Garnons, 17 Ves. 134; 11 R. R. 35.

The production of a paper, importing to be an attested copy, may with other evidence have considerable weight. Ib.

Decree for raising money under deed of appointment, though the only copy produced appeared not executed, upon recitals of it in two settlements as a subsisting effectual deed, and evidence from books of a deceased solicitor of charges for the preparation and execution of it. Skipworth v. Skirley, 11 Ves. 64; 8 R. R. 86.

Length of possession, as a ground for presuming a release, depends on the nature of the possession, whether adverse or not. Fenwick v.

Reid. 1 Mer. 114.

Courts of equity will presume a release within the same limits of time within which juries will be directed to presume it, whether any statute of limitation is applicable to the case or not. Baldwin v. Peuch, 1 Y. & C. 453.

#### b. Manner of.

Signature-In what Name-Misnomer.]-A person having executed a deed in the name of J. Janes, his real name, and being described in the body of the deed as J. James, but with the proper description and address added :- Held. that the property passed to him, and the jury was warranted in so finding. Junes v. Whitbread, 11 C. B. 406: 20 L. J., C. P. 217; 15 Jur. 612.

In debt on bond the plaintiff by his declara-tion complained against W. F. B., said by the name of W. B. The defendant pleaded non est factum. At the trial it appeared that the defenthat described in the declaration, by the name of W. B., and that, at the time of the execution, he was known by that name :- Held, first, that the proof was sufficient to sustain the issue; secondly, that, even if the objection were valid, it was not one of which the defendant could avail himself under the plea of non est factum. Williams v. Bryant, 5 M. & W. 447; 7 D. P. C. 502; 9 L. J., Ex. 47: 3 Jur. 632.

Signing-When Necessary. |- Signing as well as sealing a common bond for money innecessary. Hodghinson, Ec parte, 19 Ves. 296.

There is no anthority to say a release must be signed, as well as sealed and delivered, to make it effectual. Taunton v. Pepler, 6 Madd. 166.

Sealing and delivery essential to a deed, which if delivered may be a good deed, whether signed or not. If to be executed under a power, with signature and sealing, both are required. Wright v. Wakefield, 17 Ves. 459,

Sealing-Absence of Seal. The absence of a seal from deeds of reconveyance which were not proved to have ever been sealed, renders them invalid. Sandilands, In re (L. R. 6 C. P. 411) considered. National Provincial Bank v. Jackson, 33 Ch. D. 1; 55 L. T. 458; 34 W. R. 597—C. A. S. P., applied to a bond, Smith, In re, Oswell v. Shepherd, 67 L. T. 64—C. A.

and release presumed from eirenmstances, princi- delivered, as it may be done either by words or Goodright v. Gregory, Lofft, actual tradition.

> By a deed made between E. C., of the first part, G. W., of the second part, J. R., of the third part, and D. H. and J. S. N., of the fourth part, G. W. assigned a patent to D. H. and J. S. N., to be paid for by instalments, extending beyond a year from the execution of the deed. The deed was signed and executed by all the parties except D. H. There was a seal in the usual way for him, but no signature. It was proved that he had, together with J. S. N., attempted to work the patent, and sent a notice to the plaintiff, pursuant to a proviso in the deed, in which the deed was recited as made between the several parties thereto, and their names were correctly stated. This was signed by D. H. In an action on the deed against D. H. and J. S. N., they severally pleaded non est factum. At the trial D. H. produced the deed :-Held, that there was evidence to go to the jury that he had adopted and delivered the deed, Cherry v. Heming, 4 Ex. 631; 19 L. J., Ex. 63.

In an action by a company for calls, the declaration stated, that by deed made by and between the several persons whose names and seals were or might thereafter be thereunto subscribed, and who had sealed and delivered, or who might seal and deliver the same, of the first part; and persons nominated to be covenantees for the benefit of the company, of the second part; the parties of the first part covenanted with the parties of the second part to pay the calls. Averment, that whilst the defendant was a shareholder, "and after the execution by the defendant of the deed as aforesaid," the directors made a call, Breach, nonpayment, The declaration contained no direct averment that the defendant executed the deed :- Held, that the words "after the execution by the defendant of factum. At the trial it appeared that the defendant did in fact execute a bond agreeing with dant had subscribed, scaled and delivered the deed, and that they were, upon general demurrer, deed, and that they were, upon general demarks, equivalent to such an averment. Sutherland v. Wills, 5 Ex. 715—Ex. Ch. Affirming judgment of the court below, nom. Wills v. Sutherland, 4 Ex. 211: 18 L. J., Ex. 450.

> Proof of Execution. ]-Proof of handwriting of parties to a deed is sufficient proof of execu-tion under the Common Law Procedure Act. 1854, s. 26. Mair's Estate, In re, 42 L. J., Ch. 882; 28 L. T. 760; 21 W. R. 749.

> If the handwriting to a deed is proved, the jury may presume the sealing and delivery. Grellier v. Neale, 1 Peake, 146; 3 R. R. 669.

> A deed acknowledged by married women was signed by the parties and witnessed; but no seal or representation of a seal appeared at all on the deed :- Held, that the attestation clause, in which it was stated that the deed had been signed, sealed and delivered in the presence of the witnesses, was prima facie evidence of due execution. Mayer, In re, 40 L. J., C. P. 201; 24 L. T. 273: 19 W. R. 641.

> If a document appears to have been signed and attested, it is presumed to have been sealed and delivered, whether any impression of a seal appears on it or not. S. C., nom. Sandilands, In re, L. R. 6 C. P. 411. And see Hall v. Bain-

bridge, 12 Q. B. 699,

Proof that a party signed a deed, which bears Delivery:]—It is not necessary that it should on the face of it a declaration that the deed was appear upon the face of a deed that it has been sealed by the party, is evidence to be left to a Semble, that words at the end of a deed, following the "In equis rel testimonium," &c. following the "In equis rel testimonium," &c. form no part of the deed. Pairs v. Morrice, 4 N. & M. 48; 2 A. & E. 84; 4 L. J., K. B. 21.

Where the attestation of a lead is well as the seminorary of the execution of the exception of the execution of the execu

form, and the attesting witness recollects seeing the party sign the deed, but does not recollect any other form being gone through, it will be for is appointed. Morgan v. Hatchell, 19 Beav. 86; the jury to say on the evidence, whether the 3 Eq. Rep. 121; 24 L. J., Ch. 135; 1 Jur. (8.8.) doed was not duly signed, sealed and delivered, 12: 3 W. R. 126. deed was not duly signed, scaled and delivered, as all that is very likely to have occurred though the witness did not remember it. Burling v. Paterson, 9 Car. & P. 570.

A. deposited with B., his stockbroker, the certificates of shares in the Balkis Consolidated Company, and executed a blank transfer to secure the balance of his current account. articles of the company required that transfers of shares should be made by deed. Shortly after-wards B. filled up the blank transfer with the name of L. as transferee, and deposited the shares with L. as security for money borrowed, as he alleged, in pursuance of the general direc-tions of A. Later on B. closed A.'s account and sold the shares. L., who was willing that the purchase should be completed, applied to the company to register the transfer to himself. In the meanwhile A., who had disputed B.'s account, had given the company notice not to register. L. now moved, under the Companies Act, 1862, s. 35, to rectify the register by inserting his name. On production of the transfer it appeared that it contained no seal or wafer in the place of a seal, but only a mark on the paper of the place where the seal ought to be. The transfer was witnessed by B.'s clerk as having been signed, scaled and delivered by A., but the attesting witness did not make any affidavit, and the evidence of A. and B. as to whether A. put his finger on the seal or not was contradictory :-Held, that no order could be made on the motion; that L. could have no right to be registered unless A, were estopped from denying that the transfer to L. was good, and this estoppel could only arise if the document delivered to L. were prima facie complete; that it was not complete in the absence of a scalunless it was shewn that it had been sealed, and for this the evidence was insufficient. Balkis Consolidated Co., In re, 58 L. T. 300; 36 W. R. 392.

The plaintiff executed a declaration of trust operating as a voluntary settlement of leasehold property upon his mother for life, with remainders in favour of her children. Subsequently a deed was indorsed upon the original assignment of the property to the plaintiff, purporting to convey the legal term to the mother absolutely. The plaintiff signed his name to this deed opposite the seal, which had been previously affixed by another person, but immediately on his signing it the solicitor who was present, hearing of the declaration of trust, stopped all further proceedings. The deed, however, so signed, but undated and unattested, was left in the hands of plaintiff's mother, who afterwards repaired them to the plaintiff's knowledge. In a deed of arrangement between the plaintiff and his mother's executors, prepared by plaintiff's direction, and signed by him, though not completely executed, were contained recitals of the deed in the contained recitals of the contained recitals o executed, were contained recitals of the deed in Grantor keeping.]—The grantor of a deed question, and of the lease to the defendant:— signed it, scaled it, and declared in the presence

Attestation. - A person appointed guardian is a good attesting witness to the deed by which he

#### c. Escrow.

What is. ]-To determine whether an instrument is an escrow or not, the question is not merely whether the instrument was delivered to a third person to be held conditionally, but whether the delivery was of a character negativing its being a delivery to the party who was to have the benefit of the instrument. Watkins v. Nash, 44 L. J., Ch. 505; L. R. 20 Eq. 262; 23 W. R. 647.

It is not necessary, in order to constitute an escrow, that the deed should be expressly delivered as such. If, at the time of the delivery of the deed, there is an agreement that the deed is to have operation only on certain conditions, that is sufficient to constitute a delivery as an escrow. Nash v. Flynn, 6 Ir. Eq. R. 565; 1 Jo. & Lat. 162.

Parol Evidence-Question for Judge or Jury. Although, in general, the question whether contract has been executed only as an escrow is for the jury, because it depends on the facts proved by oral evidence; yet where the evidence is in writing, the question becomes one for the judge. Furness v. Meck, 27 L. J., Ex. 34. And see Pym v. Campbell, 6 El. & Bl. 370; 25 L. J., Q. B. 277; 2 Jur. (N.S.) 641. Daries v. Jones, 17 C. B. 625; 25 L. J., C. P. 91. Millership v. Brookes, 5 H. & N. 787; 29 L. J., Ex. 369.

To show no Contract.]—Where an agreement for a lease had been signed by the plaintiff, and was subsequently signed by the defendant, but not in the presence of the plaintiff, and the defendant never delivered the agreement to the plaintiff :- Held, that evidence might be admitted to show that there was no true animus contrahendi between the parties. Pym v. Campbell (25 L. J., Q. B. 277; 6 El, & Bl. 370) followed. Pattle v. Hornibrook, 66 L. J., Ch. 144; [1897] 1 Ch. 25; 75 L. T. 475; 45 W. R. 123.

instrument was delivered as an escrow. Stoytes v. Pearson, 4 Esp. 255.

Whether or not delivery to a person not a party to it is essential to constitute a deed an escrow, where there are several grantees, and one of them is also solicitor to the grantor and to the other grantees, and the deed is delivered to him, evidence is admissible to show the cha-

of the attesting witness, that he delivered it as his act and deed, but kept it in his own possession :- Held, that the deed was effectual from the moment of its execution though there was no delivery of it to the grantee, or to any person for his use. The grantor afterwards delivered the deed to a third person for the use of the grantee, intending to renounce all control over it. Such third person was not the agent of the grantce, nor did the grantee ever receive or know of the existence of the deed till after the death of the grantor :- Held, that the deed was effectual from the moment of such delivery. Doe d. Garanas v. Knight, 8 D. & R. 348; 5 B. & C. 471; 4 L. J. (o.s.) K. B. 161; 29 R. R. 355.

A. having received moneys from B., privately

and without any communication with B., prepared and executed a mortgage to him for the amount. A. retained the deed in his custody for twelve years, and then died insolvent. After his death the deed was discovered in a chest containing his title-deeds:-Held, that the deed was not an escrew, there being no evidence to show that it was executed conditionally, but that it took effect from its execution, and was good against A.'s creditors. Exton v. Scott. 6 Sim. 31.

Delivery to Third Party. -A., being indebted to his bankers, excented a deed, purporting to be a mortgage to them, for securing the debt. After executing it, he delivered it to his attorney, who retained it in his possession till A.'s bankruptcy, which occurred about a month afterwards. The attorney then delivered it to the mortgagees :-Held, that this was a good delivery by A, to the mortgagees, Grugeon v. Gerrard, 4 Y. & C, 119.

A person made a deed of gift of all his real property to his daughter. He signed and scaled it, and no one being present but the attesting witnesses, he said, "I deliver this as my last act and deed." After this he desired a third person to keep it, and not deliver it to his daughter till he was dead, it being suggested to him that she might otherwise take his property from him in his lifetime:—Held, that the delivery of the deed was complete; but semble, that if the direction to keep it had been given before he said "I deliver this," the deed would not have operated as an escrow. Doe d. Lloyd v. Bennett, 8 Car. & P. 124.

Deeds of appointment of a sum of 30,000%, for younger children's portions having been properly executed, and being found in the custody of the family solicitor :- Held, that the burden of proof was thrown on the party disputing them to shew that they had been executed as escrews. Rowley v. Rowley, Kay, 242; 2 Eq. Rep. 241; 23 L. J., Ch. 275; 18 Jur. 306; 23 L. T. 55.

Conditions. |-Where A. executes a deed, and delivers it to B. as an escrow, to be delivered to C, on a certain event, possession of the deed by C, is prima facie evidence of the performance of the condition. Hare v. Harton, 2 N. & M. 428; 5 B. & Ad. 715 ; 3 L. J., K. B. 41.

If the vendor of a leasehold estate delivers payment of the residue of the purchase-money, the property in the title-deeds of the estate is so vested in the vendee, that the vendor, obtaining possession of them, and pawning them, confers on the pawnee no right to detain them after tender of the residue of the purchase-money. Hooper v. Ramsbottom, 6 Taunt. 12; 1 Marsh. 414; 4 Camp. 121.

Previously to the execution of a deed of composition, it was agreed, in the presence of the surety for the payment of the composition, that it should be void unless all the creditors executed: the surety then executed the deed in the usual manner, without saying anything at the time of its execution; it was then delivered to one of the creditors in order that he might get it executed by the rest :- Held, that this was a delivery of the deed as an escrow, and, as all the creditors had not executed, the surety was not bound thereby. Johnson v. Baher, 4 B. & Ald. 440; 23 R. R. 338.

The execution by the debtor of a deed of trust is not in the nature of an escrow before it is executed by the trustees. Simpson v. Sikes, 6

M. & S. 295.

In an action upon an apprenticeship deed by the master against the father the declaration stated that the indenture was scaled by the defendant and his son, and that during the termthe son absented himself, and refused to continue in the service. Plea, that the indenture was not the deed of the defendant; that it was not the deed of the plaintiff; that it had not been executed by the plaintiff, and that it had not been executed by the defendant, and delivered to A. only as an escrow. When the defendant exeented the deed at the office of A., the attorney who prepared it (the plaintiff not being present), he requested that the plaintiff should not be allowed to execute it until an arrangement was made as to expenses, and A. made a memorandum on the deed to that effect, and acted upon it, declining to allow the plaintiff to execute it, when called to do so, and he never had executed it : Held, that, though the jury found the defendant intended that the deed should bind him, and delivered it as a complete deed, the evidence shewed that the deed was delivered as an escrow, and that the action could not be maintained. Millership v. Brookes, 5 H. & N. 797; 29 L. J., Ex. 369.

An action upon a deed described as made between G, of the first part, the defendant and L. of the second part, and the plaintiff of the third part, whereby the defendant and L. jointly and severally covenanted with the plaintiff for payment by G. of certain annual premiums, the defendant (setting out the deed in hee verba, shewing that it was made between G, of the first part, the defendant and L. and Pearce of the second part, and the plaintiff of the third part) pleaded, that the deed was made and executed by him on the faith that Pearce should join therein, or execute it, and that Pearce never did join therein or execute it :- Held bad, it not appearing that the defendant's execution of the deed was upon condition that his execution should be void, if the deed was not executed by Pearce, the other co-surety. Cumberlege v. Law-son, 1 C. B. (N.S.) 709; 26 L. J., C. P. 120; 5 W. R. 237.

A deed of inspectorship and composition made between a debtor and his creditors in Great Britain contained a covenant that in a certain the conveyance as an escrow to take effect on event the debtor would, if required by the inspector, assign all his property to the inspector for the benefit of the creditors; that upon such. assignment the inspector should give a certificate that the debtor had so assigned, and that thereupon the debtor should be released from his debts. The deed contained a proviso that it should "cease, determine, and be void" if all the creditors in Great Britain to a certain amount

did not execute it within six months from its d. Macleod v. East London Waterworks, M. & M. date. The debtor was duly required by the inspector to execute an assignment, and did so, and received a certificate :- Held, that the deed was not void, but voidable only; that the release constituted a good defence against a creditor who had executed the deed, and who, having had notice that all the creditors had not signed the deed, had endeavoured to obtain payment of a dividend out of the property assigned to the inspector. Dunn v. Wyman, 51 L. J., Q. B.

Semble, the proviso was inserted in the deed for the benefit of the debtor, and a creditor who had executed could not take advantage of it. Ib.

Intention. -A bond executed with the usual formalities may operate as a deed in præsenti. although at the time of such execution it was expressly agreed that it should not take effect until a certain event had happened; and the intention of the parties at the time of execution is a question of fact for the jury on the whole evidence. Murray v. Stair (Earl), 3 D. & R. 278; 2 B. & C. 82; 26 R. R. 282.

It is not necessary that the delivery of a deed as an escrow should be by express words; if, from the circumstances attending the execution, it can be inferred that it was delivered not to take effect as a deed until a certain condition was performed, it will operate as a delivery as an escrow only. Bowker v. Burdekin, 11 M. & W. 128; 12 L. J., Ex. 329.

Where one of three partners executed an assignment of the partnership property before, but the others did not execute it until after a flat in bankruptev had issued :-Held, in the absence of anything to shew that the deed was delivered as an escrow, that it amounted to an act of bankruptey by the one who so executed it, and that his share of the partnership property passed to 177

the assignees under the flat. A lease by deed was duly executed by the plaintiff and P., but in pursuance of a previous agreement, it remained in the possession of the lessor until 100%, for goodwill and fixtures was paid, P. paid 501., and entered into possession, and curried on business upon the premises until he became bankrupt. The defendant entered into possession as assignee of the bankrupt. In an action for use and occupation:—Held, that the deed was not delivered so as to take effect as a lease, and that until payment of the remaining 50l. a tenancy from year to year existed, and therefore the defendant was liable in this form of action. Gudgeon v. Besset, 6 El, & Bl, 986; 26 L. J., Q. B. 36; 3 Jur. (N.S.) 212.

A deed (which by arrangement was to be executed in duplicate, one to be prepared by each party, and to be interchanged between them) was executed by the grantee, but not attested, and was by him sent to the solicitor of the grantors to procure their execution; and they accordingly signed, sealed and delivered it:— Held, that this was a complete delivery whereby the estate passed; and that the arrangement did not render the deed an escrow until the duplicates were interchanged. Kidner v. Keith, 15 C. B. (N.S.) 35.

#### d. By Agents.

149

A deed signed by a feme covert, without the authority of her husband, will not bind him. White v. Cuyler, 6 Term Rep. 176; 1 Esp. 200; 3 R. R. 147.

Where a son executed a deed for his father, but without a power of attorney to do so, and evidence was adduced that the father said that his son had his authority to execute the deed, and also adopted it :- Held, that it was a delivery of the deed sufficient to make it valid. Tupper v. Foulkes, 9 C. B. (N.S.) 797; 30 L. J., C. P. 214; 7 Jur. (N.S.) 709; 3 L. T. 741; 9 W. R. 349.

An authority to execute a deed must be by deed. Steiglitz v. Egginton, Holt, N. P. 141; 17 R. R. 620. Berkeley v. Hardy, 8 D. & R. 102; 5 B. & C. 355; 4 L. J. (o.s.) K. B. 184; 29 R. R.

Method of.]-Oue who executes a deed for another, under a power of attorney, must execute it in the name of his principal; but if that be done, it matters not in what form of words : and such execution is denoted by the signature of such execution is denoted by the signature of the names, as if opposite the seal is written "for J. B." (the principal) "M. W." (the attorney), ("L. S."). Wilks v. Back, 2 East, 142; 6 R. R.

The execution of an indenture by an attorney must be in the name of the principal, in order to be binding upon the latter. Berkeley v. Hurdy, 8 D. & R. 102; 5 B. & C. 355; 4 L. J. (O.S.) K. B. 184; 29 R. R. 261. S. P., White v. Cuyler, 6 Term Rep. 176; I Esp. 200; 3 R. R.

A deed excented by A. on behalf of B., must, A need extended by A. on beharf of B., finish, in order to bind B., be executed by A. in the name of B., or by A. in his own name, with such words as shew that he is acting solely as the agent of B. in such execution. M'Ardle v. Irish Iodine Co., 15 Ir. C. L. R. 146.

Committee of Lunatic. - By a lease expressed. to be made between a lunatic by A. B. and C. D. his two committees and other parties, the lunatic acting by his committees demised certain proporty therein mentioned to the lessee. The testimonium clause was "In witness whereof the said parties to these presents have hereunto set their hands and seals." A. B. signed his name against one seal, and C. D. his against another; and the attestation clause was "signed. sealed and delivered by A. B. and C. D., in the presence of, &c." :- Held, that the lease was well executed on behalf of the lunatic. Lawrie v. Lees, 51 L. J., Ch. 209; 7 App. Cas. 19; 46 L. T. 210; 30 W. R. 185—H. L. (E.)

On Behalf of Illiterate. ]-A deed is well on Benaif of Hitterate. —A deed is wolf.

excented by an illiterate person, if it is signed
by a third person at his request and in his
presence. Rev. v. Longony. 1 N. & M. 576; ‡
B. & Ad. 647; 2 L. J., M. C. 62.
It is not necessary that the deed should have
been previously read over to him, nuless he received it.

quired it. Ib.

### e. Non-execution.

When Tender Necessary. ] - A declaration Authority. - If a deed is executed by the stated that it was agreed between the plaintiff general law agent of a trading company, such and the defendant, that the plaintiff, the defended is binding, without proof that he was dant, and R., the son of the defendant, should at authorised to execute the particular deed. Doe the expiration of a reasonable time execute a premium; that a reasonable time had elapsed for executing the deed and paying the premium, and that although the plaintiff was ready and willing to execute the deed and to receive R., and although the plaintiff requested the defendant to refused, and the defendant exonerated and discharged the plaintiff from tendering the deed for execution. Plea, that the defendant did not exonerate the plaintiff. A verdict having been found for the defendant, a rule nisi for a new trial for judgment for the plaintiff non obstante creat for jaugment for the plantar four obstance veredicts, or for a repleader, was refused. Don-good v. Rose, 9 C. B. 132; 19 L. J., C. P. 246, S. P., Thumes Haren Dock Co. v. Brymer (in error), 5 Ex. 696; and Cart v. Ambergate Ry. 20 L. J., Q. B. 460.

Held, also, that the declaration without the averment of exoneration would have been bad: and that the issue as to the exoneration was a material issue. Ib.

And see cols. 343, 344, 345, ante.

#### 3. INDORSEMENTS, PLANS, AND SCHEDULES.

Indorsements. - An indorsement on a deed after it has been signed by the parties, but written at the same time with the scaling and delivery, is part of the deed. Lyburn v. Warring-

- As to Interest. - By acts for improving a port, commissioners were empowered to raise money upon instruments which were known in the market as Old Pier Bonds. These bonds were all originally issued at 51, per cent, interest, with the exception of eight for 100%, each, which were granted to B., upon which a memorandum was indorsed before or at the execution of the bonds, whereby the obligee (under his hand only) agreed to accept interest at 41, per cent., provided the payments were regularly made. A., who was the holder of these eight bonds, was applied to by C., a broker employed to purchase such securities for D., and A. agreed to sell to D. "eight Old Pier Bonds for 1001, each," nothing being said on either side as to the rate of interest payable thereon. The bonds were left with the broker for the purpose of getting them transferred. He accordingly prepared a transfer, and got it registered, and then, for the first time, discovered that the interest payable on them was, by the memorandum on the back, limited to 4l. per cent., upon which he immediately repudiated them. In an action for the contract price, the jury found, that the bargain between U., as D.'s agent, and A. was for Old Pier Bonds of the usual sort at 5l, per cent., but that A. only intended to sell bonds at 4l. per cent, :-Held, that the jury was warranted in the conclusion they came to, and that the indorsement, in equity at least, became part of the bond. Keele v. Wheeler, 8 Scott (N.R.) 323; 7 Man. & G. 665; 13 L. J., C. P. 170.

— Deferring Payment.]—A bond was conditioned that the obligor should indemnify the obligee from all sums the latter should pay, or be liable to pay, on the obligor's account; and, before the execution of the bond, a memorandum was therean indosed, that the obligee "has given an oudertaking not so use upon the bond to the estate and ordertaking not so use upon the bond till after A blood having been given for 2,0004, the she obliger's death ":--Held, that this memo- loblogor died, and his executor gave the obligee a

deed by which R, was to be apprenticed to the random was to be taken as part of the condi-plaintiff, and that the defendant should pay a tion; and made the bond in effect payable only by the representatives of the obligor after his death. Burgh v. Preston, ST. R. 483: 5 R. R. 416.

A son being indebted to his father upon a bond for 1,000L, and interest, subsequently joined his father as surety in a bond for 5001, and execute the deed and pay the premium, yet he interest, given by the father to a third person, and a memorandum was indorsed upon the bond for 1,000%, by which it was agreed between the father and son, that the son should not be called on to pay the within-mentioned principal of 1,0007, until the father should have paid all principal money and interest due on the bond for 500/L;—Held, that this indorsement did not affect the interest accruing due upon the bond for 1,000/. Reed v. Morris, 2 Myl. & Cr. 361; 6 L. J., Ch. 197; 1 Jur. 233.

> - Addition to Lease. ]-Covenant in a lease that the lessee would not dig gravel out of any part of the demised premises without the consent of the lessor, except what should be dag out of two acres, part of the premises demised. By indorsement it was agreed, that it should be lawful for the lessee to break up and dig for gravel any part of the within-demised premises, he covenanting to pay to the lessor 20% for every acre he should break up and dig, at or before the expiration of the time, and to make good the same :- Held, that the lessee was not entitled to dig for gravel in the two acres of garden ground mentioned in the lease, without making them good. Flint v. Brandon, 1 Bos. & P. (N.R.) 73.

> — Release, ]—A. bequeathed to B. 7001.. part of 1,2001, which B. owed him on bond: A. afterwards revoked the bequest, but made an indorsement on the bond, by which he forgave B, the 7001. A.'s executors brought an action against B. for the 1,200/.; B. filed a bill to restrain the action, offering to pay to the executors the balance of 500%. The court refused the injunction, because B. had given no consideration for the indorsement on the bond. Tufnell v. Constable, 8 Sim, 69.

> A. being indebted to B., C. and D., three sisters, who were his near relations, partly on his own account and partly as executor of his father, executed to them a bond for 500l. At the time of giving the bond, A. objected to give it; and agreed to do so only on a verbal representation that it was not intended to be enforced, unless B., C. and D. should come to want, an event which did not happen. The bond remained in the hands of the three till the death of B., and after her death in the hands of the survivors, and after the death of C. in the hands of D., whose property (by mutual arrangement) it was at the time of her death. On the bond was found the following indorsement: "This bond is never to appear against A.: Witness, C. and D." This was dated eleven years after the date of bond. It was not made clear that C.'s name was written by herself; it was said that D. had written it! It was, however, proved that if D, had written it, she did so with the authority of C .:- Held, that, without saving whether the indersement amounted to a release, which was a legal question, there was an equity under the circumstances against enforcing the bond; that, if put in suit, the action would be restrained; and that there was nothing due on the bond to the estate

fresh bond, and received back the original bond, reference to coloured parts of a plan. A yard with a memorandum indorsed upon it and signed by the obligee, in which he declared that he had accepted the fresh bond in lieu of the first :-Held, that the obligee could only claim under the second bond, and that the estate of the original obligor was discharged so far as the obligee was concerned. Shore v. Shore, 2 Ph. 378; 17 L. J., Ch. 59.

A., by a deed, in which it was recited that he was selsed in fee, mortgaged to B. in fee. Indorsed on this deed was a memorandum signed by C .: - That by an indenture of surcharge, the within premises were charged by me, the pur-

chaser of the equity of redemption thereof, with the payment of the further sum of 3251, and interest":—Held, that this amounted to an admission by C, that he came in under A., and that he was therefore bound by the recital that bound A. Dow d. Gaisford v. Stone, 3 C. B. 176; 15 L. J., C. P. 234.

Plan-Erroneous.]-On a conveyance of a plot of land of certain measurements, set out on a plan, with two houses recently erected or about to be erected thereon, it was proved that the foundations were laid before the deed was executed :- Held, that it was immaterial that the ground occupied by the houses exceeded the measurements stated. Manning v. Fitzgerald,

1 F. & F. 633.

A deed conveyed a piece of land, forming part of a close, by reference to a schedule annexed, The schedule described the land, in a column headed "No, on the plan of the Briton Ferry Estate," as "153 b"; in a second column, headed "Description of Premises," as "a small place marked on the plan"; in a third column, as being in the occupation of A.; and in a fourth, as "34 perches." At the time of the contract, a line was drawn on the plan as the boundary-line, dividing the piece 153 b from the rest of the close, of which it formed a part. The plan was drawn to a scale, but, mon measurement of the land, was found incorrect; and 153 b contained, within the line so drawn, less than 34 perches, according to the actual measurement on the planand 27 perches only according to the actual measurement of the land :-Held, that the statement that the piece of land conveyed contained 34 perches was merely falsa demonstratio, the prior portion of the description being sufficient to convey it, and that the deed passed only the portion of land actually marked off on the plan, as measured by the scale. Liewellyn v. Jersey (Earl), 11 M. & W. 183; 12 L. J., Ex. 243.

A deed purporting to convey "all that messuage or farmhouse, and several closes of land thereto belonging called Gotton Farm, in the occupation of G. S., and consisting of the several particulars specified in the first division of a schedule thereunder written, and more particu-larly delineated in a map or plan thereof drawn There were no in the margin of the schedule. general words. In an action brought to try the right to a slip of land, which was not mentioned either in the schedule or in the plan, evidence was offered on the part of the grantee to shew that the locus in quo had always been occupied with the closes mentioned and delineated in the schedule and plan, and treated as part of Gotton Farm :- Held, that this evidence was not admissible, and that the deed was conclusive. Barton v. Dawes, 10 C. B. 261; 19 L. J., C. P. 302.

The parcels in a conveyance were described by

delineated, but not coloured, in the plan :-Held, to pass under the general word "yards, Held, to pass under the general word "yards," Willis v. Watney, 51 L.J., Ch. 181; 45 L.T. 739; 30 W. R. 424.

M, being entitled to lands on both sides of a river, sold and conveyed to L. a piece of land, the dimensions of which were minutely given in the eonveyance, and which was therein stated to contain 7.752 square vards, and to be bounded on the north by the river, and to be delineated on the plan drawn on the deed, and thereon coloured pink. The dimensions and colonring extended only to the southern edge of the river, and if half the bed had been included the area would have been 10,031 square yards, instead of 7,752 square yards. The deed contained various reservations for the benefit of M., but contained nothing express to show whether the half of the bed was intended to pass or not :- Held, that the prememorial to pass or not reflect, that the pre-sumption that the grant included half the bed was not rebutted. Micklethwait v. Newlay Bridge (h., 33 Ch. D. 133; 55 L. T. 336; 51 J. P. 132-C. A.

By lease and release, executed in 1839, M. and others conveyed to W.a piece of freehold ground, with a messuage thereon, adjoining a covered gateway, "together with the exclusive use of the said gateway." The dimensions of the gateway or passage, as to length, breadth, and height, were mentioned in the deal; and the said "piece of ground and premises" were stated to be more particularly delineated by the portion in the plan thereto, and coloured pink. The covered gateway was not coloured on the plan :-Held, that the conveyance to M. did not merely confer on W. and his successors in title a right of way through the covered gateway, but enabled them to use the gateway for all purposes, Reilly v. Booth, 44 Ch. D. 12: 62 L. T. 378: 38 W. R. 484

In a "sett," or lease, of a mine, the boundary line was described as "a line drawn from J. V.'s honse," to a bound-stone; and in the description of the parcels in the lease, it was described, which said premises are particularly described by the map on the back of this 'sett," On this map the boundary line appeared to be drawn from the north-east corner of the house. The position of the house itself was incorrectly represented on the map :- Held, that the judge was bound to look at the map as forming part of the deed, and (dissentiente Lord Westbury) to tell the jury that the line was to be drawn as marked on the map. Lyle v. Richards, 35 L. J., Q. B. 214; L. R. 1 H. L. 222; 15 L. T. 1.

Schedules-Part of Deed. |-Where, by articles under seal, a defendant bound himself under a penalty to deliver to the plaintiff, by a certain day, "the whole of his mechanical pieces as per schedule annexed":—Held, that the schedule formed part of the deed, which without it was insensible. Weeks v. Maillardet, 14 East. 568.

Where there was a mortgage of an iron foundry, and fixtures and working plant thereon, as specified in an inventory, which was to be read and construed with the deed. The inventory included stock in trade, which was not mentioned in the deed. A petition for liquidation was filed by the mortgagor, and thereupon the stock in trade was claimed by both the mortgagee and the trustee in the liquidation:-Held, that the inventory could not, contrary to the intention of the parties, be allowed to enlarge the operation of the deed; Jardine, Ex parte. M.Manus, In rc. 44 L. J., Bk. 58; L. R. 10 Ch. 322; 32 L. T. 681; 23

W. R. 736.

Under a deed of 1658, a manor with its rights. members, liberties, and appurtenances, saving and reserving certain land therein mentioned, was conveyed to trustees upon trust to permit the persons named in the schedule to the deed, their heirs and assigns, being tenants of the several messanges and tenements mentioned in the schedule, to have and convert to their own use a ratable proportion of the rents and profits of the manor, according to the yearly rents and purchase-moneys paid by them respectively, for the purchase of their messuages and tenements: -Held, that such an interest in the profits of the manor could not be annexed to the various tenements mentioned in the schedule without appropriate words of conveyance for that purpose. Hutchinson v. Morritt, 3 Y. & Coll. 547.

Not Annexed—Bill of Sale.]—A bill of sale transferred to A. "all the goods, fixtures. household furniture, plate, china and effects of whatever kind belonging to us, and in and about the messuage, tenement, or premises where he now resides, and being No. 2, Park-road, Old Kent-road, Surrey, and the chief articles whereof are particularly enumerated and described in a schedule hercunto annexed," The schedule being inadmissible by reason of its not being annexed :- Held, that the bill of sale was admissible without the schedule. Dyer v. Green, 1 Ex. 71; 16 L. J., Ex. 239. See Dains v. Heath,

3 C. B. 938; 16 L. J., C. P. 117.

A bill of sale assigned to R. "all the household goods and furniture of every kind and description whatsoever in the house No. 2, Meadow-place, more particularly mentioned and set forth in an inventory or schedule of even date herewith, and given up to R. on the execution thereof." the time of the execution one chair was delivered to R, in the name of the whole of the goods. The inventory did not mention all the goods in the house :- Held, that no goods passed under the bill of sale, except those specified in the inventory. Wood v. Roweliffe, 6 Ex. 407; 20 L. J., Ex. 285.

By an assignment of looms on certain premises, and other effects and things thereto belonging, more particularly set forth in the schedule, articles used therewith, they having been upon the premises, pass, although the looms only were mentioned in the schedule. Cort v. Sagar, 3

H. & N. 370: 27 L. J., Ex. 378.

Assignment of all and every the household goods, &c., the particulars whereof were stated to be more fully set forth in an inventory signed by the grantor and annexed thereto, but the inventory was not forthcoming :- Held, nevertheless, that the assignment was effectual, it appearing from the answer of the party resisting tis validity, that the particulars could be ascertained. England v. Duons, 2 Beav. 522; 9 L.J., Ch. 313; 4 Jur. 526.

- Composition Deed-Annexed after Exeention.]-A. executed to B. and C. a deed of ention.]—A. executed to B. and C. a deed of Sydney City Commissioners, 12 Moore, P. C. 473; trust for the benefit of creditors, purporting to 7 W. R. 267. these to the second of creations, purporting to the made between him of the first part, B. and C. This rule of construction equally applies of the second part, and the several other persons whether the subject-matter is a grant from whose names and the amount of whose debts the Crown or a subject. Ib.

and that as it was not as a matter of fact, in- were set out in a schedule thereunto annexed, tended that the stock in trade should be being creditors of A., of the third part. At the included in the mortgage, it passed to the trustee. time of its execution by A, there was no schedule annexed. When it was produced in evidence in an action by A. against B. and C., for a mortgage deed alleged to have passed under it, it had a schedule annexed consisting of the signatures of certain of his creditors, some of which had been erased, and others had no sums set against them : -Held, that the deed was not avoided thereby, West v. Steward, 14 M. & W. 47.

### C. CONSTRUCTION

#### 1. IN GENERAL.

Person relying on opposite Constructions in different Actions. - Where a litigant has obtained a construction by the court of certain covenants in a deed in his favour, he cannot in a second suit set up a contrary construction to that adopted by the court in the first suit. Gandy v. Gandy, 54 L. J., Ch. 1154; 30 Ch. D. 57; 53 L. T. 306; 33 W. R. 803-C. A.

Argument of Inconvenience. ]-The argument of inconvenience is a very strong argument where the construction is ambiguous, where it is fairly open to two constructions. Then the argument of inconvenience, like the argument of absurdity, may be used with great force; but when the construction is clear beyond controversy, it is no answer to say that there are some consequences which will cause inconvenience which were pro-Spinning Co., In re, 50 L. J., Ch. 167; 16 Ch. D., 686; 43 L. T. 620; 26 W. R. 133.

Modified by Custom.]-A custom cannot vary or alter the construction of written documents, Mencies v. Lightfoot, 40 L. J., Ch. 561; L. R. 11 Eq. 459; 24 L. T. 695; 19 W. R. 578. S. P., Hayton v. Irwin, 5 C. P. D. 130; 41 L. T. 666; 28 W. R. 665-C. A.

Presumption of Knowledge of Contents. ]-In the absence of evidence to the contrary, there is a legal presumption that a man knows the contents of a deed which he executes. Cooper, In re, Cooper v. Vesey, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648, S. P., Salkeld v. Vernon, 1 Eden, 64,

Where the Words are not Ambiguous.]-It is the safest and best mode of construction to give to words free from ambiguity their plain and ordinary meaning. Buchanan v. Andrew, L. R. 2 H. L. (Sc.) 286.

Deeds are to be read in their grammatical and ordinary sense, and the court should not transpose the words of a clause, unless it is absurd or repugnant to, or inconsistent with, the rest

of the deed. Clements v. Henry, 10 Ir. Ch. R. 79, In construing grants, the words used must be taken in the sense which the common usage of mankind has applied to them as well in reference to the context in which they are found, as the eircumstances in which they are used. Lord v.

an equitable effect for a clause, because the construction but upon it at law would leave it inoperative. Gladstone v. Birley, 2 Mer. 404.

Repetition. - When a word occurs twice in the same instrument it is to receive one meaning in both places, unless there appear a clear intention to the contrary. Ridgeway v. Munkittrick. 1 Dr. & War, 34.

Where there is an Ambiguity-Construction against Grantor. ] - The general rule that the construction must be taken most strongly against construction mass be taken most strongly against the grantor, modified by the necessity of giving effect to every word of the instrument, if it can reasonably be done. Pattching v. Dubbins, 1 Kay, 1; 23 L.J., Ch. 45; 17 Jur, 1113; 2 W. R. 2.

Every dead is to be taken most strongly against the grantor; but where an owner of an estate, on his marriage, settles it upon himself for life, with remainders over, and is, therefore, in one sense, both grantor and grantee, his interest under the deed is to be construed as if a stranger had been the granter. Vincent v. Spicer, 22 Beav, 380: 25 L. J., Ch. 589: 2 Jur. (N.S.) 654 : 4 W. R. 667.

The maxim, that a grant in which there is any obscurity or difficulty must be construed most strongly against the grantor, has no application at the present time. Taylor v. St. Helous Corporation, 4d L. J. Ch. 857; 6 Ch. D. 264; 37 L. T. 253; 25 W. R. 885—C. A. But see Birrell v. Dryer, 9 App. Cas. 345; 51 L. T. 130; 5 Asp. M. C. 287—H. L. (Sc.)

The principle that an ambiguous grant shall be construed in favour of the grantee and against the grantor is recognised in :- Doe d. Davies v. Williams, 1 H. Bl. 25; 2 R. R. 703. Dann v. Spurrier, 3 Bos. & P. 899; 7 R. R. 797. Doe d. Webb v. Diwon, 9 East, 15; 9 R. R. 501. Bullen v. Denning, 5 B. & C. 842; 8 Dowl. & R. 657; 4 L. J. (0.8.) K. B. 314; 29 R. R. 431. Leech v. Schroeder, 43 L. J., Ch. 232; L. R. 9 Ch. 463, 466, u.: 22 W. R. 292. Taylor v. Licerpool and Great Western Steam Co., 43 L. J., Q. B. 205; L. R. 9 O. B. 546; 30 L. T. 714; 22 W. R. 752.

- Against Party working a Wrong.] --Where words in an assignment, or in a deed, are capable of two constructions, they are to be construed strongly against the party who uses them to work a wrong. Radger v. Comptoir d' Escompte de Paris, 88 L. J., P. C. 30; L. R. 2 P. C. 393; 21 L. T. 33; 17 W. R. 468.

To Effectuate Intention, - Deeds must be construed to operate according to the intention of the parties, if by law they may; and if they cannot operate in one form they shall in another, which, by law, will effectuate the intention. Goodfitle d. Edwards v. Bailey, Cowp. 600.

The doctrine that in construing a will the circumstances and intention of the testator may be considered in order to ascertain his meaning, applies likewise to deeds. Sidebotham v. Knott,

26 L. T. 700; 20 W. R. 415.

K., being solely seised of hereditaments devised to him for the benefit of the testator's wife and children, conveyed by indenture all his real estate in trust for K.'s children:—Held, that the property devised to K. did not pass by the indenture. Ih.

a deed, and will give it such a construction as

A court of equity is not bound to find supports that general intent, although a particular expression in the deed may be inconsistent with it. Arundell v. Arundell, i Myl. & K. 316; Coop. t. Brough. 139: 2 L. J., Ch. 77.

If the time at which a remainder in a deed is to yest is not ascertained by the limitation itself, it vests immediately in consequence of the legal presumption in favour of vesting estates; but that presumption may be rebutted or controlled by intention collected from the recital of any other part of the deed. Cholmondeley (Marquis) v. Clinton, 2 Jac. & Walk. 81; 22 R. R. 84.

Where a limitation in a deed is perfect and complete it cannot be controlled by intention collected from other parts of the deed. Ib.

An imperfect limitation must be construed by the meaning and intention collected from the whole of the deed taken together. Ih.

In construing a deed, legal presumption can only prevail in the absence of a contrary intention, or where that is not manifested with sufficient clearness. Ib.

Words of description to be construed according to the intention if clearly manifested on the face of the deed, though contrary to their correct technical sense.  $\vec{Ib}$ .

The effect of a limitation in a deed, which, taken by itself, would primâ facie create a vested remainder, will be controlled by a contrary inten-

tion clearly manifested. Ib.

If a clause in a deed be distinct and express, however absurd it may be, it must prevail, and it is not its consequences which will justify the court in swerving from its clear obvious meaning; but if a rational exposition can be given, consistent with a fair interpretation of the language, it would then relinquish its most valuable powers if it did not abandon a construction which, although more consonant with the literal interpretation, leads to a capricious and irrational result. Therefore where the terms of a deed of settlement, taken literally, implied the obligation of consent to marriage at any time, it was limited to non-age, and female plaintiff, who married after she became adult, without consent, was held not to have incurred a forfeiture. Tobin, 1 Moll. 543.

Equity in constraing the effect of a contract, never departs from what appears on the face of the instrument to be the intention of the parties, unless contrary to some principle of law. Pent-

land v. Stoakes, 2 Ball & B. 78.

In putting a construction upon a deed, the court will limit the private signification of general expressions in it by the purposes for which it was executed, so far as those purposes can be discovered from the deed itself. Houston v. Barry, 5 Ir. Eq. R. 294.

- Events not Contemplated. ]-An instrument is to be construed without adverting to the nature of its provisions if legal, or to what they would have been if a particular case had been contemplated. Mosley v. Mosley, 5 Ves. 248. S. P., Miehlethauit v. Nevday Bridge Co., 33 Ch. D. 133; 55 L. T. 336; 51 J. P. 132—

General Words - After Specific. ] - General words in a deed, following words specifically describing and enumerating a certain house and closes, are controlled and limited thereby. nture. Ih.
A court of equity looks to the general intent of 223; 1 L. J., Ex. 73.

General words, although introduced for the

prima facie only to things cjusdem generis with those specifically enumerated. Crompton v. Jarrett, 54 L. J., Ch. 1109; 30 Ch. D. 298; 53 L. T. 603: 33 W. R. 913—C. A.

The proper rule of construction is to give to general words such as "goods, chattels, and effects" the full meaning which they ordinarily would bear, and not to limit them to things ejusdem generis with what has been specifically mentioned, unless it is quite plain that that was Regiroted, diness it is quite plant that that was the intention. Anderson v. Anderson, 64 L. J., Q. B. 457; [1895] 1 Q. B. 749; 14 R. 367; 72 L. T. 313; 43 W. R. 322—C. A.

Where one of a set of heads in the dispositive clause of a disposition is expressed in general terms and concludes a specific enumeration and description of separate subjects, prima facie. and unless the contrary appear, it must be presumed that it was merely intended to carry rights ejusdem generis with those previously described and disponed. Lee v. Alexander, 8

App. Cas. 853-H. L. (Sc.)

If a party possessed of a term of years makes an assignment, for the benefit of his creditors, of various species of personal property by name, concluding with the words, " and all his personal estate whatsoever," these latter words are sufficient to pass the term to the assignees, not withstanding the preceding particular words of the assignment. Ringer v. Cunn, 3 M. & W. 343; 1 H. & H. 67; 7 L. J., Ex. 108; 2 Jun. 256. S. P., Doe d. Furmer v. Hove, 7 L. J., Q. B. RAD

Upon the sale or the mortgage of a mill, looms used in the mill, not attached to the freehold, but removable at pleasure, do not pass under the general words. "machinery belonging to mill." Hutchinson v. Kay, 23 Beav. 413; 26 L. J., Ch. 457; 3 Jur. (N.S.) 652; 5 W. R. 341.

By a mortgage of a mill, the stones, tackling, and instruments necessary for the working of the mill pass to the mortgagee. Place v. Fagy, 4 Man. & Ry. 277.

Leaseholds which are not specified do not pass by the general words, all other "property and effects." Hopkinson v. Lush, 34 Beav. 215; 10 Jur. (x.s.) 288; 10 L. T. 122; 12 W. R. 392.

A chronometer on board a ship passes by assignment of the ship, her tackle and appur-tenances. Langton v. Horton, 1 Hare, 549; 6

Household furniture does not pass under the description of "fixture and fittings-up" in a Simmons v. Simmons, 6 Hare, 352: 12

Jur. 8.

By the grant of a house all the fixtures pass; secus, where, by an enumeration of particular fixtures in the conveyance, an intention is shewn to exclude other fixtures of greater value and importance. Hare v. Horton, 2 N. & M. 428; 5 B. & Ad. 715; 3 L. J., K. B. 41.

An assignment of a mortgage, not containing any words of transfer beyond those incidental to a transfer of the mere mortgage, does not pass rent then in arrear, Salmon v. Dean, 3 Mac.

& G. 344 ; 15 Jur. 641.

By a trust deed, the trustees were empowered by sale or mortgage of the trust estates, to pay ecified debts; and secondly, the mortgages on

purpose of sweeping into the assurance every-until the mortgages should be paid off:—Held, thing which has been omitted by mistake, apply that "other moneys" had reference to those ejusdem generis, and that the annuity was payable out of income only. Clifford v. Arun-dell, 1 De G. F. & J. 307.

F. B., by indentures of lease and release, in consideration of natural love and affection for his sisters, by indenture released a particular freehold estate to B., his heirs and assigns; and assigned a particular leasehold estate, and all other the property in Great Britain or Ireland, whether real or personal, which he might be entitled to at the time of executing the indenture to B., his executors, administrators, and assigns, upon trust, that B., &c., should stand possessed thereof upon trust to pay the rent, interest, dividends, or annual produce arising therefrom, or the moneys arising from the sale thereof, equally between his three sisters. F. B. was, at the date of this indenture and of his death. seised of a share in a freehold house situate in K. street, not mentioned in the lease or release: -Held, that the release could not operate as a covenant to stand seised of the house in K. street, there being therein no mention of that house, and the general words being, from the frame of the deed, applicable only to leasehold or other personal estate. Drangworth v. Blair, 1 Keen, 795; 6 L. J., Ch. 263; 1 Jur.

Where in any document a general condition would be implied, if there is inserted a specific and limited condition, it must be assumed that such specific and limited condition was meant to take the place of the general condition. Gvas, Ex parte, Clement, In re, 3 Morrell, 153—C. A.

General words in a deed by which a particular estate was conveyed held not to pass a reversion, the court considering that a sufficient indication of intention not to pass it appeared on the face of the deed, Mullineux v. Ellison, 8 L. T.

All other his Lands, &c., in M .- Description of Lands. |- A., being seised of a manor in Middlesex, which included lands held in demesne, called for the sake of distinction, but not commonly known as, the Kensington estate, and also other lands, occupied by copyholders, called, for the sake of distinction, but not commonly known as, the Brompton estate, mortgaged all the lands called the Kensington estate three times over; and then by another mortgage (for consolidating the three mortgages of the Kensington estate), reciting those three mortgages, and the intention to make one mortgage of all the property comprised in them. A. mortgaged all those lands already in mortgage (by particular description following the parcels as stated in the previous deeds), "and also all other his lands and hereditaments (if any) in the county of Middlesex":—Held, that neither the manor nor the Brompton estate passed under those words. Rooke v. Kensington (Lord), 2 K. & J. 753: 25 L. J., Ch. 795; 2 Jur. (N.S.) 755 : 4 W. R. 829.

- All other his Messuages., &c, in W. or elsewhere-Two Estates. ]-Estates at Wootton were settled to the use of L. for his life, with remainders to his eldest son, the son's wife, and their children, and ultimately to L. himself in the trust estates, with a direction, "out of the reals or any moneys held by them upon the L, for the advancement of his eldest son and trusts of the deed," to pay an ammuty to A, lyounger sou, and for settling, conveying and assuring the messnage, lands, &c., after-mentioned and particularly described, granted and seised of a share in a freehold house situate in K. released the same which were also in Wootton, street, not mentioned in the lease or release: but were entirely distinct from the first-mentioned estates, and also all other his messuages, cottages, closes, lands, tenements and heredita-ments whatsoever in Wootton or elsewhere: ments whatsover in Wootton or elsewhere; the general words being from the frame of the and the reversion, remainder, rents, &c., of all deed, applicable only to leasehold or other perand singular the premises, granted and released, and all his estate therein, to the use that he, L., of L. J. Ch. 263; 1 Jun. 620. should receive an annuity of 30%, a year for his life; and after his decease that his eldest son should receive thereout an annuity of 10%, a year for his life; and subject to the annuities, to the use of his younger son, his heirs and assigns for ever. He also assigned all his household goods to the younger son, on his covenanting to pay 20%, to the elder :- Held, that the first-mentioned estates, though not named, passed to the younger son by the general words; and that although the annuity of 10% could not legally be charged on both estates, this did not negative the intention to pass both; but that the annuity must be taken as charged upon the estate which might legally be subjected to it, the property being sufficient. Doe d. Pell v. Jeyes, 1 B. & Ad. 593; 9 L. J. (o.s.) K. B. 82.

"And all other the Hereditaments of them or either of them, "&c.]—Two partners, to seeme a partnership debt, conveyed certain joint property particularly described in the deed, "and all other the hereditaments of them or either of them situate elsewhere in the town of Morpeth," recitals, covenants and premises in the deed relating solely to the joint property :-Held, that the operation of the deed extended to a separate estate of one of the partners in the town of Morpeth. Young, Ex parte, Gowen, In re, 4 Deac. 185.

" All other Moneys, Securities, Property and Effects."]—Leaseholds which are not specified do not pass by the general words "all other property and effects." Hophinson v. Lush, 34 Beav. 215; 10 Jur. (N.S.) 288; 10 L. T. 122; 12 W R 399

By a deed executed by a trustee of a banking company on his retiring, he assigned three specified policies held for securing debts due to the bank, and the debts themselves. He also assigned leaseholds X., mortgaged to him for securing a debt due to the bank, "and all other moneys, securities, property and effects," vested in him and four others as trustees for the company:—Held, that leaseholds Y., belonging to the bank absolutely, and vested in the retiring trustees, and the same other four trustees, but which were not referred to in the deed, did not pass under the above general words. Ib.

"All other Property, &c., whether Real or Personal."]-F. B., in consideration of natural love and affection for his sisters, by indenture released a particular freehold estate to B., his heirs and assigns; and assigned a particular leasehold estate, and all other the property in Great Britain or Ireland, whether real or personal, which he might be entitled to at the time of executing the indenture to B., his executors, administrators and assigns, upon trust, that B., &c., should stand possessed thereof upon trust to pay the rent, nterest, dividends, or annual produce arising

was, at the date of this indenture and of his death, Held, that the release could not operate as a covenant to stand seised of the house in K. street, there being therein no mention of that house, and

— All the Estate, &c.]—In a conveyance of land, the general clause, purporting to convey all the estate, &c., of the grantor, may be restricted in its construction by the recitals and general scope of the instrument. Williams v. Pinckney. 67 L. J., Ch. 34-C. A.

A man being entitled to an estate in fee in one moiety and a leasehold interest (subject to forfeiture on assignment) in the other molety of a house, and also to other freehold and leasehold property, executed a mortgage deed, which recited that he was entitled in fee to certain other property and to the said house, and conveyed the same in fee with the usual estate clause, and which also recited that he had leasehold interests in two other properties, one of which it conveyed by underlease, and the other it covenanted to assign on request :- Held, that the leasehold assign on request :—rrent, that the reasonour interest in the moiety of the house did not pass. Francis v. Minton, 36 L. J., C. P. 201; L. R. 2 C. P. 543; 16 L. T. 352; 15 W. R. 788. Guardians of an infant tenant in tail redeemed

the land tax on the entailed estate. The tenant in tail died, having bequeathed the land tax to the next tenant in tail. The latter tenant in tail suffered a recovery and settled the estate, but always dealt with the redeemed land tax as a subsisting charge. The settlement contained in its operative part the usual general words "all the estate, &c.":—Held, that the land tax was not merged by its redemption, by the recovery, by the operation of the settlement, or otherwise but passed by a bequest of it in the settlor's will. Blundell v. Stanley, 3 De G. & Sm. 433; 18 L. J., Ch. 300; 13 Jur. 998.

Two terms were ereated in the same manner, one of 300 years, in 1712, the other of 600 years, in 1768. In 1791 the latter was assigned to D., to secure a mortgage debt; and by a deed of even date, the former was assigned to B., as a trustee for A. A. died, having appointed B., C. and D. his executors. In 1801, by a deed indorsed on the first assignment of 1791, and "made between B., C. and D., executors of A., of the one part, and E. of the other part," B., C. and D. assigned the premises, "and all the estate," &c., to E. for the residue of the term of 600 years, subject to the equity of redemption :-Held, that the term of 1712, being held by B. in what must be deemed his own right, did not pass by force of the words "and all the estate," &c., and was not merged. Rooper v. Harrison, 2 Kay & J.

In 1790, an advowson appendant to a manor, was sold and assigned for the residue of a term of 500 years created in the manor and advowson in 1745, and which, except as to the advowson, ceased :-Held, that this did not sever the appendancy, and that the advowson passed by a sub-sequent release of the manor with general words.

M., being lessee of premises for a term of years herefrom, or the moneys arising from the sale to G., under a lease containing a covenant by G. hereof, equally between his three sisters. F. B. that M. should at any time during the term be at

A., in consideration of A.'s having paid off certain mortgages upon the premises, to assign the freehold to A. by way of mortgage, subject to a first mortgage to the lender of the purchase-money. A deed was executed by M., which recited that G. had conveyed the freehold to M., leaving a blank for the date of the deed of conveyance, and recited also that M. had made a mortgage to the lenders of the purchase-money, a blank being left for the date of the deed of mortgage. It was then witnessed that M. conveyed the premises (subject to such last-mentioned mortgage), and all the estate, right, title, interest, property, claim and demand whatsoever of M. in the premises, to A., his heirs and assigns, for ever. The freehold was not then, nor was it eventually. conveyed by G. to M .: - Held, that the deed did not pass M.'s leasehold interest; that, looking at the intention of the parties, the deed must be construed as intended to pass the freehold when purchased, and that such purchase never having been made, the deed was, with respect to those premises, wholly inoperative. Goodwin v. Noble, 8 El. & Bl. 587.

A mortgage was expressed to comprise by way of grant in fee, "all and every the estate, right, title, property and interest of the mortgager of and in all and every those two fields or parcels of land, containing together about twenty-two acres or thereabouts, situate at and abutting upon the main road at" H., and "bounded upon one side by" B. lane, "and also of and in all and every other, if any, the lands, hereditaments and premises at H. aforesaid of, in, or to which the mortgagor hath an yestate, right, title, property or interest." All of the mortgagor's property at H. was freehold, except a strip of land of about three-quarters of an acre which lay between the freeholds and B. lane, and which was of copyhold tenure :- Held, that the copyhold strip passed under the general words and was included in the mortgage. Rooke v. Kensington (2 Kay & J. 753), and Crompton v. Jarratt (30 Ch. D. 298), distinguished. Semble, having regard to the position of the property and the description in the deed, the copyhold strip was included in the parcels themselves. Early v. Rathbone, 57 L. J., Ch. 652; 58 L. T. 517.

- Moieties. ]-One by deed, in consideration of love and affection to his name, blood, &c., and for settling the undivided moieties of his manors. lands, &c., thereinafter mentioned, granted the sald undivided moieties, particularly describing them, together with all other his lands, tenements and hereditaments in the kingdom of Ireland : habendum, the said undivided moieties before granted, together with all other his estates in the kingdom of Ireland, to A. to the several uses thereinafter declared, and for no other use whatsoever, and then declared the uses of the undivided moiety only :- Held, first, that the grantor did not intend to pass any lands but the undivided moieties; and, secondly, supposing the sweeping clause did extend to any other lands, yet no use being declared of them, they descended to the heir-at-law. Moore v. Magrath, Cowp. 9.

A deed, whereby a person conveys "one full moiety," is prima facie evidence that the grantor is owner of the other moiety. Reed v. Williams, 5 Taunt. 257; 14 R. R. 748.

The premises intended to be conveyed by a

liberty to purchase the freehold, and having made ideed of mortgage were described as the defendrangements for borrowing a sum of money for the purches of making such purchase, agreed with A., in consideration of A.'s having paid off certain premises. This conveyed the molety only, to mortgages upon the premises, to assign the free-hold to A. by way of mortgage, subject to a first mortgage, to the lender of the purchase-money. We not consider the molety of the premises in which he was entitled in his own right, and not one-third part of the same premises in which he described to the lender of the purchase-money. We note that the plaintiff. Doe d. Raihes v. Anderson, 1 the plaintiff. Doe d. Raihes v. Anderson, 1 the plaintiff.

A. being entitled to a contingent interest in 1,000l., being a moiety of 2,000l., part of a snm of 20,000l. directed by the will to be invested, and which was accordingly invested in the 3 per cent, consols, advertised it for sale by anction. describing it as a reversion to 1,000%, principal money, payable on a contingency, and part of a sum of 20,000L invested in the 3 per cent, consols. The interest having been put up for sale in pursuance of the advertisement, B. became the purchaser; and by an indenture reciting the bequest, the investment of the legacy, and the purchase at the sale, A. assigned to B. "all that sum of 1,000l. sterling, being one molety of the legney or sum of 2,000%, bequeathed by the will" :- Held, that B. was entitled to the value of the 1,000*l*, in its state of investment. *Lucas* v. *Bond*, 2 Keen, 136; 6 L. J., Ch. 259. Affirmed 2 Keen, 496; 7 L. J., Ch. 207.

There being an assignment by way of security for the husband's debt of a molery of the wife's contingent fund, and the wife when the contingency happened, insisting upon a sertlement, and a molery being settled:—Elcli, with reference to subsequent assignments of portions of the entire fund, that the first assignment passed all the remaining moiety, and not half of it. Archer v. Gardkev, C. P. Cooper, 340.

— Together with all Profits, &c., and all the Estate, &c.]—C. having, in 1815, purchased the tithe of land of which he was selsed in fee, in 1816, by a settlement on the marriage of his son, conveyed the land to transces for his son's wite, "together with all profits, commodities, advantages, emoluments, hereditaments and appartenances, to the premises belonging or in anywise appertanting, and the reversion; and all the estate, right, title, interest, use, trust, possession, freelold, inheritance, reversion, possibility, property, challeuge, claim and demand whatsoever of him C. therein or thereto, or to any part or parcel thereof"—Held, that the tithes did not pass by this conveyance. Chapman v. Gateombe, 2 Bing. (N.C.) 516; 2 Scott, 738; 5 L. J., C. P. 93.

Reversion.]—Although it is a rule of law that a reversion will pass by general words, unless a different intention is distinctly shown in other parts of the instrument, yet such an intention may be gathered by implication from the form of the deed. Multineaw v. Ellison, 8 L. T. 236.

Where a deed conveying a particular estate is expressed in such terms as appear to be reasonable only on the supposition that the general words of conveyance were not intended to pass the reversion. It is a sufficient indication of intention by the parties. Ib.

A deed was executed, by which it was intended to pass the whole of certain reversionary interest in an estate, but by mistake one share was omitted:—Held, that the intention was so clear that the whole estate must be considered to have passed. Kaupping v. Tomitinon, 18 W. R. 684.

A, assigned "all his ready money, securities | said gateway." The dimensions of the gateway for money," &c., &c., "and all other his personal | as to length, breadth and height, were mentioned estate and effects whatsoever or wheresever, of | in the deel —Held, that the conveyance to W. or belonging or due or owing to him :-Held, that the general words passed only property ejusdem generis with that specified, and that they did not convey a contingent reversionary interest in u legacy. Wright's Trusts, In re, 15 Beav. 367.

- Right of Way. ]-A grant of a right of "ingress, egress and regress is a grant of a right of way from the locus a quo to the locus ad quem, and from the locus ad quem forth to any other spot to which the grantee may lawfully go, or back to the locus a quo. By a deed of conveyance from a railway company of a close of land the grantee was given a right of free ingress, egress and regress, to and from certain private roads which bounded the close and led to the railway station and on to the public highways:-Held, that the grantee was entitled to pass from the close to the private roads, and thence to the public highways, or in the reverse slirection, and was not limited to passing from the close to the railway station or vice versa. Somerset v. G. W. Ry., 46 L. T. 883.

H. and P. were tenants in common of N. and V. estates. By a deed of partition V. was conveyed to H.: and N., "together with all and every their rights, members, easements and appartenances," was conveyed to P., who sold it to B. A right of way had existed for many years leading from V. to N., and had been up to the time of the partition used by H. and P. :-Held, that such right of way did not pass to P. by the general words used in the deed of partition. Worthington v. Gimson, 2 El. & El. 613; 29 L. J., Q. B. 116; 6 Jur. (N.S.) 1053.

The plaintiff being the owner in fee of land partly built upon, conveyed to the defendant a dwelling-house, with a coach-house and stable at the back, and a field, together with all ways, waters, easements and advantages whatsoever to the dwelling-house and field belonging or usually enjoyed therewith, with free liberty of ingress, egress and regrees for the defendant with entile and carriages, over the carriage road and footpath leading to the dwelling-honse, coach-honse and stables, in the occupation of N. and the defendant. Previously to the time of this conveyance a private road was used by earringes, eattle, &c., from the turnpike road to the defendant's coach-house, and stable, and field, from which road there was a gate into the field. The defendant afterwards pulled down his coach-house and stable, and built a wall across the private road near their former site (inclosing a portion of the road which had been conveyed to him in fee), and he also opened a gate at the further corner of his field into the private carriage road, which he used instead of the former gate, and drove cattle and carriages along the road into the field and back again :- Held, that the defendant was liable in trespass inasmuch as the grant of all ways to the field belonging or usually enjoyed therewith extended only to the user of the way as it existed at the time of the grant, through the then existing gate, and the express grant was of a right of way to the dwelling-house, coach-house and stable only.

Henning v. Burnet, 8 Ex. 187; 22 L. J., Ex. 79.
By lease and release, executed in 1839. M. and others conveyed to W. a piece of freehold ground. with a messuage thereon, adjoining a covered gateway, "together with the exclusive use of the

in the deed :-Held, that the conveyance to W. did not merely confer on W. and his successors in title a right of way through the covered gateway, but enabled them to use the gateway for all purposes. Reilly v. Booth, 44 Ch. D. 12; 62 L. T. 378; 38 W. R. 484—C. A.

Portico passing on Conveyance of House. - The plaintiff purchased two adjoining houses, one of which he had agreed to sell to P. in whose occupation it then was. This house had in front a projecting portion, which, to the extent of between two and three feet, overlapped the adjoining house, so that it extended to some distance beyond the party-wall of the two houses. The door of the house was in the centre of the projection, which formed a portice with a pillar, cornice, string course and pediment, all of which in part overlapped the adjoining house of the plaintiff. P. conveyed his house to the defendant, who painted the front including the whole of the projecting portion. In the conveyance to P., which the owner of the two houses had prepared at the plaintiff's request, the projecting part was not specifically mentioned as being conveyed. The plaintiff brought an action of trespass against the defendant:—Held, that the plaintiff was not entitled to recover, inasmuch as either the projecting portion passed by the conveyance to the defendant, or he had an easement in it. Fox v. Clarke, 43 L. J., Q. B. 178; L. R. 9 Q. B. 565; 30 L. T. 646; 22 W. R. 744—Ex. Ch.

- Running Water.]-A conveyance of land passes running water, unless expressly excepted, which is not to be presumed. Canham v. Fish, 2 Cr. & J. 126; 2 Tyrw, 155; 1 L. J., Ex. 61.

Upon the construction of the particular instruments, executed by a corporation to a purchaser : -Held, that by the conveyance of one-fourth "of and in the leat or watercourse," the purchaser acquired no interest in the water, other than such part as remained after supplying the public purposes for which the leat was anthorised to be made. Att.-Gen. v. Plymouth Corporation, 9 Beav. 67; 15 L. J., Ch. 109,

- Moiety of Canal.]—The presumption of law that where a piece of land is conveyed, which is bounded by a public highway or a non-navigable river, the conveyance passes the moiety of the soil of the highway or river, does not apply in the case of a canal. Chamber Calliery Co. v. Rochdule Canal Co., 64 L. J., Q. B. 645; [1895] A. C. 564; 11 R. 264; 73 L. T. 258—H. L. (E.)

- "Yards."]-The parcels in a conveyance were described by reference to coloured parts of a plan. A yard, delineated but not coloured in the plan, was held to pass under the general word "yards." Willis v. Watney, 51 L. J., Ch. 181; 45 L. T. 739; 30 W. 424.

"Machinery belonging to Mill."]-Upon the sale or mortgage of a mill, looms used in the mill, not attached to the freehold, but removable at pleasure :- Held, not to pass under the general words "machinery belonging to mill." Hutchin-son v. Kay, 23 Benv. 413; 26 L. J., Ch. 457; 3 Jur. (N.S.) 652; 5 W. R. 341.

Other Cases. ]-Where A. was entitled for life to the whole of an estate, directed to be sold, and B. (as was supposed) to a moiety in remainder as real estate; but in reality B, was only entitled | to one-fifth, and that as personalty, and A. and B., for securing a sum of money lent to them jointly, but paid into the hands of A., conveyed the "undivided moiety of B." and all the interest of each of them therein, and levied a fine for further assurance :-Held, that A.'s interest in one-fifth only of the property was comprised in the mortgage. Griereson v. Kirsopp, 5 Beav. 983

W. H. was entitled for life to the interest of certain residuary estate, to the principal of which the wife of A. J. was entitled absolutely. W. H. being largely indebted to A. J., executed an indenture, assigning to A. J. all his, W. H.'s. interest in the said residuary estate. It was subsequently discovered that the residuary estate consisted partly of a fund, the existence of which was unknown to either of the parties at the time of the execution of the indenture. W. H. thereupon filed a bill which, not complaining that the indenture had been executed by fraud, sought to exclude from its operation the additional fund by treating the indenture merely as a security for the amount then due from W. H. The Lord Chancellor, however, dismissed the bill, holding that the words of the indenture were sufficient to pass the interest of W. H. in the fund in question, and that no case was made on the pleadings for reforming the instrument. Howkins v. Juckson, 2 Mac. & G. 372; 2 H. & Tw. 301; 19 L. J., Ch. 451.

An assignment of "all and singular the lega-

cies, debts, moneys, estates and effects whatsoever and wheresoever, and of what nature or kind soever, of or to which J. H., in right of his wife or otherwise," was possessed, will not pass a claim of the assignor's wife to dower out of the estates of her former hisband. Brown v. Meredith, 2 Keen, 527; 6 L. J., Ch. 361.

A., and B. his wife, resident abroad, had a life interest in government stock, with a joint power of appointment by deed in favour of their children; and B, was tenant for life of other stock. with remainder to the children of the marriage, The dividends on both sums of stock were transmitted through the banking firm of C. & Co. to A, and B., who had no other account with that firm. In 1830 A. and B. appointed by deed onehalf of the first fund to their eldest son, and the remainder among their younger sons equally, reserving a power of revocation as to the shares of the younger sons. In 1839 and 1843, on the respective marriages of two of the younger sons. A. and B. executed joint instruments (unattested), by which they disposed that the two sons respectively should receive from the survivor of them a capital property of 7,000 dollars, "which stand in the English bank of C. & Co." :- Held. that, in point of construction, the words "which stand in the English bank of C. & Co." described both funds, and that each of the two sons was entitled, under the two latter instruments, to receive only from the fund over which the power of appointment extended so much money as with the share he was entitled to out of the other fund would make up the sum thereby provided for him. Sheffield v. Von Donop, 7 Hare, 42; 17 L. J., Ch. 481 : 12 Jur. 672.

A bond and warrant of attorney executed in Ireland, by a landed proprietor in that country, to receive a sum of \_\_\_\_l. "sterling, good and lawful money of Great Britain, with legal lawful money of Great Britain, with legal interest of like lawful money of Great Britain, with legal interest of like lawful money of Great Britain, with legal interest of Recursor of Great Britai

was held to be payable in British currency in London. Noel v. Rockfort, 4 Cl. & F. 158; 10 Bli. (N.S.) 483.

An instrument executed by foreigners in a foreign country must, on a demurrer, be construed according to the obvious import of its terms. unless there are allegations in the bill, that according to the law of the country in which it was executed the true construction of it is different. Spain (King) v. Machado, 4 Russ. 225; 6 L. J. (0.8.) Ch. 61; 28 R. R. 56.

A son, being indebted to his father upon a bond for 1,0007, and interest, subsequently joined his father as surety in a bond for 500l, and interest given by the father to a third person : and a memorandum was then indersed upon the bond for 1,000L, by which it was agreed between the father and the son, that the son should not be called on to pay the within-mentioned principal sum of 1,000% until the father should have paid all principal money and interest due on the bond for 5007, :—Held, that this indorsement did not affect the interest accruing due upon the bond for 1,000/, and therefore that after the deaths of the father and son the personal representative of the father might file a bill against the real and personal representatives. of the son, praying for immediate payment of the interest on the bond for 1,000l., and for payment of the principal when the principal and interest on the bond for 5007, should have been paid. *Reed* v. *Norris*, 2 Myl. & C. 361; 6 L. J., Ch. 197; 1 Juy, 233.

A grandfather, in consideration of a bond from the father to grant him an annuity of 501, during his life, enters into a counter bond with the father, conditioned for the payment to the son of a like annuity, in case he was not sufficiently provided for during the life of the grandfather, exclusive of any allowance from his father. The son obtains through some other interest a place in the Ordnance Office, with a salary exceeding the amount of the annuity :- Held, that this was not a sufficient provision within the meaning of the bond, being an office only during pleasure, whereas the provision in the contemplation of the parties must have been of a permanent nature, Peche v. Smith, 3 Mer. 312.

The fact that a bond is payable on demand and that interest is payable from the date of the bond is a circumstance to shew that it is a simple money bond, and not a bond to secure floating balances. Walker v. Hardman, 4 Cl. & F. 258; 11 Bli. (N.s.) 229; 5 L. J. (O.s.) Ch. 39,

#### 2. RECITALS.

Incorrect.]—A man cannot be required to execute a deed containing incorrect recitals. *Martley* v. *Burton*, L. R. 3 Ch. 365; 16 W. R. 876.

Effect of.]—Recitals in a deed tendered but not executed were held admissions by the parties on whose behalf the deed was prepared, but capable of being rebutted. Bulley v. Bulley, 44 L. J., Ch. 79; L. R. 9 Ch. 739; 30 L. T. 848; 22 W. R. 779, Recitals in documents are no evidence of what

is there recited, though actual possession, in conformity therewith, would constitute a prima facietitle. Bristow v. Cormican, 3 App. Cas. 641

-H. L. (Ir.)

estopped by recitals contained in other deeds through which the title so conveyed is derived. Doe d. Shelton v. Shelton, 4 N. & M. 857; 3 A. & E. 265; 1 H. & W. 287; 4 L. J., K. B.

A recital in a lease, professing it to be made under a leasing power in a will devising an estate tail, does not estop the person accepting the lease from shewing that the estate tail was barred. Blackhall v. Gibson, 2 L. R., Ir. 49.

A deed in the ordinary form of a grant in fee without any recitals does not contain any statement of the grantor's seisin in fee sufficiently precise to create an estoppel, in a case where the grantor had no title at the date of the deed, but subsequently acquired an estate in fee. General Finance, Mortgage and Discount Co. v. Liberator Permanent Building Society, 10 Ch. D. 15; 39 L. T. 600: 27 W. R. 210.

Covenants for title contain no such statement. being merely a bargain by the covenantor to pay damages if he has no such title. Ib.

An obligor sued on a bond reciting a certain consideration, is estopped from pleading that the consideration was different, unless he can make it appear by his pleas that the real transaction was fraudulent or unlawful. Hill v. Manchester and Salford Waterworks Co., 2 B, & Ad, 544.

In 1801, by a deed since lost, after reciting the conveyance to the defendants by Lord Vernou, by a deed poll of even date, of the site of a canal and other premises, in consideration of an annual rent-charge of 105L, to be paid to him "or to the person or persons to whom the freehold or inheritance of the premises thereby released should for the time belong, in case the said instrument or deed poll had not been made"; the defendants covenanted with Lord Vernon "and to and with the said person or persons to whom the freehold or inheritance of the hereditaments and premises hereinbefore recited to be released shall for the time being belong," to pay the said yearly rent-charge in manner as and at the times whereon the same shall become due and pavable ; and a power to distrain for nonpayment of the rent-charge was given, and covenants made by the defendants, to and with persons described, in the same terms as the grantees of the rent-charge. In 1827, by a deed poll reciting the last deed verbatim, and the fact of its loss, and reciting the death of Lord Vernon, and that the "freehold and inheritance of the hereditaments and premises mentioned and described in the said deed poll, or the said rent-charge or yearly sum of 1051," was then vested in the Earl of Jersey, and that the rent-charge had been duly paid to Lord Vernon during his life, and to the Earl of Jersey since his death. The defendants ratified and confirmed the deed poll so executed as aforesaid, and declared that the same should be "good, valid and effectual, to all intents and purposes, according to the true intent and meaning thereof notwithstanding the same is lost or mislaid as aforesaid." In an action by the assignce of the rent-charge :- Held, that the terms of the deed of 1801 were explained by the recital contained therein and the recital of the deed of 1827, and that the latter deed, admitting under the defendant's seal that the rent-charge was vested in fee in the Earl of Jersey, estopped the defendants from denying it and formed good evidence of a valid

But a party to a deed of conveyance is not separate deed in 1703, A. declared he was seised of the freehold of lands in trust for B., to whom he had on the same day granted a lease of the same lands for one thousand years, is not evidence of the contents of the deed declaring the trust; neither is the receipt of a Master acknowledging such deed to have been lodged with him evidence of its contents, though it may be in existence.

Kelly v. Power, 2 Ball & B. 236.

On the death of one trustee, the survivor executed a deed reciting that he was desirous of retiring from the trust, and that he had appointed another person to be a trustee in his place, and conveying the trust property to such new trustee :--Held, that the appointment by recital was good. Miller v. Priddon, 18 L. J., Ch. 226.

Where the recital in a deed stated a certain act to have been done by a party who executed the deed, and a defendant who claimed through such party denied by his answer that such act had ever been done; the recital was yet taken to Whatman v, Gibson, 9 Sim. 196; 7 be true. L. J., Ch. 160; 2 Jur. 273.

By a marriage settlement in 1779, lands were conveyed to the use of the husband (the settlor) for life: the remainder to the wife for life; remainder to the children as they or the survivor should appoint; and in default of appointment, to the heirs of the body of the wife by the husband; and in default of such issue the lands to stand charged with a sum of 2,000l, to the wife's father, his heirs and assigns. In 1798 the husband and wife by a deed reciting the first deed, that there was no issue of the marriage, and that they intended to bar all the estates and provisions in the former settlement, and to settle the lands to new uses thereby declared, covenanted to levy a fine for that purpose to enure to such uses as they should appoint; and in default of such appointment, to the use of the husband for life ; remainder to trustees for a term of years, remainder to the wife for life, and after the decease of both, to the use of the heirs and assigns of the husband; and as to the term, upon trust to raise 2,000L, and pay the same to the wife, or as she should appoint, and in case of her death without appointment, to her next of kin. The fine did not bar the first charge. On a bill by the representative of the wife's father, who was also one of the next of kin of the wife (after the death of the husband and wife without issue or appointment), to procure both snms of 2,000l. to be raised out of the settled lands :- Held, that not withstanding the recital in the deed of 1798. of the intentions of the parties, the first charge of 2,000l. should be extinguished, and although such charge still remained, yet the trusts of the term for raising the second charge of 2,000%, were not therefore inoperative, but the same must still be carried into execution; and that both sums of 2,000*l*, must therefore be raised. Farr v. Sheriffe, 4 Hare, 512; 15 L. J., Ch. 89; 10 Jur. 630.

A party who by appointing the whole fund equally amongst all the objects of the power had exhausted the power, and afterwards appointed larger shares to some of the objects of the power, and then by a deed poll stated that the first appointment was a mistake, was bound by the statement in the deed poll; and consequently that to the extent of a share in the fund which had become vested in him as next of kin of one grant. Guyn v. Neuth Cunal Co., 37 L. J., Ex. of the deceased appointees, effect must be given 122; L. R. 3 Ex. 20; 18 L. T. 63; 16 W. R. 120; to the latter appointment. Armytage v. Army-A recital in a deed executed in 1739, that by a | tagge 1, Y. x. Coll., C. 461; 6 Jur. 790. ance was in fact a mortgage :- Held. not to the 2,000%, mortgage as against the settlement : of the prior deed, though he entered under the second, inasmuch as he had not executed it. Tull v. Owen, 4 Y. & Coll. 192; 9 L. J., Ex. Eq.

33: 4 Jur. 503.

A young lady a few months after she came of age, and on the eve of her marriage, with her father's concurrence, but without the knowledge of her intended husband, made an absolute assignment of her reversionary interest in a sum of stock to the trustee thereof, by a deed, which recited a contract for sale of such stock to the trustee, and the payment of the purchase-money, and upon this deed was indersed a receipt for the purchase-money, signed by the lady, no purchase-money having been in fact paid :- Held, that the falsehood of the recitals in the deed alone would have been sufficient to prevent the court from supporting it as a security, to the amount of the consideration expressed, for a larger sum due from the lady's father to the trustee for money advanced for her education.

Lewellin v. Cobbold, 17 Jur. 448.

By a deed, dated in 1847, entered into between A. and his son B., and C., after reciting that A. and B. were indebted to C. in 10,000l. advanced by him, and that C, was then liable, as surety on behalf of A. and B., to R. B. and J. T. for a further sum of 3,000l, advanced by them, it was further recited that the deed was executed in favour of C., "as well to give further security for the 10,000%, as to secure him from all sums of money which he might pay, or become liable to pay, in discharge of his liability to R. B. and J. T." At the time the deed was executed it was asserted by C., and understood and believed by A. and B., that C. was under legal liability to repay R. B. and J. T. the 3.000%; whereas, in fact, he was only morally liable to see that their debt was discharged. A., in his examination, stated, that had the real facts been known at the time of the execution of the deed, this debt would have been included therein. In 1849 B. excented a creditor's deed in favour of L., as trustee, for the benefit of the creditors of A, and B. L. filed a bill against C., praying an account of what was due to C. under the deed of 1847; and contesting his right to be allowed the 3,000%; -Held. that C. not being legally liable for the repayment of the 3,000L, the plaintiff was, not withstanding the recital in the deed of 1847, in taking the account entitled to have the 3,000%, disallowed, Luke v. Brutton, 23 L. J., Ch. 294; 18 Jur. 412.

An estate was settled (subject to two mortgages to X, in fee) to the use of A, for life, with remainder in default of A.'s issue, which happened, to the use of B. for life, with remainder to the use of A. in fee. B. was also absolutely entitled to a 2,000% mortgage for a term of 500 years on the fee. By a settlement made in 1876, on C.'s marriage (after reciting the titles of A. and B, subject to the two mortgages to X.), A. and B. "according to their respective estates and interests" conveyed the fee simple " and all the estate, &c.," of the grantors to trustees to hold (subject to the mortgages to X.), to the use of A., B. and C., for successive life estates, with remainder to uses to secure a jointure to C.'s wife, with remainders over. This deed contained no reference to the 2,000l. mortgage. B. afterwards voluntarily transferred the 2,000l. mortgage to

A recital shewing that a prior absolute convey- having died, an action was brought to establish be conclusive on the party claiming the benefit Held, that the 2,0007, mortgage was not within the scope of the settlement. Held, also, that no estoppel as to the mortgage was raised by the settlement, and there was no ground for equitable relief in favour of those claiming under the settlement on account of any representation made by B., or standing by on his part. Williams v. Pinchaey, 67 L. J., Ch. 34—C. A.

A party to a deed is not estopped in equity from averring against, or offering evidence to controvert, a recital therein contrary to the fact. which has been introduced into the deed by mistake of fact, and not through fraud or deception on his part. Brooke v. Haymes, L. R. 6 Eq.

Where, therefore, a deed of release and indemnity to the executor of a testator contained a recital to the effect that out of the testator's residuary estate the executor had retained the sum of 191. 8s., being the amount of the legacy duty on the beanests contained in the will, and in fact the sum so mentioned was only part of such legacy duty :-Held, that the executor, who was afterwards called on to pay the balance of the duty, was not precluded from recovering such. amount from the estates of the residuary legatees. under the covenant for indemnity in the deed.

When a deed recited that the grantor devised to carry out intentions expressed in a draft will, which the intending testator had died without executing, and also professed to recite those testamentary intentions; but the recital of them was in fact erroneous :- Held, that the erroneous recital could not be corrected by reference to the draft will itself. Curter, In m, Ir. R, 3 Eq.

--- Title to Patent.]-A declaration stated that letters-patent had been granted to the defendant for improvements in purifying gas, and that other letters-patent had been granted to the plaintiff for an improved mode of manufacturing gas, and that parts of the plaintiff's invention intended to be secured had been claimed in the specification; that disputes had arisen between the parties as to their rights under the letters-patent to the use of oxides of iron for the purpose of purifying gas; and that, to put an end to such disputes, the parties covenanted by deed with each other for a mutual right of using the patents on the terms of giving notice to use the same. Breach, want of notice. Plea, that the plaintiff's patent was not a good and valid patent, in this, that it was not new, and the plaintiff was not the true and first inventor :-Held, that the intention of the deed was to prevent disputes between the parties, and that the defendant was estopped by the deed from denying the validity of the patent, its novelty, and that the plaintiff was the true and first inventor. Hills v. Luming, 9 Ex. 256; 23 L. J., Ex 60

—— Shares.]—A., by indenture, demised to B. for ten years the dividends to be declared on certain railway shares at a yearly rent, payable half-yearly. In an action by A. against B. upon this deed, the declaration alleged that A. was a member of the company, and as such was possessed of or entitled to certain shares therein : C., who charged it in favour of the plaintiffs, the declaration set out the indenture, and alleged who had no notice of the settlement. A. and B. a breach of covenant to pay the rent. B. pleaded

that A., at the time of the making of the inden- recital; and a recital in an instrument not under shares:—Held, that B. was estopped by his deed from so pleading. Brekett v. Brudley, 7 Man. & G. 994 : 8 Scott (N.R.) 843 ; 2 D. & L. 586 ; 14 L. J.,

Consideration, ]—An obligor, sued on a bond reciting a certain consideration, is estopped from pleading that the consideration was different, unless he can make it appear by plea that the real transaction was fraudulent or unlawful. Hill v. Manchester and Salford Waterworks, 2 B, & Ad, 545; 2 N, & M, 573; 1 L. J., K. B. 230, S. P., Horton v. Westminster Improcement Commissioners, 7 Ex. 780; 21 L. J., Ex. 297.

- On whom, -Where a recital in an instrument under seal is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all, whether they are parties to the deed by executing it, or only by accepting it. But when it is intended to be the statement of one party only, the estoppel, though all have executed the deed, is confined to that party. The intention is to be gathered from constraing the instrument. Stronghill v. Buck, 14 Q. B. 781; 19 L. J., Q. B. 209; 14 Jur. 741.

- Partnership Release.]-In trover for paper, it appeared that the plaintiff and the defendant had been in partnership together as paper manufacturers and iron merchants. The partnership was dissolved by a deed which recited that it had been agreed that the business of paper manufacturer should belong exchisively to the defendant, and the business of an iron merchant to the plaintiff, but that the plaintiff should receive out of the stock paper to the value of 8981. 4s. 11d., which should remain in the paper-mill for a year at his option. The deed also recited that, in performance of that arrangement, paper to the value of 898%. 4s. 11d. had been delivered to the plaintiff. and the same was then in the mill, as the plaintiff acknowledged. It was then witnessed that, in performance of the arrangement, the plaintiff and the defendant dissolved partnership, and the plaintiff assigned to the defendant the stock-intrade of the business of a paper manufacturer, except the 8981. 4s. 11d. worth of paper so delivered to the plaintiff as aforesaid; and the defendant assigned to the plaintiff the stock-intrade of the business of iron merchants; there were also mutual releases. No paper whatever was set apart or delivered to the plaintiff, but the jury found that the defendant had converted the whole stock :- Held, that the parties were estopped by the deed to say that no such delivery had taken place. Wiles v. Woodscard, 5 Ex. 557; 20 L. J., Ex. 261.

- Not in Collateral Action. - Recitals in a deed do not operate as an estoppel against a party to the deed in an action not founded on the deed, but collateral to it. Morgan, Exparte, Simpson, In re, 45 L. J., Bk. 36; 2 Ch. D. 72; 34 L. T. 329; 24 W. R. 414.

Where a distinct statement of a particular fact is made in the recital of a bond, or other instrument under seal, and a contract is made with reference to that recital, it is not as between the

ture, was not possessed of or entitled to the seal may be such as to be conclusive to the same extent. Carpenter v. Buller, S M. & W. 209; 10 L. J., Ex. 393.

But a party to an instrument is not estopped, in an action by another party not founded on the deed, and wholly collateral to it, to dispute the facts so admitted; but evidence of the circumstances under which such admission was made is receivable to shew that the admission was inconsiderately made, and is not entitled to weight as a proof of the fact it is used to establish. Ib.

Notice by. ]-A general recital in a deed that there are mortgages on the estate :- Held, to affect parties claiming under the deed in the notice of a mortgage not specified therein. Farrow v. Rees, 4 Beav. 18; 4 Jur. 1028.

Controlling Effect or Explanation by. Where the words in the operative part of a deed of conveyance are clear and unambiguous, they cannot be controlled by the recitals or other parts of the deed. Walsh v. Treranian, 15 Q. B. 784; 19 L. J.. Q. B. 458; 14 Jur. 1134. S. P., Orr v. Mitchell, [1893] A. C. 238; 1 R. 147— H. L. (Se.). Ingleby v. Swift, 10 Bing. 84; 3 M. & Sc. 489; 2 L. J., C. P. 261.

But where those words are of doubtful meaning, the recitals or other parts of the deed may be used as a test to discover the intention of the parties, and to fix the meaning of those words. Ib.

The rule that recitals may control general words is applicable to all deeds, and not only to releases. Jenner v. Jenner, 35 L. J., Ch. 329; L. R. 1 Eq. 361; 12 Jn. (N.S.) 138; 14 W. R. 305. S. P., Childers v. Eardley, 28 Beav. 648.

In the construction of a deed, regard must be had to all its parts, and general words are to be restrained by a particular recital contained therein; and if a deed operates two ways, the one consistent with the intent of the party, and the other repugnant to it, the courts will put such a construction on it as will give effect to such intent, which is to be derived from the whole of the instrument. Solly v. Forbes, 4 Moore, 448; 2 Br. & B. 88; 22 R. R. 641. S. P., Currey v. Armitage, 6 W. R. 516.

Where the recital and the operative part of a deed are at variance, the latter must be acted on until the deed has been reformed. In a suit to reform the instrument, the court would be enabled, from the circumstances, to judge which was erroncous. Hammond v. Hammond, 19 Beav, 29.

A covenant in a deed, if ambiguous, will be controlled by the recitals. Selby v. Crystal Paluce Gas Co., 30 Benv. 606.

A marriage settlement contained a recital that the land intended to be dealt with was subject to a certain charge, and to a term of 1,500 years. The operative part of the deed referred to a schedule, in which certain lands situate in four townships in the county of Durham, and subject to this charge, were particularly described. The operative part also contained general words referring to all other lands belonging to the settlor in these townships. The settlor, at the time of the settlement, was entitled to other lands in two of these townships of about the same value as the scheduled property, but subject to a different set of charges to those mentioned in the recitals :parties to the instrument, and in an action upon Held, that these last lands did not pass by the it, competent to the party bound to deny the deed, and that the operation of the generawords was confined to the lands which were to property over which he had no power, and in subject to the charges mentioned in the recitals. Durham (Earl), In re. Grey (Earl) v. Durham

(Earl), 57 L. T. 164.

The operative part of a power of attorney appointed X, and Y, to be the attorneys of the plaintiff without in terms limiting the duration of their powers, but it was preceded by a recital that the plaintiff was going abroad, and was desirous of appointing attorneys to act for him during his absence :- Held, that the recital controlled the generality of the operative part of the instrument, and limited the exercise of the powers of the attorneys to the period of the plautiffs absence from this country. Dauby v. Conts. 54 L. J., Ch. 577; 29 Ch. D. 500; 52 L. T. 401; 33 W. R. 559.

The recitals in a deed are a key to the construction, where the operative part is doubtfully expressed, and not otherwise. Baily v. Lloyd, 5 Russ, 330; 7 L. J. (o.s.) Ch. 98; 29 R. R. 30.

Where they are inconsistent, the operative part of a deed prevails over the recitals; but where the operative part is ambiguous, the recitals may be resorted to, to explain the ambiguity. Young v. Smith, 35 Beav. 87.

Where A., in a conveyance to uses, settled an estate for life on himself, remainder in tail to his issue, with an ultimate limitation to the heirs of S. R. in fee, and at the time of the settlement A. was himself the right heir of S. R. :-Held, that this ultimate limitation was void, and that the estate, after the death of A. without issue, deseended on his heirs general; and that it was not competent to go into the intention of the settlor, apparent from the recital, in order to explain the words of this limitation, they being words of plain and well-known import. mondeley (Marquis) v. Clinton, 2 B. & Ald. 625; 21 R. R. 419.

By a marriage settlement, after a recital that on the treaty for the marriage it was agreed that all real and personal property which during the coverture should devolve upon or vest in the wife or the husband in her right, to the value of 2001. at any one time, should be settled upon the trusts thereinafter declared, it was witnessed that it was thereby agreed and declared between and by the parties thereto, and the husband thereby covenanted with the trustees, that if at any time during the coverture any real or personal estate should devolve on or vest in the wife, or the husband in her right, to the amount in value of 200l, at any one time, the husband would make, do and execute, or cause and procure to be made, done and executed, and join and concur in making, doing and executing all such conveyances, &c., as would effectually vest such real and personal estate in the trustees upon the trusts therein declared. After the marriage, a deed was executed by the wife's mother, under which, during the coverture, a sum exceeding 2001. became payable to the wife for her separate use :- Held, by Fry, J., that this sum was within the covenant, and must be settled. But held, by the Court of Appeal, that as the operative part of the deed was clear, the recital could not control it-that as the operative part of the deed only related to acts to be done by the husband, the agreement and declaration between and by the parties that those acts should be done did not import a covenant by any other party that they should be done, and that there was, therefore, no covenant by anyone but the husband-that the covenant by him could not be held to relate

which he had no interest-and that the wife, therefore, was not bound to bring into settlement property given to her separate use. Tredwell, 18 Ch. D. 354; 45 L. T. 118; 29 W. R. 793-C. A.

A marriage settlement recited an agreement to convey a certain estate, save and except the lands of Ballyhenry, and its sub-denominations; but the operative part of the deed purported to convey by name, as a separate denomination, the lands of Kilahan, which it was proved were reputed a sub-denomination of Ballyhenry :-Held, that there was not sufficient evidence of mistake to justify the court in striking Kilahan out of the settlement. Alexander v. Crosbie, 145 Ll. & G. t. Sngd.

Held, that the recital of an agreement to mortgage a "freehold estate at A., subject to the charge affecting the same," did not restrict the operative part of a deed, which in its terms included other freehold estate not subject to any charge, and also copyhold, there being also other memoranda shewing an intention to give a general charge. Glyn, Ex parte, 1 Mont. D. & D.

29; 9 L. J., Ch. 41.

An assignment of one equal eighth part or share, or other part or share, parts or shares, to which the assignor became cutitled :- Held, upon the construction of the recitals and of the whole instrument, to pass only one-eighth, although the assignor was entitled to a larger share. Gray v. Limerich (Eurl), 2 De G. & Sm. 370; 17 L. J., Ch. 443; 12 Jur. 817.

The plain effect of the operative part of a deed cannot be cut down by the recitals. Holliday v. Overton, 14 Beav. 467; 21 L. J., Ch. 769;

16 Jur. 346.

A trustee for a banking company had vested in him, as such trustee, property held by the bank as security for moneys advanced, and also property belonging to the bank absolutely. The trustee, upon retiring from the trusts, executed a deed, which contained recitals shewing an intention to pass to new trustees for the bank the property vested in him by way of seemrity only. There was also a recital of a request by the bank to transfer the property generally vested in the trustee. At the time the deed was executed, it was not present to the minds of the parties that there was any property vested in the trustee other than the securities :- Held, that leaseholds of great value, which were the absolute property of the bank, did not pass, Hopkinson v. Lusk, 10 Jur. (N.S.) 288; 10 L. T. 122; 12 W. R. 392.

The same rule of construction applies whether a deed of conveyance is for value or of trust

property only. 1b,

In 1844 A. agreed to give a security for the debt then due, or which might thereafter become due to him, from a company. This was carried into effect by a deed in 1845, which, after reciting the agreement, assigned all sums claimed to be due, and which he might thereafter recover :- Held, that the deed passed all sums due at its date, but nothing subsequent. Scott v. Scott, 24 Beav. 263.

Release. - General words in a release are to be limited and restrained by the particular words in the recitals. Bayes & Bluck, In re, 13 C. B. 563; 22 L. J., C. P. 173. Stanchewer v. Farrer, 14 L. J., Q. B. 122. The defendant having given the plaintiff a

would withdraw an execution from the premises of the former, the plaintiff executed a general release of all suits, which, after reciting the agreement to withdraw the execution, &c., proceeded to state, "that in pursuance of the agreement, and in consideration of the said sum of 401. being now so paid, as hereinbefore is mentioned. &c." :- Held, in an action on a promissory note which had been dishonoured, that the release was no bar to the suit, as the general words were qualified by the recital, which stated only an agreement to pay, and not an actual payment of the 401. Lampon v. Corke, 5 B. & Ald. 606; 1 D. & R. 211; 24 R. R. 488,

In an action on a covenant by S. against J. and another, a release was pleaded, which began by reciting "that various disputes were subsisting between S. and J., and actions had been brought by them against each other, which were still depending, and that it had been agreed between them that, in order to put an end thereto, J. should pay S. 150l., and each should execute a release to the other of all actions, causes of action, and claims brought by him, or which he had against the other"; and then proceeded in the usual general words to release all actions, &c. whatsoever :- Held, that the effect of the general words was confined by the recitals to actions then commenced, and in which S, was the party on one side, and J. on the other, and that it could not be pleaded to an action brought by S, against J. and others jointly; and that parol evidence P. (N.R.) 113. was admissible to shew that, at the time of exeenting the release, there were mutual actions depending between S. and J. for other canses than that of the present suit, and for such causes only. Simons v. Johnson, 3 B. & Ad. 175; 1 L. J., K. B. 98.

A release, though unlimited in its terms, held, from the recitals and context, to operate only as to a particular sum mentioned in the recitals. Lindo v. Lindo, 1 Benv. 496; 8 L. J., Ch. 284.

A release contained in a deed, which recited that the defendant stood indebted to his creditors in the several sums set to their respective names, and that they had agreed to take from the defendant 15s, in the pound upon the whole of their respective debts, whereby the creditors, in consideration of 15s. in the pound paid to them before executing the release, each and every of them did release the defendant from all manner of actions, debts, claims, and demands in law and equity, which they or any or either had against him, or thereafter could, should, or might have, by reason of anything, from the beginning of the world to the date of the release, was held to release nothing but the respective debts, and all actions and demands touching them; for the general words of release have reference to the particular recital, and shall be governed by it. Payler v. Homersham, 4 M. & S. 423; 16 R. R. 516.

Therefore, where to an action by the plaintiffs on the defendant's bond, the defendant pleaded this release:-Held, that the plaintiffs, in their replication, might plend that the bond was given by the defendant, with others, as a security for the repayment of bills drawn upon them by the defendant, and for moneys advanced to him, and that the sum set against their names in the release was due to them from the defendant on the day of the release on his own account, and the

promissory note for 40L in consideration that he; the release, were not, nor was any part included or meant by them or by the defendant to be included in the sum set against their names or in the release. Ib.

A., the mother of B., having entered into a bond on his behalf for 1,000L. B. executed an indemnity bond of the same date, viz. 26th April, 1800, in the sum of 2,000l, conditioned for the payment of 1,000l. three months after her decease. On the 9th February, 1801, A. made a codicil to her will, by which she relinquished two debts due from him, one of 1,000l, and one of 500l, and desired him to be punctual in indemnifying her estate against the 1,000%, bond of the 26th April. Three days after the execution of this codicil, A. executed a release to B., which, after mentioning a snm of 500l., for which she had his bond, and two sums of 480l, and 300l, due to her from B., for which she had receipts, expressed that she had agreed to release B. from those sums "and of and from all or any other sum or sums of money, claims and demands thereby secured or intended to be seenred, and all other snm or snms of money, claim, and demand what-soever"; and released him accordingly from those sums, and all claim on account of those sums, "or for or on account of any other matter, canse, or thing whatsoever":—Held, first, that this release did not extend to the indemnity bond; and, secondly, that no intrinsic evidence could be admitted to explain the intentions of A. as to the release. Butcher v. Butcher, I Bos. &

- Parcels.]-The parcels may be controlled or extended by reference to the recitals. Barratt v. Wyatt, 30 Benv. 442; 8 Jur. (N.S.) 1045; 10 W. R. 454. Denison v. Holiday, 3 H. & N. 670; 28 L. J., Ex. 25; 4 Jur. (N.S.) 1002; 6 W. R. 719 -Ex. Ch.

— Covenant.]—A marriage settlement recited an agreement that the future property of the wife should be settled, but the covenant to settle was on the part of the husband alone, to execute all necessary deeds, as that such property should (so far as he was concerned) be vested in the trustees, on the trusts of the settlement :- Held, that property afterwards given to the separate use of the wife was not liable to be settled. Hammond v. Hummond, 19 Beav. 29,

By the marriage settlement of O., dated in 1821, a sum of money was settled upon the children of the marriage as O, should by deed or will appoint; and in default of appointment, to be divided among all the children at twenty-one equally. By his will, O. did not validly appoint the fund, but he gave certain legacies to his children, of whom A. was one, at twenty-one. By the marriage settlement of A., dated in 1851 (she being then an infant), after reciting that A, was entitled to certain sums and to other interests, and that it had been agreed that the intended husband should covenant to assign to trustees all the property which, "under the will or otherwise of the said O.," A. might become entitled to, the husband covenanted to assign to trustees all the property which, "under the will or otherwise of the said O., or otherwise howsoever," A, might become entitled to. A, attained twenty-one, and a share of the unappointed fund, under the settlement of 1821, becoming therefore payable to her .—Held, as between the trustees of the settlement of 1851 and the husband moneys intended to be seenred by the bond, although part was due at the time of executing Trust, In re, 1 Jur. (N.S.) 1069. The words in the operative part being clearly sufficient to include the interest which A, took in the unappointed fund, the court refused to cut them down by reference to ambiguous words in a recital which did not clearly include such interest. Ib.

Where the operative part (which was not by way of present conveyance, but by way of covenant) appeared to be intended to follow, but did not accurately follow, the words of a recital, the effect of the operative part will be limited to the extent pointed out by the recital. Noul's Trusts, Lu r. 4 Jur. (X.S.) 6.

A marriage settlement resited the treaty to be, to settle all property which may come to the wife from H. by will, or codied or codieds, or otherwise. The instand subsequently corenanted to settle all property which thereafter might come to the wife by any will or codied or codicids of H. or otherwise:—Held, that a gift to the wife by the will of one of the trustees of this marriage settlement (not being H.) was not bound by this covenant; and that the covenant only bound the husband to settle sneh property as should be derived by the wife from H. Ih.

will, purported to devise a farm, consisting partly of freeholds and partly of copyholds, to a trastee upon trust to sell and divide the proceeds amongst five persons, of whom the plaintiff was one. The plaintiff came of age in 1867, and shortly afterwards sold her one-fifth share under the will to her nucle, and executed a deed conveying to him her one-fifth share and "all other the estates, shares, parts, and interests" of her in the farm; and her uncle mortgaged the farm (other shares in which he took under the will) to a loan company. Subsequently, the nucle by chance discovered an old disentailing deed, dated in October, 1841, from the non-enrolment of which his solicitors inferred that the plaintiff was really entitled to an estate tail in all the freehold parts of the farm. Thereupon he cansed a draft deed to be prepared (to which he and the loan company were parties), for execution by the plaintiff in order to bar the entail. This draft deed recited that in 1746 R. devised all his freehold and copyhold hereditaments to his daughter in tail; that in 1840 his grandson B. became entitled to those hereditaments as tenant in tail, and that in 1841 he barred the estate tail in the copyholds, and executed a deed dated October, 1841, which purported to bar the estate tail in the freeholds, but that that deed was never enrolled, and that, therefore, the estate tail in the freeholds had never been barred. plaintiff refused to execute the proposed deed, and relying upon the admissions contained in the recitals, but having no other evidence that the freeholds comprised in the deed of October, 1841, and purporting to be devised by B. in 1851, belonged to R. at the date of his will, though she had evidence that he was seised of the copyholds of that date, filed a bill against her uncle and the loan company, praying that the conveyance by her to her uncle, and the mortgage by him to the loan company, might be declared void as against her, and that she might be declared to be entitled to the freeholds as tenant in tail :- Held, that the suit being in the nature of an equitable ejectment, the strictest proof must be given that R. was seised of all the freehold parts of the farm at the date of his will in 1746; that although the admissions contained

in the recitals of the proposed deed were admisshle as evidence, pet they were not conclusive, as they were not admissions of facts within the knowledge of the defendants, and the court would examine the facts on which those admissions were beard and determine for itself what weight ought to be attached to the admissions: that the deed of Oerober, 1941, lift not justify the inference that R. was seised of the freeholds comprised in it at the date of his will, but that on the contrary the omission to enrol that deed rather led to the inference that the freeholds were affered with finite more than the freeholds were affered with finite more than the freeholds were affered with finite more to have passed by his will, nor to be subject to the entail, and that, will nor to be subject to the entail, and that, therefore, the appeal must be dissussed with costs. Bulley, Bulley, 44 L. J., Ch. 79; L. R. 9 Ch. 30; 30 L. T. 848; 22 W. R. 779.

A mortgagor, with two sureties, entered into a bond to the mortgagee, the condition of which, after reciting that the mortgagor was seised in tail of premises of which he had covenanted to suffer a recovery, to come to the use of the mortgagor in fee, subject to the proviso for redemption, was, that the bond should be void if the recovery should be suffered, so and in such manner, as that under and by virtue thereof, and of the mortgage deed, the premises should be vested in the plaintiff in fee, according to the true intent and meaning of the mortgage deed, subject only to the proviso for redemption. recitals in the mortgage deed stated a seisin in fee by the mortgagor's maternal grandfather in 1795. A deed of settlement and fine in 1795, by his daughter and devisee and her husband to themselves for their lives, with power of appointment by the former, which she, in 1809, executed by a devise to her son, the mortgagor, for life, and his sons in tail; and also a conveyance after the wife's death of the husband's life estate to the mortgagor, were proved. In an action on the bond against a surety :- Held, that these recitals. were sufficient evidence that the maternal grandfather of the mortgagor had seisin, and that the possession had followed the limitations and power of the deed of 1795. Edwards v. Brown, Tyrw. 182: 1 C. & J. 307; 3 Y. & J. 423; 9 L. J. (o.s.) Ex. 84.

As Asknowledgment of Debt.]—By the acknowledgment of a debt in a deed under sal, a covenant to pay will not be implied where the acknowledgment is merely colluteral to the purpose for which the deed was executed. Jackson v. North Eindern Rep. 47 L. J., Ch. 903; 7 Ch. D. 573; 57 L. T. 64; 26 W. R. 513.

Where a deed on the sale of certain inventions and patents contained a recital that the purchase-money had been paid, it being held that no express covenant was contained therein for payment :—Held, further, that in the face of such acknowledgment it was impossible to imply such a covenant, and that on partial evidence. Mongan's Patent Jachor Co. v. Morgon, 35 L. T.

A conveyance, after reciting that it had been agreed that 1.400L, part of the purchase-money, should be paid to a mortgage of the premises, and that the residue of the purchase-money, and the state of the the vendor, witnessed that, in consideration of the 1.400L, poid to the mortgage at or before the scaling and delivery of the deed, the receipt whereof the mortgage acknowledged, and from the mortgage money and every part thereof acquitted and dischanged the vendor and purchaser; and also in consideration

of the 460l. paid to the vender as before mentioned, the receipt whereof, and also the payment of the mortgage-money, making in the whole 1,860l., the vendor thereby acknowledged, and from the sume and every part thereof acquirted, released, and discharged the purchaser:—Held, to be no estopped upon the vendor, the release by the words "as before mentioned." xc., referring to, and being qualified by the recital, which stated an agreement to pay the 400l., and not an actual payment. Botteell v. Summers, 2 Y. & J. 407; 3l R. R. 613.

A recital of the existence of a debt may amount, by reference to the context, to an implied contract to pay; but does not, of itself, necessarily imply such a contract. Treas v. Eliver, 3 Drew, 25; 3 Eq. (Bp. 163; 3 W. R. 119; 24 L. J., Ch. 249; 1 Jur. (8.8) 6; 8; P., Contracy v. Tuylor, 7 Scott (S.R.) 749; 6 Man, & G. 851; 12 L. J., C. P. 330.

Where a deed executed by A. and B. recited that A. was indebted to B. in various sums, the amount of which was not yet ascertained, and a balance not yet struck, and that A. was willing to pay B. the amount which might appear to be due to B. in respect of such sums, such amount to be ascertained and paid as thereinafter mentioned, and the deed afterwards provided for taking the accounts by the arbitration of two persons named in the deed :- Held, that notwithstanding the clause as to arbitration, the recitals amounted to an absolute promise to pay the amount when ascertained, and that when coupled with extrinsic parol evidence as to the amount they were sufficient consistently with the statute 9 Geo. 4, c, 14, to take the debt out of the Statute of Limitations. Cheslyn v. Dalby, 4 Y. & Coll. 238.

— Reference to another Instrument.]—An obligor of a bond couldifunct for the symment of rent, at the rate of 170L a year, "according to an indenture of lense," is estopped from saving that the rent reserved by the Indenture was 140L a year. Latinam v. Tremera, 3 N. & M. 603; 1 A. & E. 792; 4 L. J., K. B. 201. S. P., Carter's Trusts, Liv r., 1r. B. 3 Eq. 495.
If a bond in its rectain trefers to a bill of ex-

If a bond in its recital refers to a bill of exchange as the principal security, the bond may be construed to be only a collateral security, atthough it is a specialty, and of a higher nature than the bill, which is only a simple contract debt. Hank of Lepland v. Beresford, 6 Dow, 234; 19 Ir. E. 50.

A deed of indemnity recited, that by a former deed the plaintiff land become trustee to a company, and incurred certain liabilities:—Held, first, that in an action on the deed of indemnity to recover money paid to a creditor of the company, it was incumbent on the plaintiff to produce the former deed, to shew that he became liable as trustee: secondly, that such deed, when produced, could not be received in evidence without proof of its execution; thirdly, that no more of the former deed was proved by the recital in the latter than was actually stated in that recital. Gillett v. Abbatt, 3 N. & P. 24; 1 W. W. & H. 8; 7 A. & E. 783; 7 L. J., Q. B. 61; 2 Jur. 300.

Restraining Liability.]—A covenant of indemnity, unlike a release, is not to be restricted by its rectals. Buker. In rv. Chillias v. Rhodes, Seuman. In rc, Rhodes v. Wish, 51 L. J., Ch. 315; 20 Ch. D. 230; 45 L. T. 658; 30 W. R. 858— C. A. The extent of the condition of an indemnity bend may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate. *Pearsull* v. *Summerstt*, 4 Tant. 593.

The recital in the condition of an indemnity bond, professing to state the agreement between the parties, does not confine the responsibility of the spreties to the limits therein specified.

Sunson v. Bell, 2 Camp. 39.

The condition of a bond recirci that the defendant had agreed with the plaintiffs to collect their revenues from "time to time for tweether mouths", and afterwayds stipulated, that "at all times thereafter during the continuance of such his employment, and for so long as he should continue to be employed," he would justly account and obey orders:—Held, that the obligation was conflued to the period of twelve mouths mentioned in the recital. Literpool Watercowles v. Alkinson, 6 Bast, 307; 2 Smith, 634.

A bond taken in the penal sum of 1,000*l*, cannot be reduced to 500*l*, by a recital in the condition that the parties had agreed to execute a bond in the sum of 500*l*. *Ingleby* v, *Swift*, 10 Bing, 84; 4 M, & Sc, 488; 2 L, J, C, F.

The condition of a bond, executed by the principal and two sureties in the penal sum of 1,000l., contained a recital that the obligor had taken a farm of the obligee, subject to the payment of rent reserved in a lease of even date with the bond, and that it had also been agreed by the obligor and the obligee, that the obligor should enter into a bond with two sureties in the penalty of 500l, for the due payment of the rent. Rent having been found by a jury to be due to the amount of 740l., the court refused to reduce the verdict to 500%, to which only it was contended the sureties could be liable by virtue of the recital in the condition. Ingleby v. Mousley, 3 M. & Sc. 488.

A, as surety, executed a bond, the condition of which recited an agreement between the directors of an Indian railway company and P., whereby it was agreed that P. should forthwith proceed to such place in the East Indies, at such time, and by such conveyance, as the company should direct, and should there serve the company as engineer at a certain salary per month, to commence from the day of his embarkation at Southampton. The condition was in terms of the recited agreement, but mentioned no place of embarkation. The company paid for the passage of P. to India, on board a vessel about to leave Southamuton: but the bond not having been executed in sufficient time to enable him to go by that vessel, he was directed by the company to go by way of Marseilles, and so meet the vessel. He embarked at Dover, but never reached Marseilles, and in a short time returned to this country :- Held, that the condition of the boud was not restrained by the recital, and consequently that the surety was ilable, notwithstanding the principal did not embark at Southampton. Eeans v. Erle, 10 Ex. 1; 2 C. L. R. 1222; 23 L. J., Ex. 265; 2 W. R. 476. Sec. Y. W. Ry v. Whinray, 10 Ex. 77; 2 C. L. R. 1207; 23 L. J., Ex. 261; 2 W. R.

Supplying Omission.]—The omission of the word "pounds" may be supplied in a bond acknowledged "in the sum of 7,700l, of lawful money of Great Britain," conditioned for the payment of several sums denominated as pounds

shillings and pence, although the sums secured respecting the number of perches was immaterial, amount to more than the half of 7,700l. Coles v. Hulme, 3 Man. & R. 86; 8 B. & C. 568; 7 L. J. (o.s.) K. B. 29; 32 R. R. 486.

# 3. PARCELS AND DESCRIPTION.

Question for Judge and Jury.]—Parcel or no parcel is a question of fact for the jury, but the judge is bound to tell the jury what is the proper construction of any document necessary to be considered in the decision of that question. Lyle v. Richards, 35 L. J., Q. B. 214; L. R. 1 H. L. 222; 15 L. T. 1.

Inconsistent Descriptions. ]-A full and complete description of the subject-matter of a deed being followed by another description in the same instrument, the first description will be preferred although the second is equally full and complete. Roe v. Lidwell, 11 Ir. C. L. R. 320— Ex. Ch. Llewellyn v. Jersey (Eurl), 11 M. & W. 183; 12 L. J., Ex. 243.

A specific description by abutments shall prevail, and parcels shall not be limited by an inaccurate description of the occupation. Smith v. Galloway, 5 B. & Ad. 43; 2 N. & M. 240 ; 2 L. J., K. B. 182.

Parcel Omitted by Mistake.]—A deed was executed, by which it was intended to pass the whole of certain reversionary interests in an estate, but by mistake one share was omitted:-Held, that the intention was so clear that the whole estate must be considered to have passed. Knapping v. Tomlinson, 18 W. R. 684.

A mistake in a deed in a statement of the then occupier of premises will not vitiate, if the description of parcels is the same as in a former conveyance of the same premises, and the intention to pass the same property is clear. Wilkinson v. Malin, 2 Tyrw. 544; 2 C. & J. 636; 1 L. J., Ex. 234.

Evidence to Explain.]-See post, col. 423.

General Words of Description.]-See col. 382,

By Reference to Name and Acreage.]--The parcels in a conveyance which were described as W. farm, with certain closes, &c. (commerating W. IATH, WHA CETAIN CLOSES, S.C. (CHIMICRALING HEM WITH THEIR ACCESS), containing 213 acres, with all woods, &c., and the ground and soil thereof, fifty-six acres of woodlund, part of W. farm, but not enumerated, were held to pass. Portman v. Jüll, 8 L. J., Ch. 161; 8 Jun. 356.

Portuna v. 1844, 8 L. J., Ch. 161; 3 Jur. 308.
A deed conveyed a piece of land, founing part of a close, by reference to a schedule
attacked to it, which described the land in a
column headed "Number on the plan of the
Briton Ferry Estate," as No. 138 b.; and in
another column, headed "Description of the as "a small piece marked on the premises," premises, as a smar piece market on the plan "; and in a third column, as in the occupa-tion of J. E.; and in a fourth column, headed "Perches," as 34. This plan was drawn to scale, but upon measurement of the land, was found to be incorrect; a line was drawn across the close 153 b, which contained less than 34 perches according to the measurement on the plan, and only 27 perches according to the actual measurement of the land :-Held, that the prior portion of the description being sufficient, the statement greater part, but not all, of the closes whereof

and that the purchaser was not entitled to 34 perches, according to the measurement on the map, or according to the measurement of the land, but only to the portion of the close actually marked off on the map as ascertained by the scale. Llewellyn v. Jersey (Earl), 11 M. & W. 183; 12 L. J., Ex. 243.

By Reference to Boundaries.]-By a demise of land situate at A., and now in the occupation of S., lying within certain boundaries, land within the boundaries passes, though not in the occupation of S. Doe d. Smith v. Galloway, 2 N. & M. 240; 5 B. & Ad. 43; 2 L. J., K. B. 182.

If a deed correctly describes land by its quantities and occupiers, though it describes it as being in a parish in which it is not, the land will pass by the deed. Lambe v. Reuston, 5 Taunt. 207; 1 Marsh. 25.

"More or Less,"]-A conveyance described the land as containing the dimensions shewn and delineated on a plan in the margin "be the same a little more or less," and purported to convey it as it was then held and enjoyed by the vendor. The plan specified the dimensions in feet and inches, and the measurement corresponded with the actual measurement to a few inches :-Held, that the description could not be controlled or affected by the fact that six feet of the part of the passage purporting to be conveyed was also included in the subsequent conveyance to the plaintiff, and had been treated as part of No. 1, by being covered in and included in the curtilage, Dodd v. Burchall, 1 H. & C. 113; 31 L. J., Ex. 364; 8 Jur. (N.S.) 1180.

Strips of land lying along a highway, even though indirectly connected with parts of a waste, may well pass under a conveyance of the adjacent inclosure, though the deed purports to state the quantity of acres, within the fences, that were therein passed, if the words "more or less" were added. Dendy v. Simpson, 7 Jur. (N.S.) 1058; 9 W. R. 743—Ex. Ch. Affirming,

C. B. (N.S.) 433.

By Reference to Occupation. ]-Under a lease of "all that messuage or tenement called, &c., now or late in the occupation of C.," the boundaries given not accurately defining the premises, a gateway under a portion of the messuage, and leading to a yard behind, in which were some small houses not included in the demise, the tenants of which had always used the gateway, does not pass, in the absence of evidence to show that it has been in the exclusive occupation of C. Dyne v. Nutley, 14 C. B. 122; 2 C. L. R. 81.

A shop, over which there was a leaden roof, was demised to M., under the description of " the same was late in the occupation of C." During that occupation another tenant of the same landlord had a right to use the leaden roof :-Held, that these words were merely used for the identification, and did not limit the rights of M. to the absolute originment of the leaden roof. Martyr v. Lauvence, 10 Jur. (N.s.) 858; 10 L. T. 677; 12 W. R. 1043.

A conveyance by deed of all that messuage, with the lands, &c., belonging, late in the occu-pation of B., and which house, lands, &c., are called by the names following (naming the 313.

Two adjoining plots of ground, A. and B., were let on building leases to separate tenants. On plot A. a house and stables were built, and on plot B, a house, the stables being situate between the two houses. The leases of both premises having become vested in P., he, in 1795, blocked up the communication between the stables and A., and attached them to B., with which premises they continued to be occupied. P. then made an assignment of the lease of A., excepting the stables, but including cellars under them. In 1823, the owner of the reversion in both premises granted to the defendant, in whom P.'s estate in the massigned premises was vested, a reversionary lease of B. by a description and plan corresponding both in measurement and boundaries with the original lease, but with the addition among the general words of the following, "with all stables . . . to the premises belonging or appertaining," and with a covenant to surrender at the end of the term "the racks, mangers, &c., affixed, or belonging to the premises," there being no such words in the corresponding covenant of the original lease. There were no other stables belonging to, or occupied with B.:—Held, that the stables did not pass under the lease of 1823. Maitland v. Mackinnon, 1 H. & C. 607; 32 L. J., Ex. 49; 9 Jur. (N.S.) 255; 7 L. T. 427; 11 W. R. 237.

A conveyance of a house, mill, and lands, called Clock Mills, and "all lands, &c., belonging, used, occupied and enjoyed, or deemed taken or accepted as part thereof, &c.," will pass leasehold lands which have been occupied with, and are reputed part of Clock Mills, as well as freehold, especially against the conveying party. Doe d. Davies v. Williams, 1 H. Bl. 25; 2 R. R. 703.

A specific description by abottments shall prevail, and parcels shall not be limited by an maccurate description of the occupation. Doe d. Smith v. Galloway, 5 B. & Ad. 43; 2 & M. 240; 2 L. J., K. B. 182.

Where the words of a second deed are sufficient to pass the whole of the property conveyed by a former deed, and the intention to do so is clear, a mistake in describing the occupation will not vitiate. Wilkinson v. Malin, 2 C. & J. 636; 2 Tyrw. 544; 1 L. J., Ex. 234.

Soil of Highway.]-Where piece of land which adjoins a highway is conveyed by general words, the presumption of law is that the soil of the highway usque ad medium filum passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it. Berridge v. Ward, 10 C. B. (N.S.) 400; 30 L. J., C. P. 218; 7 Jur. (N.S.) 876.

The plaintiff granted to the defendant two pieces of land separated by, and each described as abutting on, a strip of land called a street, which the plaintiff intended to dedicate as a highway, but which was, in fact, never so dedicated. For more than twenty years before action the defendant used this piece of land for the purposes of his business in such a way as to make it impassable, save for foot passengers. Within twenty years both the plaintiff and the defendant had repaired some railings which separated this intended street from an adjoining highway; and within the same period the bed was intended to pass or not. M. was at the

B.'s farm consisted), passes the closes expressly defendant had first inclosed a small portion of named only, and not the residue also. Griffills the street, and then fenced it in at each end, v. Pennon, 9 Jun. (x.8) 885; 8 L. T. 84; 11 W. R. Where it abuntted on two highways. In an action to recover possession of the land :-Held (affirming the decision of the Exchequer Division), that the presumption that the soil to the middle of a highway belongs to the owner of the adjoining inclosed land, does not apply where such land abuts on an intended highway which has not at the time of the conveyance been dedicated to the public. Leigh v. Jack, 49 L. J., Ex. 220; 5 Ex. D. 246 : 28 W. R. 452.

Held, also, that the plaintiff had not been dispossessed by the defendant, nor had he discontinued possession within the meaning of s. 3of the Statute of Limitations. Ib.

Where a deed of conveyance of land contiguous to a highway described the parcels, giving the acreage to the thousandth part of an acre, by reference to an Ordnance map and to a schedule and plan drawn on the conveyance, the measurements and corresponding numbers and colouring of which did not include any portion of the highway, and further contained a recital that the trees on the land to be sold had been valued, and the amount of the valuation-which, in fact, did not include any of the trees upon the highway-formed part of the purchase-money : -Held, that the presumption of law that a micity of the highway passed by the conveyance-was rebutted. Berridge v. Ward (10 C. B. (N.S.)-400 distinguished. Pryor v. Petre, 63 L. J., Ch. 531; [1894] 2 Ch. 11; 7 R. 424; 70 L. T. 331; 42 W. R. 435—C. A.

Soil of Common.]—Under a conveyance by the lord of the manor of P. of "all those messuages, lauds, tenements, commons, wastes, woods, underwoods, and the soil of the wood and underwoods of P.," without any reservation of manorial rights, the soil of the common of P. passes. Cutor v. Croydon Cunal Co., 4 Y. & Coll. 405.

Bed of River ad medium filum, 1-Though the presumption that a grant of land described as bounded by an inland river passes the adjoining half of the bed of the river may be rebutted by circumstances which shew that the parties. must have intended it not to pass, it will not be rebutted because subsequent circumstances, not contemplated at the time of the grant, shew it to have been very disadvantageous to the grantor to have parted with the half bed, and if contemplated would probably have induced him toreserve it; nor is the presumption excluded by the fact that the grantor was owner of both banks of the river. Micklethwait v. Newlay Bridge Co., 33 Ch. D. 133; 55 L. T. 336; 51 J. P. 132-C. A.

M., being entitled to lands on both sides of a river, sold and conveyed to L. a piece of land, the dimensions of which were minutely given in the conveyance, and which was therein stated to contain 7,752 square yards, and to be bounded on the north by the river, and to be delineated on the plan drawn on the deed, and thereon coloured pink. The dimensions and colouring extended only up to the southern edge of the river, and if half the bed had been included, the area would have been 10,031 square yards, instead of 7,752. The deed contained various reservations for the benefit of M., but contained nothing express to shew whether the half of the

time owner of a private bridge close by, from which he received tolls. Thirty years afterwards a bridge was projected to cross the river from L.'s land. The plaintiffs, who had succeeded to all M.'s property in the neighbourhood, brought their action to restrain the making the new bridge. If the grant to L passed half the bed, no part of the new bridge would be over land of the plaintiffs:—Held, that the presumption that the grant included half the bed was not rebutted, and that an injunction could not be granted on the ground that the erection of the

bridge would be a trespass. Ib.

The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river, usque ad medium filum, should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question which negative the possibility of such having been the intention. The owners of a manor by conveyances made respectively in 1767 and 1846 granted to purchasers pieces of riparian land fronting a river, the bed of which formed parcel of the manor. It was proved that, prior to the carliest of the conveyances, a fishery in the river fronting the lands conveyed had for a very long time back been from time to time let to tenants by the lords of the manor as a separate tenement, distinct from the riparian closes; and that at the date of the conveyances in 1846 such fishery was actually under lease to tenants. The grantees under the before-mentioned conveyances, and their successors in title, had, until the acts complained of in the action, never claimed or exercised any right of fishing over the bed of the river by virtue of any right of soil or otherwise, but the owners of the manor, or their tenants of the fishery, had always fished without interruption:—Held, that, under the circumstances, the conveyances ought not to be construed as passing any portion of the bed of the river to the grantees. Deconshire (Duke) v. Pattinson, 57 L. J., Q. B. 189; 20 Q. B. D. 263; 58 L. T. 392; 52 J. P. 276—C. A.

The general law of conveyancing-that, where a riparian owner, who is also owner of the soil under the river ad medium filum, makes a grant of his land on the banks of the river, the soil ad medium filum passes by the grant—applies to land of any tenure, whether freehold, copyhold, or leasehold. Tilbury v. Silva, 45 Ch. D. 98;

62 L. T. 254.

The presumption that a conveyance of land adjoining a river passes the bed ad medium filum without special mention does not apply unless the bed is in the disposition of the grantor. so that it would pass if expressly mentioned. The presumption is rebutted by proof of the existence of a several fishery in a person other than the grantor. It is doubtful whether the presumption applies at all to an inclosure award required by an inclosure act to contain an exact quantitative description of the allotments made. Ecroyd v. Coulthard, 66 L. J., Ch. 751; [1897] 2 Ch. 554; 77 L. T. 357; 46 W. R. 119; 61 J. P. 791.

Conveyance of "Exclusive Use of Gateway."-By lease and release, executed in 1839, M. and others conveyed to W. a piece of freehold ground, others conveyed to m. a pieceta receioning fronting with a messuage thereon, adjoining a covered gateway, "together with the exclusive use of the said gateway." The dimensions of the gateway to passage, as to length, breadth and height, and the said gateway to the s

were mentioned in the deed; and the said "piece of ground and premises" were stated to be more particularly delineated by the portion in the plan thereto, and coloured pink. The covered gateway was not coloured on the plan :- Held, that the conveyance to W. did not merely confer on W. and his successors in title a right of way on W. and its succession at the a right of way through the covered gateway, but enabled them to use the gateway for all juriposes. Semble, the conveyance to W. passed the ownership of the gateway, and not merely an easement, Berlly v. Booth, 44 Ch. D. 12; 62 L. T. 378; 38 W. R. 484-C. A.

Right of Way.]—A way not strictly appur-tenant will not pass under the words, "together with all ways thereto belonging or in anywise appertaining," unless it can be collected that the parties intended to use those words in a sense more extensive than their ordinary legal signifi-cation. Barlow v. Rhodes, 1 C. & M. 439; 3 Tyrw. 280 : 2 L. J., Ex. 91,

Chattels-Locality.]-Assignment by way of mortgage of trader's furniture, shop fittings, stock-in-trade, &c., held only to extend to such furniture, &c., as were in the house and shop at the time of the mortgage, and remained there at the bankruptcy. Stephenson, Ex parts, 17 L. J., Bk. 5; 12 Jur. 6.

- Investments. ]-The plaintiff was entitled to a contingent interest in 1,000/., being a moiety of 2,000L, part of a sum of 20,000L directed by the will to be invested, and which was accordingly invested in the 3 per cent, consols. The defendant became a purchaser at a sale by auction of the premises, which were described as a reversion to 1,000l, principal money payable on a contingency, and part of a sum of 20,000l, invested in the 3 per cent, consols. The assignment to the purchaser described the property as "all that sum of 1,000l, sterling, being one moiety of the legacy or sum of 2,000/, bequeathed by the will" -Held, that the purchaser was entitled to the —Held, that the purchaser was entraced to the value of the 1,000*L* in its state of investment. Lucas v. Bond, 2 Keen, 136; 6 L. J., Ch. 259. Affirmed, 2 Keen, 496; 7 L. J., Ch. 207.

A deed purported to settle a sum of money, portion of the moneys to which the settlor was entitled under the Statute of Distributions :-Held, that it passed chattels real coming to the settler in the manner described.

Robinson, 15 W. R. 77. Newitt v.

Other Cases.]—Where a general grant is made of ten acres of ground adjoining or surrounding a particular honse, part of a larger quantity of ground, the choice of such ten acres is in the grantee; and a devise to the like effect is to be considered as a grant. Hobson v. Blackburn, I Myl. & K, 571; 2 L. J., Ch. 168.

An assignment of "all and singular the legacies. debts, moneys, estate and effects, whatsoever and wheresoever, and of what nature and kind soever, of or to which J. H., in right of his wife or otherwise, was possessed," will not pass a claim of the assignor's wife to dower out of the estates of her former husband. Brown v. Meredith, 2 Keen. 527; 6 L. J., Ch. 361.

implication and presumption of law, but if an the vessel should be complete. Read v. Fairhabendum follow the intention of the parties as to the estate to be conveyed will be found in the habendum, and consequently no implication or presumption of law can be made; and if the intention so expressed be contrary to the rules of law, the intention cannot take effect, and the deed will be void. On the other hand, if an estate and interest be mentioned in the premises, the intention of the parties is shewn, and the deed may be effectual without any habendum; and if an habendum follow which is repugnant to the premises, or contrary to the rules of law, and incapable of a construction consistent with either, the habendum shall be rejected, and the deed stand good upon the premises. Goodtitle d. Dodwell v. Gibbs, 5 B. & C. 709 : 8 D. & R. 502; 4 L. J. (o.s.) K. B. 284; 29 R. R. 866.

Discrepancy between granting Part and Habendum, ]—M., possessed of two contiguous plots of ground, assigned one of them to T., "together with the right to use the walls on the north side" (i.e. on the adjoining plot) for building purposes. T. afterwards assigned the plot so purchased by him to the defendant by deed, the granting part of which was silent as to "rights, members and appurtenances," habendum " with the rights, members and appurtenances thereto belonging"; and, subsequently, M. assigned the adjoining plot of ground to the plaintiff :- Held, in an action for trespassing upon the walls, that the right to use them for building purposes Passed with the plot of ground to the defendant.

Reuwick v. Daly, Ir. R. 11 C. L. 126.

Where the words of an habendum in a deed

are manifestly contradictory and repugnant to the words in the premises, the former are to be disregarded; but where part of the words in the habendum are contradictory to those in the premises, and part explanatory, the contradictory part only need be rejected. *Doe* d. *Timmis* v. *Steele*, 4 Q. B. 663; 3 G. & D. 622; 12 L. J., Q. B. 272.

The bolder of an estate for life in realty granted the laud to A., his executors, administrators and assigns, habendum from a future date for the term of the grantor's life :-Held, to pass an estate for life. Boddington v. Robinson, 44 L. J., Ex. 223; L. R. 10 Ex. 270; 33 L. T. 364; 23 W. R. 925.

The rule is, that where there is an express grant in the premises of a deed, that grant cannot be prejudiced by the invalidity of the habendum, but where the premises contain only an implied grant, and the habendum is invalid, the conveyance fails. Ib.

Qualification.] - The habendum of a deed, although void, may be looked at, together with the other parts of the deed, to qualify the estate granted by the premises. Hugarty v. Nally, 13 Ir. C. L. R. 532.

The plaintiffs contracted with R, to build a ship for them, and made advances from time to time in respect of her, and R. gave them, as a security for the advances, a bill of sale of the ship, which stated that he, R., thereby did sell, transfer and assign to the plaintiffs a certain ship in progress of building (describing her), to have and to hold the same to the plaintiffs for ever, when she should be completed:—Held, that the present property passed to the plaintiffs by the bill of sale, and that the vesting of it was not

banks, 13 C. B. 692; 22 L. J., C. P. 206; 17 Jur.

- Counterpart. ]-The rule as to lease overruling counterpart applies only where there is inconsistency between those two documents compared with each other, and not where the lease is inconsistent with itself. Burchell v. Clark, 46 L. J., C. P. 115; 2 C. P. D. 88; 35 L. T. 690; 25 W. R. 334-C. A.

When the term mentioned in the reddendum in a lease differed from that stated in the habendum, and the counterpart throughout stated the term as in the reddendum, the habendum was corrected so as to agree with the reddendum. Ib.

Reservation-By Implication.]-The law will not reserve anything out of a grant in favour of the grantor, except in a case of necessity. Crossley v. Lightocler, 36 L. J., Ch. 584; L. R. 2 Ch. 478; 16 L. T. 438; 15 W. R. 801.

Essentials of a Good Reservation, ]-A reservation is a clause in a deed, whereby the feoffor, donor, lessor, grantor, &c., doth reserve some new thing to himself out of that he granted before. And in a reservation four things must concur: 1, it must be by apt words; 2, it must be of some other thing issuing or coming out of the thing granted, and not as part of the thing itself, nor of something issuing out of another thing; 3, it must be of a thing whereunder the grantor may have resort to distrain; and 4, it must be made to one of the grantors, and not to a stranger to the deed. *Inchiquin* v. *Burnell*, 3 Ridgw. P. C. 418.

An exclusive licence to take the whole of a profit à prendre of a particular kind can be granted; but such a grant cannot be inferred from language which is not clear and explicit. Sutherland (Duke) v. Heatheote, 61 L. J., Ch. 248; [1892] 1 Ch. 475; 66 L. T. 210-C. A.

By a deed dated in 1783, the plaintiff's predecessors in title revoked the old uses of certain lands, and granted and appointed such lands to the defendant's predecessor in title and his heirs, saving and reserving to themselves and their heirs full and free liberty to get and carry away the ninerals thereunder:—Held, that the clause of reservation operated, not as an exception of the minerals, but as a regrant of a non-exclusive licence to get them, and that the defendant could not be restrained from working the mines.

By deed A, and B, conveyed to D, and his heirs certain lands, excepting and reserving to A. B. and C., their heirs and assigns, liberty to come into and upon the lands, and there to hawk, hunt, fish, and fowl :-Held, that this was not in law a reservation properly so called, but a new grant by D. (who executed the deed) of the liberty therein mentioned; and therefore that it might enure in favour of C, and his heirs, although he was not a party to the deed. Wickham v. Hawker, 7 M. & W. 63; 10 L. J., Ex. 153.

Effect of Reservation. ]-Where the owner conveys land to a person, reserving the "liberty of working the coal" in those lands, he must be taken to have reserved the estate of coal (unless there are clear words in the deed qualifying that right of property) with which he stands vested bill of sale, and that the vesting of it was not at the date of the conveyance. *Hamilton (Duke)* postponed by the habendum to the time when v. *Dunlop*, 10 App. Cas. 813—H. L. (Sc.)

At common law, where A. has two interests in | made between B. and C., C. granted to B. the the same hereditament, as houses or minerals, or a watercourse and also a mill, or two storeys in a house, and demises one part, e.g. the lower portion of a house, reserving to himself the upper part, the grantee either for years or in fee will not, except by express stipulation or very direct implication, be permitted to use the portion held by him so as to interfere with the enjoyment by the grantor of the portion of which he has retained possession. Dugdale v. Robertson, 3 Jnr. (N.S.) 687.

It is a settled principle of law that not only as between the Crown and a subject, but as between subject and subject, the reservation of a right implies the means of enjoying it. Gould v. Great Western Deep Coal Co., 12 L. T. 842.

By a deed dated in 1630, the grantor conveyed in fee farm, land in the manor of A., in the county of Northumberland, "excepting and reserved out of the grant all mines of coals within the fields and territories of A. aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pit and pits": with a covenant by the grantees that they, their heirs and assigns, should give such accustomed recompense for digging and breaking the ground within A. aforesaid as formerly had been usually given and allowed there in like cases." By another deed of the same date, the same parties conveyed in fee farm, to other persons, lands in the manor of H, (adjoining A.), with a like exception, reservation and eovenant:—Held, that the reservation of a "sufficient wayleave" did not confine the right to such ways as were in use at the time of the grant; but that under the reservation in the former deed the coal-owner could not earry over A. coals got in H., although from part of the same mineral field. Dard v. Kingscote, 6 M. & W. 174; 2 Railw. Cas. 27; 9 L. J., Ex. 279.

A dean and chapter were seised in fee of lands, and by indenture between them and the plaintiff, demised them to him for a term, "excepting and reserving the mines under the same, with power to dig, win and carry away the mines, with free ingress, egress, regress, wayleave and passage to and from the same, or to or from any other mines, lands and grounds, on foot and on horseback, and with carts and all manner of carriages, and also all necessary and convenient passages, convenience, privileges and powers whatsoever, for the purposes aforesaid, and particularly of laying, making and granting waggonways in and over the premises, or any part there-:-Held, that the proper construction of the exception was, that it gave the dean and chapter not a general power of making ways and granting wayleaves for all purposes, but for the limited purpose only of getting the accepted minerals. Durham and Sunderland Ry, v. Walker, 2 G. & D. 326; 2 Q. B. 940; 11 L. J., Ex. 442— Ex. Ch.

Held, also, that the right possessed by the dean and chapter under the clanse as lessor, was not the subject of an exception, as it was no parcel of the thing granted, nor of a reversion, as it did not issue out of the thing granted, but that it was an easement newly created by way of grant from the lessee. Ib.

In an action for breaking and entering the closes of A., it was pleaded that B. being seised in fee of the closes, and of a manor whereof the closes were parcel, demised the closes to C. for ninety-nine years; and that afterwards, by deed | 8 App. Cas. 853-H. L. (Sc.)

sole and exclusive right to pursue, kill and take all birds of warren at any time during the term in and upon the closes; together with free liberty to enter the closes, and therein to pursue. kill and take the birds of warren in and upon the same at any time, at his free will and pleasure; and so justified entering upon the closes for the purpose of pursuing birds of warren. The deed appeared to be a demise of the closes by B, to C,, "except and always reserved out of that demise anto B. all timber trees, and also except and reserved all royalties whatsoever to the premises belonging or in anywise appertaining": — Semble, that this clause created an exception or a reservation, and was not properly pleadable as a grant. Pannell v. Mill, 3 C. B. 625; 16 L. J., C. P. 91; 11 Jur. 109.

But held that, at all events, it did not amount to a grant by C. of a liberty to B. to enter upon the closes for the purpose of pursuing, killing and taking birds of warren. Ib.

Where land was conveyed by plaintiff to defendant, with a reservation to the plaintiff of a power to enter on the land and dig and make a sewer through it for the purpose of carrying off the waste water from the premises of the plaintiff; and the plaintiff having made a covered sewer in pursuance of the power, defendant made an opening in it, and drained his premises by means of it:—Held that myder the Held, that under the reservation the plaintiff was entitled to the exclusive use of the sewer. Lee v. Sterenson, E. B. & E. 512; 27 L. J., Q. B. 263; 4 Jur. (N.S.) 950.

Latent Ambiguity in Reddendum. ]-The plaintiff, in 1868, granted by deed, licence and authority to use an invention, of which the patent was vested in him, for breechloading rifles, to the defendants, "yielding and paying unto the licensor the royalty of one shilling for every gun, rifle or breech action manufactured, produced or sold under the powers hereby granted." The exemption of the Crown from royalties for the use of patents, laid down by Feather v. Reg. (6 B. & S. 257), was at that time generally believed to extend to government contractors; but by Dixon v. London Small Arms Co. (1 App. Cas. 632), this exemption was limited to the use of the immediate servants of the Crown; upon which the plaintiff brought an action to recover royalties under the deed for the rifles manufactured by the defendants for the government. The jury found that the defendants intended the deed should not apply to government contracts, and that the plaintiff knew this was their intention, and purposely abstained from mentioning the subject in order that they might be bound contrary to their intention:—Held, that the words of the reddendum suggested a latent ambignity which admitted extrinsic evidence to shew the intentions of the parties; and that the plaintiff under the circumstances could not recover. Roden v. London Small Arms Co., 46 L. J., Q. B. 213; 35 L. T. 505; 25 W. R. 269.

Held, also, that the defendants were entitled to equitable relief from the plaintiff's claim. Ib. Although subsidiary clauses of a deed may be legitimately referred to, for the purpose of solving any ambiguity which is raised by the terms of the dispositive clause, yet if the terms of the dispositive clause are per se sufficient to give a right, they cannot be controlled by a reference to the other clauses of the disposition. Leev. Alexander,

#### 5. PROVISO

Effect of. ]—The words "provided always" are to be considered as words of reference to all that has gone before them. They constitute a qualification of the preceding limitations. Martelli v. Hollowau, L. R. 5 H. L. 532.

A grant contained a proviso, that the grantee and his heirs should not work coal for sale :-Held, to be a covenant, and not a repugnant condition, and that the grantee was entitled to get all the coal for his own use, though not to sell it. Ashton v. Stock, 6 Ch. D. 719; 25 W. R.

Proviso in a deed of separation that the wife surviving shall be entitled to her dower and thirds, and to all real and personal estates whereof the husband shall die seised or possessed, construcd not as a covenant to leave her such a portion of the personal estate as she would be entitled to under the statute had he died intestate, but that she would be in the same situation as if not separate as to dower and thirds-i.e. the actual share by the law or custom; not interfering therefore with his testamentary disposition, Cochran v. Graham, 19 Ves. 63.

#### 6. PARTICULAR WORDS.

"And "-" Or." ]-Whether the instrument in which the word occurs is a will or a deed, "or" may be construed to mean "and," and "and" may be construed to mean "or," if such a construction is necessary to give effect to the intention of the party by whom the word is used. White v. Supple, 2 Dr. & War. 471; 1 Con. & L.

"Appurtenances."] — As to general words "appertaining and belonging" in conveyance of a manor, see Townsend v. Champernown, 1 Y. & J. 538; 30 R. R. 825.

It is settled by the earliest authority, repeated It is settled by the charles authority, repeated without contradiction to the latest, that land cannot be appartenant to land, and the word "appartenances" only includes incorporeal hereditaments attached to the land, granted or demised, such as rights of way, of common, piscary, and the like, but it does not include additional lands. Lister v. Pickford, 34 Beav.

Under a deed of 1658, a manor with its rights, members, liberties and appartenances, saving and reserving certain land therein mentioned, was conveyed to trustees upon trust to permit the persons named in the schedule to the deed. their heirs and assigns, being tenants of the several messnages and tenements mentioned in the schedule, to have and convert to their own use a ratable proportion of the rents and profits of the manor, according to the yearly rents and purchase-moneys paid by them respectively for the purchase of their messuages and tenements: -Held, that such an interest in the profits of the manor could not be anuexed to the various tenements mentioned in the schedule without appropriate words of conveyance for that purpose. Hutchinson v. Morritt, 3 Y. & Coll. 547.

A. was owner of the E. estate adjoining the

seashore, and let N., part of the estate, to a tenant with express liberty to take seaweed from the shore to manure his lands. N. was a farm lying inland, no part of it being nearer legal sense. Barlow v. Rhodes, 1. C. & M. 439; than about two miles from the shore. N., while 3 Tyrw. 280; 2 L. J. Ex. 2)

so occupied, was sold to F., and the lands were described in the conveyance "as the same are presently possessed by the tenant." No express mention was made of any ensement to take seaweed, and there were only the general words, together with all the appurtenances." having claimed an easement to go and collect the scaweed adjoining A.'s estates to manure his lands:—Held, there being no express words of conveyance of such an easement, and the period of prescription not having elapsed, the easement did not pass under the words "together with the appurtenances." Baird v. Fortune, 7 Jur. (N.S.) 926; 5 L. T. 2; 10 W. R. 2.

To pass rights which are not properly servitudes, but are used in like manner, words amounting to a grant must be used. Ib.

B., in consideration of certain improvements he had made in his house, including the opening of two new windows, was granted a new lease by his landlord, in which the words "ancient lights and appurtenances" were used. After the death of the lessor his assignce allowed C., his lessee of the next house, to make certain additions thereto. C. proceeded to creet a high wall, which obstructed the light from B.'s windows, contending she had a right to do so, as he had thrown out new lights. B. filed a bill for an injunction :- Held, that as the lease referred not only to the ancient lights, but also under the word "appartenances" to the new lights, it was not competent for the lessor, or anyone claiming under him, to obstruct them; and that a decree for an injunction ought to be granted during the continuance of B,'s lease, although he had not made an interlocutory application. Duvies v. Marshall, 7 Jur. (N.S.) 720; 4 L. T. 105; 9

- Right of Way.]-A railway company purchased under the powers of their act a piece of land on which was a stable. By the conveyance to the company the premises were granted together with all "rights, members or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member, thereof." The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience. and had used it ever since. The soil of this road was not conveyed to the company and no express mention of it was made in the conveyance :-Held, that a right of way passed to the company under the general words of the conveyance, Bayley v. G. W. Ry., 26 Ch. D. 434; 51 L. T. 337—C. A.

H. and P. were tenants in common of N. and V. estates. By a deed of partition V. was conveyed to H.; and N., "together with all and every their rights, members, easements and appurtenances," was conveyed to P., who sold it to B. A right of way had existed for many years leading from V. to N., and had been up to the time of the partition used by H. and P. :-Held, that such right of way did not pass to P. by the general words used in the deed of partition. Worthington v. Gimson, 2 El. & El. 613; 29 L. J., Q. B. 116; 6 Jur. (N.S.) 1053.

The words "with all ways thereto belonging or in anywise appertaining" in a conveyance, will not pass a way not strictly appurtenant, unless the parties appear to have intended to use coparceners, the land was conveyed to a trustee together with all "ways, paths, passages, casc-ments," &c., to the same belonging or appertaining, or therewith usually held and enjoyed, habendum with the "appurtenances," &c. — Held, that a right of way passed. James v. Plant, 6 N. & M. 282; 4 A. & E. 749; 6 L. J., Ex. 260-Ex. Ch.

P. was the owner of an inn, the yard of which was approached by a passage over adjoining They agreed to alter their property of M. boundary, and substitute a new passage for the old one. M. accordingly, in 1854, conveyed to P. a small strip of land reaching across the end of the new passage where it entered the yard, and granted to him, his heirs and assigns, "rights, of way at all times and for all purposes along a passage intended to run between the piece of land hereinbefore conveyed and a street called the Tyrrels." By another deed P, released his rights of way over the old passage. The plaintiff was a lessee of the inn and yard under P. The defendants were tenants of M., occupying warehouses on his property, and the bill was filed to prevent the defendants from allowing carts and waggons to remain stationary in the passage in course of loading and unloading, so as to obstruct the access to the yard :- Held, that the right of way was not a right in gross, but was appurtenant to the property occupied by the plaintiff, so that his lease gave him a right to the enjoyment of it. Ackrayd v. Smith (10 C. B. 164) explained. Thorpe v. Brumfitt, L. R. 8 Ch. 650.

# Right of Common. - See COMMON.

"Children"—" Issue."]—Where, in a deed, a power is given to appoint among issue, followed by a limitation over in their favour, and then it is declared that the children shall take in equal shares, the word "children" does not cut down the strict technical meaning of the word "issue." Harrison v. Symons, 14 W. R. 959.

"Gosts."]—The condition of a bond, after reciting that A had filed a bill in chancery against several persons (naming them) and the now defendant, as defendants, was, that the now defendants should pay all such costs as the Conrt of Chancery should award to all the defendants : -Held, that the construction of this condition was, that the defendants should pay the costs awarded to all or any of the defendants except himself. Vesey v. Mantell, 9 M. & W. 323; 11 L. J., Ex. 99.

"Fixtures and Fittings up."]—Household furniture does not pass under the description of "fixtures and fittings up in a deed." Simmons v. Simmons, 6 Hare, 352; 12 Jur. 8.

"Heirs."]—In a deed the extensive and ordinary signification of the word "heirs" will be limited where the intention of the parties to the deed is perfectly apparent. Wall v. Wright, 1 Dr. & Wall 1. And see Sheller's Case (Rule in).

"Household Furniture, Plate, &c., and other Goods, Chattels, and Effects in House and Stables."]—A husband settled upon his wife the use of during his life, and at his death the absolute property in, a leasehold house, coach-houses, and stables, together with "the household furni-

Under a deed of partition between two tures, wines, spirits, and other consumable stores, pareeners, the land was conveyed to a trustee and other goods, chattels, and effects "upon the thouse and or which should be brought upon the house and premises :- Held, that the horses and carriages in the coach-houses and stables at the time of the husband's death passed to the wife under the settlement. Anderson v. Anderson, 64 L. J., Q. B. 457; [1895] 1 Q. B. 749; 14 R. 367; 72 L. T. 313; 43 W. R. 322-C. A.

> Next of Kin. ]-A. assigned a fund to trustees, upon trust to pay the interest to B. for his life, and after his decease to pay, transfer, and assign the same among B.'s children; and if no child of B. from and immediately after the decease of B., upon trust to pay, transfer, and assign the same as A. should appoint; and in default of appointment, to pay, transfer, and assign the same to such person or persons as should at the time of the decease of A. be A.'s next of kin. A. died in the lifetime of B., without having made any appointment, and B. died without issue, B. is not excluded from the benefit of the limitation to A.'s next of kin. Elmsley v. Young, 2 Myl. & K. 780; 4 L. J., Ch. 200. Overruling 2 Myl. & K. 82; 3 L. J., Ch. 17.

> B. was the only surviving brother of A., and there were children of a deceased brother of A. : —Held, overruling Phillips v. Garth (3 Bro. C. C. 64), Hinchley v. Maclarens (1 Myl. & K. 27), and the decision in the present case at the Rolls, that the words "next of kin," used simpliciter, are to be taken to mean "nearest of kin," and that consequently B.'s personal representatives were entitled to the whole fund. Ib.

> "Other"—"Survivor."]—In a deed, as in a will, "survivor" may be read "other," in order to effect the intention of the parties. Palmer's Settlement Trusts, In re, 44 L. J., Ch. 247; L. R. 19 Eq. 320; 32 L. T. 9.

> By a settlement executed by two sisters, E. and S., a trust fund was settled upon trust to pay the income to them equally during their joint lives, and after the death of one of them to the survivor for her life; and if either of them should die, leaving children, to pay one moiety to such children; and if either should die without leaving children, to pay the moiety of the deceased sister to the children (if any) of the "survivor," but if both of the sisters should die without leaving children, then over. deceased S. and left children; then she died without leaving children :- Held, that her moiety passed to the children of E. Ib.

> An estate was settled by deed upon A., B. and C. for life, as tenants in common, remainder to their first and other sons respectively in tail male, remainder to their daughters respectively as tenants in common in tail, remainder, "in case one or two of the said A., B. and C. should die without issue of her or their bodies, then as to the share of such one or two dying without issue, to the use of all and every the daughters of such survivors, as tenants in common in tail":-Held. that the limitation to the daughters of the survivor was a good contingent remainder, and not void for remoteness, and that the word survivors must be construed "others." Cole v. Sewell, 2 Con. & L. 344; 4 Dr. & War. 1; 6 Ir. Eq. R. 66. Affirmed, 2 H. L. Cas. 186; 12 Jur. 927.

"Plant." -In most cases the word "plant" is used to describe something which, if not in ture, plate, linen, china, glass, tenant's fix- direct contrast to stock, is at any rate of an

entirely different nature. All the matters permanently used for the purposes of a trade, as distinguished from the fluctuating stock, are commonly included in the term "plant." It consists sometimes of things which are fixed, as, for example, counters, heating, gas, and other apparatus and things of that kind, and in other cases of horses, becomotives, and the like, which are in this sense only fixed, that they form a part of the permanent establishment intended to be replaced when dead or worn out as the case may be. Blake v. Shue, J 150.ns. 732.

"Possession.")—A charge was made raisable, when A or his issue should come into "possession." A jointress who had an estate for life conveyed to a trustee, in order to enable A, who was tenant in tail in remainder, to saffer a recovery, which he did, having such an interest as enabled him to suffer a recovery.—Held, to be coming into possession within the terms of the deed, and to make the charge raisable. Hill v. Bruanhton, 3 Bro. C. C. 180.

"Then."]—In a limitation by deed, on a partitudar event, to the "then" next of kin of A, the word "then" was held to refer to the event, and not to the time of its happening. Wheeler v. Addams, 17 Benv. 417.

"Younger Children"—"Other than an Eldest Son."]—A father's estate was limited after his death to the eldest son in tail, and the mother's estates were limited after her death to the sons and daughters (other than an eldest son) as tenants in common in tail:—Held, that the rule of construction was the same as to realty and personalty, and that the son of a younger son who had succeeded to the father's estate was excluded from all interest in the mother's estates. Buyliy's Settlement, In re, L. R. 6 Ch. 590; 25 L. T. 249; 19 W. R. 789.

#### 7. Inconsistent Clauses.

Articles of separation between John Wright Henniker Wilson and Mary Wright Henniker Wilson, his wife, provided that all the rents, taxes, and other outgoings in respect of certain estates which were originally the property of the latter, should be paid by the former up to a day named, and that after that day they should be paid by Mary Wright Henniker Wilson, and that John Wright Henniker Wilson, and that John Wright Henniker Wilson should be indemnified therefrom, and from all the present debts and liabilities of the said John Wright Henniker Wilson:—Beld, that as the words in italies made the clause inconsistent with, and repregnant to itself, they ought to be disregarded. Wilson v. Wilson, 15 Sin. 487; 11 Jur. 340.

Principles on which the court proceeds in putting a construction upon inconsistent clauses in a settlement. Bush v. Watkins, 14 Beav.

Where a deed contains inconsistent clauses, the court very reluctantly rejects one altogether; and never, unless it is absolutely impossible to reconcile the inconsistencies. *Tb*.

A declaration inserted in the testing clause of a deed, which purports to affect or quality any of the provisions in the body of the deed, has no legal effect. Smith v. Chambers (5 Rettic, 97) followed. Blair v. Assets Co., [1896] A. C. 409—H. L. (Sc.)

## D. PAROL EVIDENCE.

#### 1. TO EXPLAIN.

In General.]—Parol evidence, to explain intention of party giving a release, rejected. Butcher v. Butcher, 1 Bos. & P. (N.R.) 113.

Parel evidence is admissible to enable the courtrightly to understand in what sense words are used in a deed, just as evidence is afforded by a dictionary which enables us to translate a foveign language, or by a book of science, which gives us the meaning of words of art; but where the aid of parol evidence is invoked for the purpose of contradicting the express provisions of a deed, then such evidence is inclumisable. Att. Gan. V. Clapham. 4 De G., M. & G. 591; 3 Eq. B. 704; 24 L. J., G. H. 77; 1 Jur. (XSA) 505; 3 W. B. 158.

224 L. J., Ch. 111; I Jun. (N.8.) 300; S. W. R. 108.
On a question of construction of a written instrument, no evidence of the intention of the
parties is admissible, though intrinsic evidence
may be adduced to show the position of the parties, the state of the funds, and the rights and
interests of the parties in them. But in a suit to
reform a written instrument, evidence of intention is admissible. Therefore, in a suit mising
both questions, the court, though it received the
evidence on the one point, rejected the same evidence when considering the other. Bradford
(Eurr) V. Ronney (Eurl.), 30 Beav. 431.

Acts or communications of the parties after an agreement may be evidence of facts existing at the time of the agreement material to 4ts construction, but not to determine its meaning. Monro v. Taylor, 8 Hare, 56. Affirmed, 3 Macn. & G. 713: 21 L. J., Ch. 525.

Where a deed is in writing it cannot be altered by parol evidence. Bluke v. Marnell, 2 Ball & B, 47; 12 R. R. 68. Affirmed, 4 Dow, 248.

The acts of parties cannot be allowed to affect the construction of deeds, Danglas v. Allen, 1 Con. & L. 367; 2 Dr. & War. 213.

A legal instrument is not to be construed by the acts of the parties. Bayuham v. Guy's Hospital, 3 Ves. 299; 3 R. R. 96.

A deed is not to be construed by the subsequent acts of the parties. Burrowes v. Hayes, Hay & J. 597.

In construing a charity trust deed the court will admit proof of the meaning of the founders from evidence of their acts, their form of worship, and that of the societies of which they were members, and from contemporaneous history, and will adopt the construction rendered probable by the evidence, provided it be consistent with the words of the deed. Att.-Gen. v. Drammond, 1 Dr. & War. 353; 3 Td. 162; 1 Con. & L. 210; 2 Zd. 98.

To aid in the construction of such a deed the court will receive evidence of the acts of the founders, but not of their opinions.

founders, but not of their opinions. Ib. Evidence is also admissible to explain the signification in which ambignous words or expressions were generally understood at the time of the execution of the ded. Ib.

It is a settled rule of law that, in construing a deed or written instrument, the court is at liberty to inquire into all the surrounding circumstances which may have acted upon the minds of the persons by whom the deed or will was executed; but the knowledge of such facts will not enable the court to put a construction upon the instrument inconsistent with the words thereof. Ib.

An absolute conveyance decreed to be only a

clear, on the written evidence, and the accounts of the parties, that the agreement was not what the deed purported to be. Cripps v. Jee, 4 Bro. C. C. 472.

Conveyance by lease and release in fce, in the circumstances, held to be subject to a parol defeasance, and to be in the nature of a mortgage, with a power of repurchase on the footing of redemption, and a reconveyance decreed. Muttyloll Seal v. Annundochunder Sandle, 5 Moore, Ind. App. 72.

The consideration, as stated in a conveyance, was 1501. paid, and an acceptance for 3001. :-Held, that the form of the deed was not conclusive, and that it was competent for the vendor to shew that he had stipulated for a lien for the amount of the acceptance. Fruil v. Ellis, 16 Beav. 350; 22 L. J., Ch. 467; 1 W. R. 72.

If parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and the court cannot look at the contract although it is recited in the deed, except for the purpose of constraing the deed itself. The court cannot look at the contract, either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself. Leggot v. Barrett, 15 Ch. D. 306; 28 W. R. 962.

To shew Intention at Time of executing Conveyance.]—In order to shew that land had been bought for certain purposes, it was proposed to adduce as evidence the minutes of the proceedings of the vendees :- Held, that the conveyance having been executed, the minutes of the proceedings were inadmissible as evidence shewing the purposes for which the land was bought. Prison Commissioners v. Middlesew Clerk of the Peace, 51 L. J., Q. B. 433; 9 Q. B. D. 506; 46 L. T. 864; 30 W. R. 881-C. A.

On a question of construction of a deed, parol evidence is inadmissible to shew the intention of the parties thereto. Pulmer v. Newell, 20 Beav. 39

Prior and contemporaneous enjoyment of a privilege which may be attached to land, and subsequent enjoyment, are admissible to explain the terms of a deed. Baird v. Fortune, 4 Macq. H. L. 127; 7 Jur. (N.S.) 926; 5 L. T. 2; 10 W. R. 2-H. L.

Although parol evidence cannot be used to add to or detract from the description in a deed, or to alter it in any respect, it is admissible to shew the condition of the property, and all other circumstances necessary to place the court, when it construes an instrument in the position of the parties to it, so as to enable it to judge of the meaning of the instrument. Ih.

One of the ordinary rules of construction of deeds is that you are entitled to look at the circumstances existing at the date of the deed. Those circumstances will give very little help in the construction if the words of the deed are clear, but they will help very much if the words are ambiguous—per Esher (Lord), M.R. Roe v. Siddons, 22 Q. B. D. 224; 60 L. T. 345; 37 W. R. 228; 53 J. P. 246.

Parcels-Explanation by Possession. - Where the description of the parcels in a conveyance are capable of two meanings, the true description

security for money on parol evidence, it being | Booth v. Ratte, 59 L. J., P. C. 41; 15 App. Cas.

Parcels.]—In 1861, Plowman, a common predecessor in title of both the plaintiff and the defendant, being possessed of 27 rods of land, conveyed to the defendant's predecessor in title "all that piece of garden ground containing by estimation 20 rods, bounded on the south by other land or garden ground belonging to Plowman." In 1866, Plowman conveyed the residue of the property to the plaintiff's predecessor in title, describing it as "15 rods more or less"; the result being that if the measurement of the deed of 1861 was accurate, the defendant took under it 12 rods instead of 20, while if the measurement of the deed of 1866 was accurate, the plaintiff took under it 7 rods instead of 15. The plaintiff brought ejectment for the 8 rods in dispute :-Held, that the parol evidence of Plowman was admissible to shew that he had conveyed 12 and not 20 rods by the deed of 1861. Jerrey v. Styring, 29 L. T. 847.

— 01d Documents.]—Where parcels are described in old documents by words of a general nature, or of doubtful import, evidence is admissible to shew the meaning of the words used. Waterpark (Lord) v. Fennell, 7 H. L. Cas. 650; 5 Jur. (N.S.) 1135; 7 W. R. 634.

- Not Admissible.]-Where a deed purported to convey "a messuage or tenement for-merly used as a workhouse, in the occupation of A., with the appartenances," and it was shewn that there was a small garden adjoining, which had been always occupied by A. as master of the workhouse :- Held, that the garden passed, and that the grantor could not afterwards be admitted to narrow the operation of his grant, by shewing that the conditions of sale, signed by the vendor at the time of the sale, expressly excepted the garden; or by proving subsequent declarations of the grantee that it had not been purchased by him. Doe d. Norton v. Webster, 12 A. & E. 442;

4 P. & D. 270; 9 L. J., Q. B. 373.

The question being whether the locus in quo was parcel of an estate purchased by and conveyed to an ancestor of the alleged freeholder, an agreement preliminary to the conveyance, and in which the locus in quo was expressly named as part of the land to be sold, is not admissible for the purpose of shewing what was conveyed. Williams v. Morgan, 15 Q. B. 782.

Measurement - Construction for Judge. 1-Land was granted by deed under this description : "All that piece or parcel of land or ground situate, lying, and being in the parish of C., in the county of B., measuring in width from east to west thirty feet, which piece or parcel of land or ground appointed and conveyed is more particularly delineated and described in the map or plan drawn in the margin of these presents, the fences of which piece or parcel of land or ground hereby conveyed on the cast and west sides are to be made and maintained by M. (the vendor), In an action his heirs, appointees, or assigns." for a trespass to this land, evidence was given to shew that, before the deed was executed, the ground had been staked out by the grantee under the direction of the grantor, and that the breadth of the space between the fences was in no part equal to thirty feet :- Held, that after these facts is capable of being explained by possession, had been proved it was for the judge to interpret

-In determining the meaning of a word that has both a primary and a secondary signification, the court will admit evidence as to, and will look at its primary meaning alone, and will not admit technical evidence, unless satisfied that it is to be construed in its secondary sense. Holt v. Collyer, 50 L. J., Ch. 311; 16 Ch. D. 718; 44 L. T. 214; 29 W. R. 502.

Parol evidence is admissible to enable the court rightly to understand in what sense words are used in a deed, just as evidence is afforded by a dictionary which enables one to translate foreign language, or by a book of science, which gives the meaning of words of art: but where the aid of parol evidence is invoked for the purpose of contradicting the express provisions of a deed, then such evidence is inadmissible. Att .-Gen. v. Claphan, 4 De G., M. & G. 591; 3 Eq. Rep. 702; 24 L. J., Ch. 177; 1 Jur. (N.s.) 505; 3 W. R. 158.

Custom to Control Covenant, ]-A custom to control the words of a covenant in a deed must be one which both parties to the covenant can know, and must be certain and invariable. Abbott v. Bates, 43 L. J., C. P. 150; 30 L. T. 99; 22 W. R. 488. Affirmed, 45 L. J., C. P. 117; 33 L. T. 491; 24 W. R. 101,

See also EVIDENCE and CUSTOM.

# 2. To Supply Consideration.

Evidence of. |- Evidence may be given of a consideration not mentioned in a deed, provided it is not inconsistent with the consideration expressed in the deed. Clifford v. Turrill, 1 Y. & C. C. C. 138; 14 L. J., Ch. 390; 9 Jur. 633.

The consideration expressed in the deal of conveyance was 28l., but parol evidence was admitted to prove that 30l. was the real consideration. Res v. Scammonden (Inhabitants), 3 Term Rep. 474; 1 R. R. 752,

Want of allegation shall not prevent the court from looking into the consideration. Colman v.

Sarrel, 1 Ves. J. 51; 1 R. R. 83.

An impeached deed cannot be supported by evidence of considerations different from those alleged in it. Watt v. Grore, 2 Sch. & Lef. 501, Whatever is wanting to shew the consideration.

and from whom it moves, may be supplied by evidence dehors the deed, where such evidence does not contradict the deed. Hartopp v. Hartopp, 17 Ves. 184; 11 R. R. 48.

Evidence of a consideration not expressed in a deed is admissible to shew that it was not voluntary, unless inconsistent with the deed itself. Nixon v. Hamilton, 1 Ir. Eq. R. 55; 2

Dr. & Wal, 364.

The consideration, as stated in a conveyance. was 150%, paid and an acceptance for 300%; :-Held, that the form of the deed was not conclusive, and that it was competent for the vendor to shew that he had stipulated for a lien for the amount of the acceptance. Frail v. Ellis, 16 Beav. 350; 22 L. J., Ch. 467; 1 W. R. 72.

Parol evidence is admissible to shew that there was consideration for a deed. Townend v. Toker,

14 W. R. 806.

The expression of a nominal consideration is

the deed, and to say what passed under it. Skull not inconsistent with the fact, that money or v. Elemister, 16 C. B. (N.S.) 81; 33 L. J., C. P. money's worth was the real consideration. B45; 12 W. R. 554.

To determine Meaning of Trade Term in Deed, 1 I S. L. 7. 267; 14 W. R. 22.

Although evidence is not admissible to shew, contrary to the terms of a deed, that by the contract the consideration was not to be paid, as stated in the deed, but in goods, such evidence is admissible to shew that, in point of fact, the consideration was so paid, and that goods were accepted in payment. Smith v. Battams, 26 L. J., Ex. 232.

An agreement between the administrator of the covenantee and the covenantor not to enforce performance of the covenants in the deed provided the latter would pay certain rent may be a good consideration for a parol promise to pay such rent; and the enforcement of such promise is not open to the objection that it is seeking to vary by parol the terms of an instrument under seal. *Nush* v. *Armstrong*, 10 C. B. (N.S.) 259; 30 L. J., C. P. 286; 7 Jur. (N.S.) 1060; 9 W. R. 782.

Where a deed purported to be made "in consideration of esteem for A. T., and for divers other good considerations," evidence is admissible to shew that it was made in consideration of an intended marriage with A. T. Tull v. Parlett, I M. & M. 472: 31 R. R. 751.

#### F. PARTICULAR DEEDS AND BONDS.

#### 1. Post-Obits.

Nature of. ]-A post-obit bond is a security of a doubtful nature. Lushington v. Waller, 1 H. Bl. 94; 2 R. R. 727.

A nephew, who was provided for by his aunt's will, obtained a post-obit bond from her. It was set aside, he not having proved that she knew that the effect of the bond was to make her will irrevocable. Cooke v. Lamatte, 15 Beav, 234; 21 L. J., Ch. 371.

Validity of ]-A debtor executed a post-obit bond for payment of a sum of money. The bond recited that the debtor owed the money to the obligee. The bond was assigned to a third party, who took the assignment upon the faith of the lebtor's tacit representation that the debt was due, as recited in the bond. The debtor afterwards assigned his estate and effects to trustees for the benefit of creditors, and subsequently instituted a snit for the performance of the trusts of the deed in equity. The transferee of the bond applied to be allowed to prove, but was opposed the debtor, and his claim disallowed by the chief elerk, on the ground that the bond was originally given for a gambling debt. The only evidence of the gambling transaction was that of the debtor :-Held, by Stuart, V.-C., that the debt was provable, for that the debtor could not be allowed to set up as against an innocent transferce, a state of circumstances inconsistent with representations made by him before the transfer, and upon the faith of which the transfer was taken, and that as bona fide holder of the bond without notice, he was within the equity of the 5 & 6 Will. 4, c. 41; and, upon appeal.—Held, that the decision of Stuart, V.-C., was correct, the only evidence in support of the allegation that the debt was a gambling transaction being that of the debtor, who was not a trustworthy witness. Hawker v. Hallewell, 25 L. J., Ch.

B., for the purposes of a society of which he was the solicitor, borrowed 600%, on the security of a joint bond entered into by himself and C. The bond was conditioned to be void if the obligors, their heirs, executors or administrators, should within one month after the death of such one as should first depart this life of three persons, named in the bond, pay to the obligee The bond also charged the interests to 2.0007. which the obligors might become entitled in any personal estate under the wills of the three persons, with payment of the 2,0001. Ou the death of the last survivor of the three persons the obligors sought to be relieved of their obligation under the bond, on the ground that it had been entered into under circumstances which were inequitable, and that the whole transaction amounted, in fact, to a sale of a reversionary interest for an insufficient consideration :- Held, that the bond was good. Gardiner v. Cowper. 18 L. T. 627.

#### 2. VOLUNTARY DEEDS AND BONDS

Effect of Voluntary Bond. ] - A. by deed voluntarily settled some property on trust for himself for life, and after his decease upon trust to pay all the debts then owing by him, and any legacies or sums of money not exceeding 4001. which he by will or writing should direct, and subject thereto in trust for his son. Afterwards, in order to defeat the settlement, he gave voluntary bonds to the extent of 3,500l. in favour of other relatives:—Held, that the bonds were effectual and created valid debts, payable out of the trust property. Markwell v. Markwell, 34 Beav. 12.

Whenever a person obtains by voluntary donation a benefit from another, he is bound, if the transaction be questioned, to prove that the transaction was righteons, and that the donor voluntarily and deliberately did the act, knowing its nature and effect. 'Cooke v. Lamatte, 15 Beav. 234; 21 L. J., Ch. 371.

What is. ]-P. binds himself in a penal sum to pay an annuity of 200%, a year to trustees for the benefit of E. K., a single woman, by whom he has had five children, in consideration of her having ceded to him the custody, education, and support of such children, And such boud is conditioned to be void on due payment of the annuity during such time as E. K. shall not require the custody of the children :-Held, that such bond was for valuable consideration, and constituted a specialty debt. Plaskett's Estate, In re. Bryant v. Knyrett, 4 L. T. 544; 9 W. R. 628.

A promise to pay in consideration of the creditor forbearing to sue only operates as a valuable consideration when a right to sue exists. Graham v. Johnson, 38 L. J., Ch. 374; L. R. 8 Eq. 36; 17 W. R. 810.

## 3. OF INDEMNITY.

Validity. ]-A bond of indemnity given to protect a purchaser of land against adverse claims threatened at the time of the purchase is valid to the full amount of the penal sum named in it, notwithstanding that such penal sum greatly agreement exceeded the original purchase-money; there Dougl. 385.

558; 2 Jur. (N.S.) 794; 4 W. R. 621-L.JJ. | being no equity in the circumstances of the case Before Stuart, V.-C., 3 Sm. & G. 194: 2 Jur. to justify an interference with the legal right, (N.S.) 537. See Murray v. Stair (Earl), 3 and the purchaser having, in discharge of the D. & R. 278; 2 B. & C. 82; 26 R. R. 282. sum than the full amount of the penal sum named in the bond. Osborne v. Eales, 2 Moore P. C. (N.S.) 125; 12 W. R. 654. And see Warwick v. Richardson, 10 M. & W. 282, post.

> Recitals.]-A covenant of indemnity, unlike a release, is not to be restricted by its recitals. Baker, In re, Collins v. Rhodes, 51 L. J., Ch. 315; 20 Ch. D. 230; 45 L. T. 658; 30 W. R. 858-

C. A.

A bond by a surety for W. and H., with a condition reciting that the obligees were bankers and W. and H. paper manufacturers, and had overdrawn their account with the obligees 4,8221., and, in order to enable them to carry on their business, had applied to the obligees to allow them for a time to overdraw such further sums as they should require, so that the same, together with the 4,8221, should not exceed, at any one time, 5,000/, ; which they had agreed to do : and the condition was for the payment by W. and H. and the surety, or any of them, of 4,8221, and also such further sums as the obligees should or might thereafter advance to W. and H. in the course of their business, not exceeding 5,000%.is not avoided by the obligees having allowed W. and H. to overdraw to an amount together with the 4,822l, exceeding 5,000l, for the restrictive words in the recital are not to be construed as conditional, that if the obligees exceeded the amount the bond should be void. Parker v. Wise, 6 M. & S. 239; 18 R. R. 359.

When Action lies upon.]—An obligee in an indemnity bond, upon being damnified, has an immediate right to be reimbursed. Challoner v. Walker, 1 Burr. 574.

For, one who agrees to indemnify and save others harmless against a certain engagement is bound to secure them from incurring any expense, as it runs on at the time, which falls upon them by virtue of that engagement. Sparks v. Martindale, 8 East, 593.

A. being principal, and B. surety in an annuity to C., A. gave B. a bond conditioned to pay the annuity to C., and to indemnify B. from any claims of C .:- Held, that this was not a mere indemnity bond, and that B, therefore might put it in suit as soon as A. made default in payment of the annuity, without proving that he had actually been damnified. Penny v. Foy, 8 B, & C. 11; 2 Mau, & R. 181; 6 L. J. (o.s.) K. B. 230.

Where there are several names composing a firm, but part is nominal only and not interested in the profits, and in a declaration on a bond of indemnity to secure money advanced to a third person, the breach states the money to be paid by the partners only who are interested in the profits, it is good, though the mouey was paid on bills drawn on the firm composed of all the partners. Harrison v. Fitzhenry, 3 Esp. 238.

Several owners of different ships having en-tered into a bond to a trustee, binding themselves and their assigns to indemnify each other to a certain amount, if any of their ships should be lost : and one of them having sold his ship, and she being afterwards lost, the others are not liable under the bond, unless the vendor has sold (together with the ship) his interest in the agreement of indemnity. Ayres v. Wilson, 1

For what-Receiver and Manager of Estate.] -Under a bond of indemnity given by A., that B., who was appointed the general agent of C., the receiver of his rents and the manager of his estates, should pay over to C. all rents which he should receive, as also the increase and improvements thereof upon any new contracts or renewals of leases; A. is answerable for all fines received by B. on renewing the leases which were not paid over by him. Irish Society v. Necdham, 1 Term Rep. 482.

Against Adverse Claims. ]-The condition of a bond, which recited a purchase from W. by the plaintiffs of lands, was to save them and the lands harmless from all manner of mortgages, judgments, extents, executions and other incumbrances, had and obtained, or thereafter to be had and obtained, by T. or any other person :—Held, to bind the obligor against the wrongful entry of T., being particular against the acts of a partienlar person. Nush v. Palmer, 5 M: & S. 374; 17 R. R. 364.

A bond of indennity given to protect a purchaser of land against adverse claims threatened at the time of the purchase is valid to the full amount of the penal sum named in it, notwithamount of the penal sum greatly exceeded the original purchase-money; there being no equity in the circumstances of the case to justify an interference with the legal right, and the purchaser having, in discharge of the claim and expenses incident thereto, expended a larger sum than the full amount of the penal sum named in the bond. Osborne v. Edles, 2 Moore, P.C. (N.S.) 125; 12 W. R. 654.

Against Liability for Breach of Trust.] -A. devised his real and personal estate to D. and R. upon trust to sell, and to invest 10,000L. arising therefrom, in the public funds or real scentities, for the benefit of persons mentioned in the will. The money was not so invested, but with D.'s consent was received by R., and used by him in a private trade; and R. gave to D. a bond, conditioned to keep him harmless and indemnified against all actions, suits, proceedings, claims, demands, loss, costs, charges, damages and expenses, on account of the 10,0007, or by reason of R.'s being permitted to hold the same: Held, that this bond was valid in law. Warwick v. Richardson, 10 M. & W. 282; 11 L. J., Ex. 351.

The legatees having filed a bill in Chancery against the trustees and their representatives, claiming payment of the 10,000%, and interest, obtained a decree whereby it was declared that D. and R. were jointly and severally liable to pay that sum; and the legatees carried in a claim against D.'s estate for that amount, but no money was received therefrom :- Held, that the representatives of D. were entitled to recover from R. in an action on the bond the whole amount of 10,0007, and interest, and that their claim was not limited to the amount of costs actually incurred and paid by them in the chancery suit. Ib.

- For Legacy paid to Wrong Person. A party who gives a bond of indemnity to another for the amount of a legacy improperly paid to a wrong person, and for all costs respecting it, is liable for the reasonable costs incurred by the obligee in defending a suit in equity brought by the legatee. Lloyd v. Mostyn, 10 M. & W. 478; 2 D. (N.S.) 476; 12 L. J., Ex. 1; 6 Jur. 974.

For Handing Over a Bill of Exchange. -A bond conditioned to save A. harmless from all actions, legal proceedings and costs which might be the consequence of A.'s delivering over to the defendant a bill of exchange, part of the proceeds of which a third person was entitled to, is forfeited by a payment over by A. to such third person of his share of the proceeds, upon his demanding the same, without his bringing any action; although A. gave no notice of the payment to the defendant. Ker v. Mitchell, 2

\_\_\_\_ To secure Balance due.]—When a surety gives a continuing guarantee limited in amount to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed (prima facie at least) as applicable to a part only of the debt co-extensive with the amount of the guarantee. But a guarantee limited in amount for a debt already ascertained which exceeds that limit is not prima facie to be construed as a security for part of the debt only. Ellis v. Emanuel, 46 L. J., Ex. 25; 1 Ex. D. 157; 34 L. T. 553; 24 W. R. 832—C. A.

It is a question of construction on which the court is to say whether the intention was to guarantee the whole debt with a limitation on the liability of the surety, or to guarantee a part

of the debt only. Ib.

A debtor and his surety excented a joint and several bond for 14,000% conditioned for avoidance if they or either of them should in satisfaction of a debt of 7,0007, then due from the debtor to the obligee pay the 7,0001, with a proviso that the surety should not be liable under the bond for a sum or sums exceeding altogether in debt or damages 1,3007. The debtor having paid 1,000l., part of the debt, and then filed a petition for liquidation, the obligee proved for and received a dividend of 9s, 2d. in the pound on 6,000% under the liquidation. After deducting from the 7,000l. the 1,000l. and the dividend, there remained more than 1,300%, due. The obligee having brought an action on the bond against the surety to recover 1,3000%, the surety contended that he was entitled to deduct from the 1,800%, a ratable proportion of the dividend, viz. 9s. 2d. in the pound on 1,300l., and was only liable for the balance :-Held, that the intention of the bond was that the surety should guarantee the whole 7,000l, though his liability was limited to 1,300%; that he was, therefore, not entitled to deduct a ratable proportion of the dividend, but was liable for the whole 1,300l. Ib.

A surety bound himself jointly to a banking company in 500L, the condition of the bond being that if the obligors should from time to time pay all and every such sum or sums of money as should become due to the bank for money advanced to surety's co-obligor, and pay interest at 51, per cent, per anunm for such sum or sums of money as aforesaid, to be computed as is usual with the banking company in ordinary banking accounts with them; and also the lawful commission, charges and expenses incident to. or occasioned by the transactions or matters between the bank and the co-obligor, and should indemnify and save harmless the banking company from all actions, suits and expenses, and all liability whatsoever by reason of the transactions and matters; then the bond was to be void. Provided that the principal moneys to be

ultimately recovered on the bond were thereby i limited not to exceed 2507, and that the obligors or any of them should not be liable to pay, by virtue thereof, any greater principal sum than 2501. But that the bond should be a continuing security to that amount, for the snms from time to time owing as aforesaid, exclusive of interest (to be computed as aforesaid), commission, costs, charges and expenses :- Held, that the surety was liable on this bond only for 250l. principal moneys advanced, and interest accrned upon that sum : but not for interest upon any further principal sum advanced by the bank. Meek v. Wallis, 27 L. T. 650.

To Secure other Money Payments. |binds himself under a penalty to indemnify B. against his obligation to C., if the money be not paid before a certain day. B., in an action on the bond for not indemnifying, is entitled to recover the amount of the penalty of the bond, Wood v. Wade, 2 Stark, 167.

A. engages to indemnify B. against a debt due from A. and B. to C. of 50l.; they, in fact, owe 74l., for which B. is arrested. A. is liable to B. on his engagement to indemnify him. Hancock

v. Clay, 2 Stark, 100.

- Bond to Indemnify against Costs of Action.]-A condition of a bond, after reciting that one A. B. had filed a bill in chancery against several persons (naming them) and the now defendant, as the defendants, was that the now defendant should pay all such costs as the Court of Chancery should award to all the said defendants:—Held, that the construction of this condition was that the defendant should pay the costs awarded to all or any of the defendants except himself. Vesey v. Mantell, 9 M. & W. 328; 11 L. J., Ex. 99.

Amount Recoverable-Extra Costs.]-In an action by a lessee against the assignce of the lease for a breach of a contract by the assignee to indemnify the lessee against a failure to perform the covenants contained in the lease, he sought to recover the whole costs, as well those paid by him on taxation as extra costs paid by him to his own attorney, incurred in nusnecessfully defending an action brought against him by the lessor for breach of one of the covenants in the lease committed after the assignment :-Held, that the lessee was entitled to recover both the extra costs paid by him to his attorney and the taxed costs, Howard v. Loregrave, 40 L. J., Ex. 13; L. R. 6 Ex. 43; 23 L. T. 396; 19 W. R. 188,

The indemnity due from a principal to his agent covers solicitor and client costs incurred by the agent, and it makes no difference whether the contract of indemnity is express or implied. Wells and Croft, In re. Official Receiver, Exparte, 15 R. 169: 72 L. T. 359.

# 4. TITLE DEEDS.

Custody-Right to, passes with Estate. |-The right to the estate confers a right to the possession of the title deeds. Smith v. Chichester, 2 Dru. & W. 393; 1 Con. & L. 486; 8. P., Har-rington v. Price, 3 B. & Ad. 170. S. C., nom. Harvington v. Glem, 1 L. J., K. B. 122; Strode v. Blackburn, 3 Ves. 225; Newcastle (Duke) v. Pelham (Lord), 3 Bro. P. C. 460.

the property in the deed passes with it. Lord v. Wardle, 3 Bing. (N.C.) 680; 4 Scott, 402; 1 Jur. 382.

The person who is entitled to the inheritance has a right to the possession of the title deeds; and it is no answer to an action founded on his right to the possession of the deeds to shew that another person has a term of 1,000 years vested in him to attend the inheritance, Austin v. Croome, Car. & M. 653.

A person who has parted with his interest in the estate cannot maintain an action to recover the title deeds from another with whom he has bailed them. *Phillips* v. *Robinson*, 4 Bing, 106;
5 L. J. (0.8.) C. P. 111; 29 R. R. 518.

Where the plaintiff in a suit is the personal representative of a person who could not have sued; and through her of one who was entitled to sue, the bill will not be dismissed on that ground. Carter v. Sanders, 2 Drew. 248; 2

Eq. Rep. 891; 23 L. J., Ch. 679; 2 W. R. 325.

The personal representative of a person may maintain a suit regarding the title deeds of the

testatrix's real estate. Ib.

A deposit of title deeds by the heir-at-law of a testatrix to secure a private loan will not prevent the creditors of the deceased person from pro-

ceeding against the depositee. Ib.

On the death of a tenant for life, who had granted a lease under a power in a will, the reversioners were held entitled to recover the title deeds from an assignce of the lease, with whom they had been deposited as security for money advanced to the tenant for life and the losses, Easton v. London, 33 L. J., Ex. 34; 12 W. R. 53.

A person who is out of possession, and whose ultimate right to obtain and keep possession of the title deeds depends on the validity of his title, may maintain a suit for the delivery up to him of the title deeds, if the evidence of his title is not in his own power, and depends on the production of the deeds of which delivery is prayed. Whittingham v. Cusach, Ir. R. 6 Eq. 451.

A suit by a person claiming a legal title to land, praying discovery and delivery up of the title deeds, against a person who had the deeds, and merely claimed to hold them as a stakeholder for whoever had the legal title, the deeds having been brought into court on an interlocutory motion, and another suit having been subsequently instituted in which the questions as to the title of the lands could be decided, the plaintiff in the first suit offered the defendant to consent that the deeds in court should be transferred to the second suit, and the first dismissed with costs; the defendant having declined to consent, and put the plaintiff upon terms to bring the first suit to a hearing :- Held, that the plaintiff in that suit should pay the costs of it up to the service of the notice of consent, and the defendant those incurred afterwards.

Where several are Interested in Estate. -He who has occasion to use a deed is legally entitled to the custody of it; and where several are equally interested in it, either having possession, may retain it against the others. Consequently one cannot maintain detinue against a person in whose hands the party who first obtains possession of it has deposited it, to be redelivered to him on request. Foster v. Crabb, 12 C. B. 136: 21 L. J., C. P. 189; 16 Jur. 835.

Where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title deeds whenever it shall be necessary, and Where the property in land passes by deed, the deeds afterwards come into the purchaser's possession on his taking a mortgage of the other life and a son entitled in remainder; but in the part of the estate, and he then assigns the morta gage to a third person, not mentioning the deeds, such third person cannot maintain trover against him for the deeds. Yea v. Field, 2 Term Rep. 705; 1 R. R. 603,

Deeds affecting Several Estates.]—Deeds which relate to two distinct properties will not be delivered to the owner of the largest property, unless he exonerates the previous holder by an unqualified covenant to produce them. original covenantee not a necessary party to a suit for the purpose of obtaining such a covenant. Ruseve v. Richards, 1 Jur. 304.

- Right to Recover. |- The owner in fee of an estate gave her title deeds into the possession of her solicitors. She afterwards settled the estate, and under the limitations of the settlement part of the estate became vested, after her death, in the plaintiffs, and the remainder in the heir-at-law of the settlor. The heir-at-law could not be found. The solicitors refused to deliver up the deeds to the plaintiffs:—Held, that the plaintiffs could not recover possession of the deeds from the solicitors without the concurrence of the heir; but that the deeds must be deposited in court, the plaintiffs having liberty to inspect and make copies of them. Wright v. Robothum, 55 L. J., Ch. 791; 33 Ch. D. 106; 55 L. T. 241; 34 W. R. 668-C. A.

Tenant for Life-Since Settled Land Acts. ]-Consideration of circumstances under which the court will give the tenant for life the custody of the title deeds. Newen, In re, Newen v. Barnes, 63 L. J., Ch. 763; [1894] 2 Ch. 297; 8 R. 309; 70 L. T. 653; 43 W. R. 58; 58 J. P. 767.

The fact that the tenant for life has mortgaged

An equitable tenant for life of settled land was declared entitled to the custody of the title deeds upon his undertaking not to part with the deeds except with the consent of the trustees. and to produce them at all reasonable times. Burnaby's Settled Estate, In re, 58 L. J., Ch. 664; 42 Ch. D. 721; 61 L. T. 22.

Before the Settled Land Acts. ]-A legal tenant for life of freeholds is entitled to the custody of the title deeds; and the court will not interfere as between a tenant for life and remainderman, except where there is danger to the safety of the deeds if left in the hands of the tenant for life, or where the court requires the deeds for the purpose of carrying out frusts relating to the property. Leathes v. Leathes, 46 L. J., Ch. 562; 5 Ch. D. 221; 36 L. T. 646; 25 W. R. 492.

On an application by a tenant for life in remainder of settled estates for the title deeds to be deposited in court:—Held, that the tenant for life in possession was entitled to their enstody.

A legal tenant for life has a right to recover from a contingent remainderman the possession of the title deeds. Altrond v. Heywood, 1 H. & C. 745; 32 L. J., Ex. 153; 9 Jur. (N.S.) 108; 7 L. T. 640; 11 W. R. 291.

With respect to the title deeds, it is a settled doctrine that this court never interferes as to the possession of deeds between a father tenant for 32 W. R. 737-C. A.

case of a stranger tenant for life the court will interfere, especially when the deeds are in court. Warren v. Rudall, 1 Johns. & Hem. 13. And see Pyncent v. Pyncent, 3 Atk. 571.

The legal tenant for life is entitled to the ens-

tody of the title deeds, and they will not be ordered to be deposited in court merely because the tenant for life is heir-at-law, and claims the immediate reversion against the residuary de-

visce. Garner v. Hannyngton, 22 Beav. 627.
A testator devised his real estate in strict settlement, giving to trustees a power of sale and exchange, to be exercised with the consent of the person entitled in possession, if of full age; and he bequeathed his residuary personalty to the trustees upon the trusts declared concerning the moneys to arise from sales under the power. Shortly after his death a decree was made at the suit of the first tenant for life, then an infant, for the execution of the trusts of the will. Parts of the estate were sold under the power, and the money paid into court, and a large fund was there applicable to the purchase of real estates. After the tenant for life came of age inquiries were directed as to the investment of part of the funds in real estate, and as to the propriety of applying for a private estate act, which inquiries were still being prosecuted. Shortly after this the tenant for life applied to the court, that the trustees might be ordered to deliver to her the title deeds of the estate, subject to the limitations of the will, which application was refused by Stuart, V.-C. :-Held, that as a snit affecting the estates was being prosecuted, the custody of the deeds did not depend on the question who had the legal right to them, but on the question what custody was most convenient for the purposes of the suit; and that the Court of Appeal would not interfere with his interest is a strong reason for not granting the discretion of the Vice-Chancellor on the his application for the custody of the title deeds, subject. Stinford v. Roberts, L. R. 6. Ch. 307; 19. W. R. 552.

Deeds delivered to an equitable tenant for life in possession on giving security. Langualte (Lady) v. Briggs, 8 De G., M. & G. 391; 26 L. J., Ch. 27; 2 Jur. (N.S.) 982; 4 W. R. 703.

Devise of residnary real estate to trustees to permit the testator's sister, if single, to receive the rents for life without power of anticipation, but if either should marry or die, then the single one or survivor to take the whole, but if both married, on trust to sell and divide the proceeds among testator's nephews and nieces. title deeds having passed into the possession of the surviving tenant for life, on a bill filed by the trustees, the court refused to direct the tenant for life to deliver up the decas to the trustees. Taylor v. Sparrow, 4 Giff. 703; 9 Jur. (N.S.) 1226; 9 L. T. 438.

-- Married Woman-No Limitation to Separate Use.]—The trustee in bankruptey of a husband whose wife is legal tenant for life of land (not to her separate use) has no absolute right to the custody of the title deeds of the land during the coverture, but the court has a discretion as to the custody. In a case in which there was evidence that a bankrupt's wife was about to apply to the Divorce Court for the dissolution of the marriage :- Held, that the title deeds of the land, of which she was tenant for life, ought to be ordered into court. Rogers, Ex parte, Pyatt, In re, 53 L. J., Ch. 936; 26 Ch. D. 31; 51 L.T. 177; that the party who has a freehold estate has a 1829, by a party claiming through the convey-right to the title deeds, a mortgage in fee, with ance to W. H., it was held that the legal owner whom the mortgagor deposited the counterfeit of a conveyance to himself, the mortgage purporting to convey the deeds, is entitled to recover the genuine deed from a third party, with whom the mortgagor had subsequently deposited it as a security for advances. Newton v. Beck, 3 H. & N. 220; 27 L. J., Ex. 272; 4 Jur. (N.S.) 340; 6 W. R. 443.

legal mortgagee had asked for the deeds A which the mortgagor, who was his solicitor, made excuses for not giving him. The mortgagor afterwards deposited the deeds with another mortgagee as security for the money advanced without notice of the legal mortgage :- Held, that the legal mortgagee was entitled to recover the deeds from the mortgagee by deposit. Manners v. Mew, 54 L, J., Ch. 909; 29 Ch. D. 725; 53 L. T. 84.

Where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title deeds whenever it shall be necessary, and the deeds afterwards come into the purchaser's possession, on his taking a mortgage of the other part of the estate, and he then assigns the mortgage to a third person, not mentioning the deeds, such third person cannot maintain trover against him for the deeds, Yea v. Field, 2 Term Rep. 708 : 1 R R 603.

An estate comprised in an ante-muptial settlement was mortgaged for a term of years by the husband and wife in exercise of a power of appointment. The mortgage deed contained an assignment of the title deeds. The mortgage term was assigned, and assigned over, but neither assignment contained any mention of the deeds. The original mortgagee handed back the deeds to the husband mortgagor, who deposited the deeds with the defendants as collateral security for a sum of money advanced to him by a client of the defendants. The husband and wife then exercised the power of appointment in the settlement, reserving a power of appointment to the survivor. Upon the death of the survivor, the widow appointed to herself in fee :- Held, that she was entitled to recover possession of the deeds upon paving off the amount of the original advance. for although the original mortgagee was bound to give them up to the assignce of the mortgage term if required, yet, as he was not so required, the subsequent delivery of them to the husband of the plaintiff curred to the benefit of himself and the plaintiff, and upon his death they belonged to the plaintiff, by virtue of her equity of redemption, and of the appointment to herself in fee. Davies v. Vernon, 6 Q. B. 443; 14 L. J., Q. B. 30.

A mortgagee by demise for a term, but whose mortgage does not contain a grant of the title deeds, is not entitled to the deeds relating to the freehold. Wiseman v. Westland, 1 Y. & J. 117; 30 R. R. 765. S. P., Austin v. Croome, Car. & M. 853

Equitable Mortgagee.]—An estate was conveyed in 1803 by J. B. to W. H., who, in 1812, conveyed it to A. H., and he sold it in 1826 to the plaintiff. The original vendor did not deliver up the title deeds. In 1824 he was sued by the owner of the estate for the deeds, and a verdict was recovered against him, but the judgment was not docqueted. He absconded, and in 1825 obtained a sum of money, as on a mortgage of the covenant, and that he had no right to require them estate, from one of the defendants, with whom to be delivered to the receiver in the cause. Ib.

Mortgagee. |-The general rule of law being he deposited the deeds. On trover brought in of the estate might recover the deeds from the mortgagee without tendering the mortgage money. Hurrington v. Price, 3 B. & Ad. 170. S. C. nom. Harrington v. Glenn, 1 L. J., K. B. 122. And see Daris v. Vernon, supra.

> Jointress.]-Primâ facie title deeds are property in the custody of tenant for life, but may be taken from a jointress upon her jointure being confirmed. Ford v. Peering, 1 Ves. J. 76.

Trustee. ]-A testatrix bequeathed a leasehold estate to trustees and executors in trust for sale, and gave one of such executors a beneficial interest for his life in one-fourth part of the estate. The latter executor, being at the time indebted to the estate of the testatrix, made an assignment of his beneficial interest by way of mortgage, to seenre a private debt which he owed to a creditor, and deposited the title deeds with a creditor :- Held, on a bill by his coexecutors to recover the title deeds, that the estate of the testatrix was entitled to a lien on the interest of the defaulting executor in the premises comprised in the deeds, in priority to the lien created by his assignment to the mortgagee, and the court decreed the title deeds to be delivered up, with a declaration that they belonged to the three trustees. Cole v. Muddle, 10 Hare, 186; 22 L. J., Ch. 401; 16 Jur. 853.

Negligence cannot be imputed to trustees for leaving documents of title in the hands of one of their number, and allowing him to receive the income, and no authority to deal with the property can be implied, even in favour of a bona fide purchaser for such trustee. Cottum v. Eastern Counties Ry., 1 J. & H. 243; 30 L. J., Ch. 217; 6 Jur. (N.S.) 1367; 3 L. T. 465; 9 W. R. 94.

As against tenant for life, see col. 433, supra. F. and W., as solicitors for the tenant for life. held the title deeds, which afterwards passed into the possession of W. and C., their successors.
The tenant for life died, and the estate then stood limited, first to F. and W. for five hundred years to seenre a sum of 2,000%, with remainder to trustees for six hundred years to secure a jointnre and portions, with remainder to A. B. in tail. A. B. being an infant, a suit was instituted on his behalf, in which the 2,000%, was raised on the security of the term. Upon that occasion, F, and W. covenanted with the mortgagees to produce the title deeds from time to time, and not to part with them ; but they were relievable from the covenant on certain terms. A receiver was appointed in the suit, and the court directed the costs of the solicitors of the suit to remain charges upon the estate at interest. W. and C. were solicitors in the suit for A. B. Hotham v. Somerrille, 5 Beav. 360; 6 Jur. 861,

A. B., upon coming of age, presented a petition for the delivery of the title deeds :-Held, that (independently of the covenant) W. and C. held the deeds for A. B., and not for the termors; but the covenant having been entered into for the benefit of the infant, F. and W. were not bound to part with the deeds until released from their covenants :-Held, also, that W. was not entitled to hold the deeds for the trustees of the term of six hundred years, or for any costs other than those of seeing himself properly released from the The court will not take a trust deed out of the

Plaintiff, as heir-at-law of C., sued defendant rainth, is never possession of a title deed under the following circumstances: By a conveyance of the 12th November, 1862, certain freehold property was conveyed to C. in fee. On the 13th July, 1865, C., by an ante-mutial settlement of that date, in consideration of his intended marriage with the defendant's sister, charged the said property with the payment, after his death, of a yearly annuity of 12l. to her during her life, and secured the same by a grant of the said property to the defendant, as trustee for his sister, for a term of 100 years, with the usual powers of distress and entry, &c., in case of the quarterly payments of the annuity being in arrear. Upon the execution of the settlement C. handed the deed of conveyance of the 12th November, 1862, to the defendant and said to him, "You shall have the deed of the honse to hold in your possession for the safety of your sister," and at the same time a written acknowledgment of the receipt of the conveyance, and an undertaking to deliver it to C. or his assigns, on the fulfilment of the trusts of the settlement, was signed by the defendant. The marriage took place, and on C's subsequent death, in December, 1875, the plaintiff, as his eldest son and heir-at-law, brought an action in the county court against defendant to recover possession of the conveyance of 12th November, 1862. The county court judge held, in favour of the plaintiff, that he was entitled to recover the deed in question :- Held, that the defendant, as trustee of the settlement, was entitled to retain possession of the deed of conveyance in question during the continuance of the trusts of the settlement on the ground that it was delivered to him by C., the settlor, as a further security for the payment of the annuity, and that the possession of it enabled him the better to perform L. T. 916.

- Deeds in Court-Delivery out. ]-Where a suit affecting an estate is being prosecuted, the right of custody of the deeds does not depend on the question who has the legal right to them, but on the question what enstedy is most convenient for the purposes of the suit. The Court of Appeal will not interfere with the discretion of the judge of first instance. Stunford v. Roberts, L. R. 6 Ch. 307; 19 W. R. 552.

Deeds in possession of court delivered up to tenant for life. Webb v. Webb, Dick. 298.

Title deeds delivered out of court to tenant for life, except when brought into court under an order for safe custody. Webb v. Lymington (Lord), 1 Eden, 8.

Title deeds delivered out of court, upon the application of the trustees and the tenant for life. Duncombe v. Mayer, 8 Ves. 320.

Deeds brought into court by the executor, under the common order for production of documents made in a creditor's suit, will, after the debts are paid, be ordered to be delivered out to the party by whom they were deposited, and the court refused to order such deeds to be delivered to the plaintiff in the cause, although he was the tenant for life of the estate comprised in the deeds. Plunkett v. Lewis, 6 Hare, 65.

A sait was instituted for raising portions out possession of the bankrupt's trustees. *Holder*, of a settled estate. Pending the suit, the tenant Exparte, 3 Deac. & C. 276; 2 L. J., Bk. for life took a number of the leases to Paris. He afterwards, under an order of the court, brought the whole of the title deeds and leases into court, for the purposes of the suit. The purposes of the suit having been satisfied, and the portions raised by mortgage, he applied to have the title deeds and leases given up to him, which applica-tion was opposed by the mortgagees, and was-refused by Kindersley, V.-C. :—Held, by Kuight Brnce, L.J., that as the tenant for life had, on a former occasion, taken some of the deeds abroad, the delivery of them to him ought not to be ordered without the consent of the mortgagees. Jenner v. Morris, L. R. 1 Ch. 603; 14 W. R. 1003.

Per Turner, L.J., that the deeds ought to be delivered to him, on his giving sufficient security for their safe custody and production, and for returning them to court when ordered. Ib.

- To a Stranger. ]-A person who has lent his deeds for the purposes of an action to which he is not a party, which are brought into the master's office, may apply in the action to have the deeds delivered out to him, Marriott v. White, I Sim & S. 17.

- In other Cases. -A, having agreed to purchase of B. the remainder of a term, the latter delivered to him the lease, in order that he might get an assignment made out : A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price agreed upon, because B.'s under-tenant had removed some fixtures :- Held, that B, might insist on A. accepting the assignment, and after demand and refusal of the lease might maintain trover for it. Parry v. Frame, 2 Bus. & P. 451; 5 R. R. 651.

Upon the contract for the sale of an estate, the title and abstract to be made at the vendor's expense, the purchaser is entitled to the enstedy the trusts of the settlement with the execution of of the abstract until either the purchase is which he was charged. Chrin v. Thomas, 46 finally rescinded by consent or declared impracticable by the court. When the contract is determined the vendor is entitled to have the abstract delivered back to him. If the sale proceeds, the abstract becomes the property of the purchaser. Roberts v. Wyatt, 2 Taunt, 268; 11 R. R. 566.

> Ordering into Court. ]-Where tenant for life is satisfied, and does not care about the title, but remainderman is not; court will take care of the deeds, and not leave them in the hands of a third person who has no right to prejudice the remainderman. Ford v. Peering, I Ves. J. 78.

> A testator charged annuities exclusively on his real estate, the legal estate of which he devised to trustees, upon trust to pay the rents to or permit the same to be received by one for life, with remainders over. On the testator's death the tenant for life took possession of the estate and title deeds, and he kept down the annuities, but cut down some timber. The trustees acquiesced for four years, but afterwards proceeded by action to recover the deeds, and to receive the rents. The court, by motion, restrained the proceedings, on the tenant for life undertaking to keep down the annuities, not to grant leases or cut timber without the consent of the trustees, and bringing the deeds into court. Denton y. Denton, 7 Benv. 388; 8 Jur. 388.

rupt's Wife.]—The trustee in bankruptey of a husband, whose wife is legal tenant for life of land (not to her separate use) has no absolute right to the custody of the title deeds of the land during the coverture, but the court has a discretion as to the custody. In a case in which there was evidence that a bankrupt's wife was about to apply to the Divorce Court for the dissolution of the marriage :- Held, that the title deeds of land, of which she was legal tenant for life, ought not to be delivered to the trustee in and other cases, col. 479, post. the bankruptey, but ought to be retained in court, where the county court judge had, upon the trustee's application for delivery to him, ordered Trusce's application for derivery to finit, ordered them to be deposited. Rogers, Exparts, Pyatt, In re, 53 L. J., Ch. 936; 26 Ch. D. 31; 51 L. T. 177; 32 W. B. 737—C. A.

Per Cotton, L.J.:-Whether under ordinary circumstances, an assignce from a husband of his right to receive during the coverture the rents of land of which his wife is legal tenant for life, is entitled as a matter of course to the enstody of

the title deeds, quere. Ib.

Production of-By Trustee-To Cestui que Trust. - Prima facie, and in the absence of any special circumstances, a cestui que trust, even though he be only interested in the proceeds of the sale of land, is entitled to the production and inspection of all title deeds and other documents relating to the trust estate which are in the possession of the trustees. One cestui que trust can enforce his right against the trustees, without bringing before the court the other persons beneficially interested in the property when they have no higher right than himself. Cowin, In re, Cowin v. Grarett, 56 L. J., Ch. 78; 33 Ch. D. 179; 34 W. R. 735.

- By Tenant for Life-Contingent Re-mainder, - Semble, bill does not lie by purchaser from contingent remainderman for inspection of title deeds in hands of tenant for life. Noel v. Ward, 1 Madd, 322; 16 R. R. 229,

- Vested Remainder.]-Any remainderman whose estate is vested may maintain a bill against the tenant for life, for the sole purpose of production and inspection of the muniments of title. Davis v. Dysart (Earl), 20 Beav. 405; 24 L. J., Ch. 381; 1 Jur. (N.s.) 748; 3 Eq. Rep. 599; 3 W. R. 893.

If the tenant for life suggests that the purpose for which production is required is improper, the

onus is on him to shew it. Ib.

This right, however, only exists when the title of the remainderman is undisputed; for, if there be a reasonable cause for litigating his title, he

cannot compel reduction. Ib.

When the title of a remainderman is clear, the court will, at his instance, compel the remainderman to produce the title deeds; but if his title is not clear, the court will not, incidentally, decide in favour of the remainderman's title to the estate, in a suit merely for the production of the title deeds. Pennell v. Dysart (Eurl), 27 Beav. 542.

Absence of Title Deeds-Postponing-Right of Trustee.]-In order to postpone any party to a cause in respect of a prior mortgage or incumbranec, on the ground that you have got the title deeds, it must be shewn that you have got them through gross negligence on the part of

Trustee in Bankruptev-Life Estate of Bank- on you of shewing this. Carter v. Carter, 3 Kay & J. 618; 27 L. J., Ch. 74; 4 Jur. (N.S.)

> To allow title deeds to remain with a party, who, besides having a beneficial interest in the property, is also a trustee to others, is not gross negligence : for, qua trustee, he is the right person to hold them. Ib.

> See respecting the effect of the absence of title deeds in register counties, Lee v. Clutton, 46 L. J., Ch. 48; 35 L. T. 84; 24 W. B. 942—C. A.;

Purchaser for Value without Notice.]—Since the Judicature Act, the Chancery Division has jurisdiction on the application of the legal owner of title deeds to order them to be delivered up by a purchaser for value without notice. Me Leod. v. Drummond (14 Ves. 353; 17 Ves. 182; 11 R. R. 41) distinguished. Cooper v. Vesey, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648—C. A. S. P., Manners v. Men, 54 L. J., Ch. 909; 29 Ch. D. 725; 53 L. T. 84.

## 5. RELEASE.

# a. Power to Give.

Nominal Parties.]—Where a lessor, with the permission of a bailiff, who had made for her a distress for rent, commenced in the bailiff's name an action against the sheriff for taking insufficient pledges, and the bailiff afterwards, without the lessor's privity, released the sheriff, the court set aside the release, and a plea thereof puis darrein continuance, Hickey v. Burt, 7 Taunt. 48; 17 R. R. 440.

If a person who is sued by a landlord, in the name of his tenant, procures a release from the nominal plaintiff, the court will order the release to be delivered up, and permit the landlord to proceed. Payne v. Royers, 1 Dongl. 407.

Assignees.]—Where one of several assignees of a bankrupt releases the cause of action, and the release is pleaded, the court will set aside the plea, suspicion being thrown on the defendant's poss, asspection being arrown out the derendant's conduct in the transaction, the co-plaintiffs indemnifying the plaintiff, who had given the release, against costs. Johnson v. Holdswarth, 4 D. P. C. 63.

Where a release by the obligee of a bond was deaded to an action by his assignee against the obligor in the name of the obligee :- Held, that the special circumstances under which the release was given, and that it was obtained by fraud, might be replied to avoid the release, Craib v. D'Aeth, 7 Term Rep. 670; 1 Bos. & P. 448, 11,

Executors.]-Where an action was brought by two as executors, the court refused to set aside a plea of release given by one. Anon., 1 Chit. 391, n.

And where an action was brought by two ont of four executors, and the two who were not joined in the action released puis darrein continuance, the court refused to set aside the plea, the plaintiff having failed to make out a case of the plannin laving lanea to make out a case on fraud. Herbert v. Pijott, 2 C. & M. 384; † Tyr. 285; 2 D. P. C. 392; 3 L. J., Ex. 79.
Where husband and wife lived separately under a deed, by which he stipulated that she

the person you seek to postpone, and the onus is should enjoy as her separate property all effects,

&c., which she might acquire, and that he would not do any act to impede the operation of that deed; and the wife having as executrix commenced an action on a promissory note against the defendant, in the names of her husband and herself, and the husband released the debt, which release was pleaded pais darrein continuance; the court ordered such plea to be taken off the record, and the release to be given up to be cancelled. Innell v. Newman, 4 B. & Ald, 419.

Partners. ]-A declaration on a policy of insurance on goods on board a ship, at the suit of D. W. and A. W., alleged that the policy was made by them as well in their own name as for and in the name of every other person to whom the same did appertain; and it averred that Z. and the plaintiff A. W., or one of them, were or was, then and thenceforth until the loss, interested in the goods. The defendant pleaded a release by D. W. for himself and his partner A. W.:—Held, that the plea was a good answer to the action. Wilkinson v. Lindo, 7 M. & W. 81.

A purtner has implied authority to execute a lease of a debt due to the firm. *Hawkshaw* y, release of a debt due to the firm.

Parkins, 2 Swanst, 539; 19 R. R. 125.

Where two plaintiffs (as partners) instructed their attorney to proceed to trial in an action brought by them against the defendant for misrepresentation as to their solvency, and a few days before the trial one of them gave a release refused to interfere. Furnival v. Weston, 7 Moore, 356; 24 R. R. 687.

A partner sued in equity for a money demand, alleged by his bill that his co-partner had released the debt, which was still due to the partnership :- Held, that the release created such a timetary in string at flaw for the debt, that the bill was not demurrable for want of equity. Piercy v. Flynney, 40 L. J., Ch. 404; L. R. 12 Eq. 69; 19 W. R. 710.

In an action for a partnership debt, a covenant not to sue entered into by one only of the partners cannot be set up as a release. Walmersley v. Cooper, 3 P. & D. 149; 11 A. & E. 216; 10 L. J., Q. B. 49.

Where Rights of Third Parties Intervene— Equity to a Settlement.]—If the wife insist upon her equity against the assignees in bankruptey of her husband, it attaches for the benefit of her children, and she cannot afterwards release it in favour of her husband. Burker v. Leu, 6 Madd, 330.

Solicitor-Lien. ]-A solicitor has a lien upon costs ordered to be paid to his client upon a petition in bankruptcy, although there be no fund in court; nor can the client release the benefit of the order to the prejudice of the solicitor. Bryant, Ex parte, 2 Rose, 237.

By Appointee under Power. ]-Appointment by will (professedly in execution of a power in a marriage settlement) to A. for life, or until he should encumber, and upon his death or incumbering to the wife of A. for life for her separate use, and after her death to A.'s children, and if asse, and titler are death to A. 8 cliniters, and the A. should die without wife or children to B., who was A.'s brother. A. and B. took other benefits under the will. The appointment to the wife and children of A. being an excessive execution of the power :-Held, that A. was bound to elect, but that B. might release to A. all his interest under the appointment. Kater v. Roget, 4 Y. & Coll. 18. M'Clel. 495: 28 R. R. 735.

Trustees.]—A plea puis darrein continuance of a release by one of several plaintiffs was set aside without costs, on the terms of an indemnity being given to the plaintiff who had released the action, although the consent of such plaintiff had not been obtained before the action was brought, it appearing that no consideration had been given for the release, and that the plaintiffs such as trustees for the creditors of an insolvent person. Mountstephen v. Brooke, 1 Chit. 390; 22 R. R. 805.

A court of equity looks with considerablejealousy at a release executed by a young lady, at or shortly after attaining twenty-one, upon a settlement of accounts between her and her trustees. Parker v. Blowam, 20 Beav. 295.

A general release given by a trustee, in fraud of his trust, is void: where, therefore, a testator bequeathed premises to a trustee, to receive the rents for the benefit of his children, and gavehim power to demise the same for a term, which he did, and received the rents, but did not apply them to the purposes of the trust; on which a bill in equity was filed against him, by one of the parties beneficially interested under the will. and a receiver was appointed, who sned the lessees in the name of the trustee for nonpayment of rent, and they pleaded a release, exe-ented to them by the trustee pending the suit, the court ordered the plea to be set aside, and days before the trial one of them gave a release the release to be delivered up to be cancelled to the defendant, without the knowledge of or Manning v. Chw., 7 Moore, 617; 1 L. J. (O.S.) (C. P. 36.

Pauper Litigants. ]-A plaintiff sning in forma panperis may execute a release of the cause of action to the defendant without the consent or knowledge of his attorney, if it is done bona fidewith a view to settle the action, and not from difficulty in suing at law for the debt, that the any intention to deprive the attorney of his costs. Jones v. Bonner, 5 D. & L. 718; 2 Ex. 230; 17 L. J., Ex. 343.

> Against Strangers. ]-Where a debt, not assignable at law, has been equitably assigned for value, and the debtor has had notice of the assignment, all payments which he may thereafter make to the purchaser on account of the debt are well made so far as the debtor is concerued, although the purchaser may have sold the debt, provided the debtor has no notice of the sale; nor is it absolutely necessary for him, ou making such payment, to require production of the original assignment. The purchaser of a debt may execute to the debtor a release for value of the debt, valid as against an assignee from the purchaser, if the debtor has not, at the time when the release is executed, notice of the assignment. Stocks v. Dobson, 4 Dc G., M. & G. 11; 22 L. J., Ch. 884; 17 Jur. 539.

# b. What Amounts to.

i. In general.

Form. ]-There is no authority to say a release must be signed, as well as sealed and delivered, to make it effectual. Taunton v. Pepler, 6 Madd, 166.

Where Release under Seal necessary. ]charge on lands created by deed cannot be discharged but by deed, or at least by some formal act of release. Cupit v. Jackson, 13 Price, 721; Receipt in Writing.] — When a receipt has v. Freer, 6 Bing, 547; 4 M. & P. 305; 8 L. J. been given under scal it discharges at law all (o.s.) C. P. 176; 31 R. R. 489. canse of action, and can only be set aside by the equitable jurisdiction of a court of law; but a mere receipt in writing has no such effect; it amounts simply to an acknowledgment of money amounts simply to infacts to what action, and it may be impossed or explained by parol evidence. Lee v. Laurashire and Yorkshire Ry., L. R. 6 Ch. 527; 25 L. T. 77; 19 W. R. 729.

Release or Covenant not to Sue.]—A composiis to be treated as a covenant not to sue, and not as a release, when such is evidently the intention of the parties. A release in terms cannot be treated as a release if it be followed by a saving clause against certain parties. Currey v. Armitage, 6 W. R. 516.

When there is an absolute release of the principal debtor, the remedy against the surety is gone, because the debt is extinguished. Where such a release is given no right can be reserved, because the debt is satisfied, and no right of recourse remains when the debt is gone. Language imputing an absolute release may be construed as a covenant by the creditor not to sue the principal debtor when that intention appears, leaving such debtor liable to make good any claims for relief at the instance of his sureties. But a covenant not to sue the principal debtor is a partial discharge only, and, although expressly stipulated, is ineffectual if the discharge given is in effect absolute. Commercial Bank of Tasmania v. Jones, 62 L. J., P. C. 104; [1893] A. C. 313; 1 R. 367; 68 L. T. 776; 42 W. R. 256; 57 J. P. 644-P. C.

Covenant not to Sue, ]-A covenant not to sue one of two joint debtors does not operate as a release to the other. Hutton v. Eyre, 6 Taunt. 289; 1 Marsh 603: 16 R. R. 619.

If the obligee of a bond covenants not to sue one of two joint and several obligors, and if he does, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. v. Newhall, 8 Term Rep. 168.

In an action for a partnership debt a covenant not to sue entered into by one of two of the partners cannot be set up as a release. Walmesley v. Cooper, 3 P. & D. 149; 11 A. & E. 216; 10 L, J., Q. B. 49.

A covenant not to sue one of two joint tortfeasors does not operate as a release so as to discharge the other. An agreement to accept a sum of money from one of two joint tortfeasors in full discharge of his liability, without prejudice to the right to claim against the other, ought to be construed, not as a release, but as a covenant uot to sue. Duck v. Mayeu, 62 L. J., Q. B. 69; [1892] 2 Q. B. 511; 4 R. 38; 67 L. T. 547; 41 W. R. 56; 57 J. P. 23—C. A.

- For a Limited Time. |- A covenant not to sue upon a simple contract debt for a limited time is not pleadable in bar of an action for such debt. Thimbleby v. Barrow, 3 M. & W. 210; 7 L. J., Ex. 128.

A covenant not to sue upon a bond during the life of the obligor; and that if any person to whom the obligee should assign the bond should recover the principal, the obligee would pay the obligor during his life interest on the amount recovered, is no bar to an action by the assignee of the bond in the name of the obligee. Morley nanted to pay the interest in default.

- Principal and Surety.] - A declaration stated that an action had been commenced by the public officer of a banking co-partnership against T, for the recovery of the amount of a bill of exchange drawn by him upon and accepted by the defendant for 1.250l.; that while the action was pending, it was agreed between the company, T. and the defendant, that the action should be settled as follows: 250l. and 500l. by the promissory notes of T., and 500l. by the defendant's promissory note at twelve months, the defendant consenting to the company appropriating the securities held by them to the payment of such balance, and the defendant agreeing to give them a power to sell the properties mentioned in the securities, the company to forego all interest on receiving the three notes, and to guarantee to give up the bill sued on and the 1,000L bill received on account of the said bill. The declaration averred that the company had performed all things on their part to be performed, and had always been ready and willing to settle the action. Breach, that the defendant did not nor would give the company the promissory note for 500l. nor the power of sale. Plea, that the defendant entered into the agreement jointly with M., B. and J., and that after breach of the agreement by an indenture made between the nominal plaintiffs in this action (one of whom was the public officer of the company) of the first part, the directors of the company of the second part, the defendant, M., B. and J. of the third part, and T. of the M., B. and J. of the third part, and a to another fourth part, the public officer on behalf of the company did remise, release and for ever discharge M., B. and J. of and from the action, and all actions and suits, causes of action und debts whatsoever without the consent of the defendence of the control of the co dant, and thereby released the defendant from the same :- Held, that the indonture set out in the plea did not operate as a release, but only as a covenant not to sue. Henderson v. Stobart, 5 Ex. 99; 19 L. J., Ex. 135.

A. and B. entered into a joint and several bond, conditioned for payment of moneys due by B. to a bank. After the making of the bond, the bank, without the privity or consent of B., executed a deed, whereby the bank released B. from all actions, &c., with a proviso that nothing therein contained was to extend to prevent the bank from sning any other person than B., who might be liable to make good to the bank any money due from B., or as being jointly or sever-ally bound with B. in any bond, &c., as if the deed had not been executed, it being understood and agreed, that as regards any such suits, the deed should not operate or be pleaded in bar or as a release :-Held, first, that this deed operated only as a covenant not to sue B., and not as a Price v. Barker, 4 El. & Bl. 760; 3 C. L. R. 927; 24 L. J., Q. B. 130; 1 Jur. (N.S.) 775.

Held, secondly, that A. was not discharged by the execution of the deed without his consent; the effect of a covenant not to sue the principal debtor qualified by a reserve of the remedies, against a surety being to allow the surety to retain all his remedies over against the principal, and the covenant not to sue operating only so far as the rights of the surety may not be affected. Ib.

By a mortgage deed the debtor covenanted to

pay principal and interest, and a surety cove-

debtor afterwards, by deed, assigned his property | where a long time has elapsed between the date to a trustee on trust to sell and divide the pro- of the agreement and the pleading of it. Ib. ceeds amongst his creditors; the creditors releasing the debror from the debts due to them respectively; but there was a proviso in the deed that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the debtor:—Held, that this deed only amounted to a covenant not to sue the debtor, and that the surety was not released, but that the surety could pay off the principal to the creditor and recover the amount from the debtor. Green v. Wynn, 38 L. J., Ch. 220; L. R. 4 Ch. 204; 20 L. T. 131; 17 W. R. 385.

To an action for goods sold and delivered, the

defendant pleaded that the causes of action accrued to the plaintiffs against himself and A., B. and C. jointly, and not otherwise, and not separately against the defendant, and that he and A. B. and C. were jointly liable in respect of the causes of action, and not otherwise; and that the plaintiffs by deed released A., B. and C. from the causes of action. Replication, that this deed was a deed of assignment by A., B. and C. of their estate and effects for the benefit of their creditors, and contained words purporting, if considered without reference to any other part of the deed, to release as in the plea pleaded, but that, in another and earlier part of the deed, it was agreed and declared in the words following, that is to say, "that it shall be lawful for the creditors to execute these presents without prejudice to any mortgage, lien, or security which they may have for their debts, or any part thereof, or to any claim against any surety or sureties, or any other person or persons who may be liable for the payment thereof"; and that all the creditors who executed the deed, executed the same without prejudice, as aforesaid; and so the plaintiffs say that the defendant was not released, as in and by the plea is supposed:—Held, that, taking the plea and replication together, the deed appeared to amount only to a covenant not to sue A., B. and C., and not to a release, and con-sequently that the liability of the defendant. whether joint only, or joint and several, was not thereby discharged. Willis v. De Custro, 4 C. B. (N.S.) 216; 27 L. J., C. P. 243; 6 W. R. 500.

And see PRINCIPAL AND SURETY.

Executory Agreement.]-An executory agreement is a cause of action, and cannot be pleaded in bar to another cause of action. Rowe, 2 Bligh, 596; 21 R. R. 119.

Such an agreement is totally different from a release under the scal; but considered as in the nature of a release, it could only be applied to such part of the relief sought by the bill as relates to the questions at issue between the plaintiff and the party who proposes to have the benefit of the agreement by way of plen. It could not be pleaded in bar to the whole relief; for the cause must, at all events, proceed as to the relief sought against the other parties. Ib.

A plea of an executory agreement, containing no averments that all the parties to the agreement are ready to perform it, is not only insufficient for want of proper averments, but could not be made a good plea by any amendment; because it is not a proper subject of plea, but a

Compromise of Action.]-In an action for entering the plaintiff's close, and carrying away hay, the defendants pleaded that the trespasses were committed by them jointly with C., and that afterwards certain disputes were pending between C and the plaintiff, concerning claims of C. against the plaintiff, in respect of the farm occupied by him under the plaintiff, and conoccupied by him under the plaintiff, and con-cerning claims by the plaintiff against C. in respect of the causes of action in the declara-tion mentioned; and that the plaintiff agreed to release C. from all claims, and did accordingly relinquish all claims against him in respect of the causes of action :- Held, that this plea was sustained by proof of an agreement, whereby in consideration that C. (who had been tenant of a farm under the plaintiff, and had held over the same, under colour of a claim for improve-ments) acknowledged that he had no claim against the plaintiff, the plaintiff "relinquished all claims against C, for mesue profits and rent, or for holding over," the action being substantially an action for mesue profits. Hey v. Moorhouse, 8 Scott, 156; 6 Bing. (N.O.) 52; 9 L. J., C. P. 113.

Assignment of Remedies. - To an action by indorsees against an indorser of a bill of exchange, he pleaded a deed of release, alleged to have been executed by the plaintiffs and other ereditors of one Crokat, a prior indoser. The deed appeared to have been executed by the plaintiffs alone, and was in form a more assignment by the plaintiffs to one Sonter, of the debt due to them from Crokat, putting Souter in their place with regard to the remedy against Crokat on the bill, the consideration for such assignment being 2s. 6d. in the pound on the amount of the debt :- Held, that this deed did. not sustain the plea. *Houlditch* v. *Curty*, 6 Scott, 209; 4 Bing. (N.C.) 411; 7 L. J., C. P. 217.

Collateral Undertaking.]—At the time of executing a bond to secure a sum of money, the obligors procured a letter from the obligee, stating his intention not to call in the money within a specified period, if the interest was regularly paid:—Held, to be a binding undertaking. Norton v. Wood, 1 Russ, & Mylne, 178; taking, *Nor* 32 R. R. 181.

Contract to Give-Extent of. ]-The defendant agreed to pay to the plaintiff within two months 1,500l., and, in consideration thereof, the plaintiff agreed to deliver up all securities in his possession, under which he claimed any debt against the estate of W., deceased, to execute a general release of all claims on the estate of W. for matters between the plaintiff and W, to the day of his decease, and between the trustees and representative of W. to the date of the agree-ment, except 600L, and interest due on a bond given by W., which the defendant agreed to pay to the person entitled thereto. In an action, stating unitual promises to perform the agree-ment, the plaintiff averred that he was ready and willing to deliver up all securities under which he claimed any debt against the estate of which he claimed any debt against the estate of w., and to execute a general release of all claims on the estate of W. for matters between the plaintiff and W., to the day of his decease, and assigned for breach non-payment of the because it is not a proper surject or pica, our a lon the coact of it. In manager man mere right of action, and cannot be a bar to plaintiff and W, to the day of his decease, another suit instituted by the party against and assigned for breach non-payment of the whom the right of action is claimed, especially 1,500% and 600%, or either of them:—Held, that

that this defect would not be cared by a verdict; but that in this case it appeared that the payment of the money was intended to precede the release, and, therefore, the averment was not necessary, and the declaration well enough.

Smith v. Woodhouse, 2 Bos. & P. (N.R.) 233— Ex Cb

A nephew, who was the heir-at-law and sole next of kin of the testator, having taken the opinion of counsel as to the widow's rights under the husband's will, and being advised that she took the residue absolutely, contracted to sell to her a house which had descended to him as heir; and part of the agreement was, that he should release all demands against her as executrix, or against her deceased husband's personal estate: a general release, executed in pursuance of this agreement, was held to be valid, and to invest the stock in the executrix absolutely, though it made no specific mention acsolutely, though it made no specific mention of the stock. Collier v. Squire, 3 Russ. 467; 5 L. J. (o.s.) Ch. 186; 27 R. R. 112.

A defendant signed an instrument, addressed

to the plaintiff, in the following terms:-"In consideration of your having, by indenture, agreed to accept payment of the debt owing to you by A., by the following instalments (that is to say), 10s. in the pound on the 18th of August next, I promise to guarantee the payment of the instalments": and delivered it to the plaintiff in exchange for an indenture executed by the plaintiff ;-Held, that the true construction of the instrument was, that the defendant made his promise in consideration that the plaintiff would execute an indenture and release A. : and consequently, that the execution of the instrument was not an admission by the defendant that the plaintiff had released A., and furnished no evidence in support of an issue taken on an allegation in the declaration, that the plaintiff had released A. King v. Cole, 2 Ex. 628; 17 L. J., Ex. 283.

A declaration recited an agreement in writing, by which defendant agreed to permit plaintiff to occupy certain lands until the 29th of September, 1843, the plaintiff paving therefor on that day, as he thereby agreed to do, 30%, as rent for the same, and then to deliver up the premises to the defendant in good repair, and meantime to cultivate the same in a husbandlike manner; and that, upon the plaintiff quitting the premises, paying the rent, and observing the other stipulatious, and releasing the defendant from all claims under the will of G., as also releasing to the defendant all the lands devised by G., which the plaintiff agreed to do, the defendant should pay to the plaintiff 2001, with interest from the 29th September, 1842. It was agreed that all releases required by the defendant should be prepared by his attorney. Averment, that the plaintiff was ready and willing to deliver up the premises, and to pay the rent, and to release the defendant (as agreed on). Breach, that although the 29th September elapsed, and although a reasonable time clapsed between that day and the commencement of the action for the payment of the 2007., and although no release was prepared by the defendant's attorney before that day, non-payment of the 200l, by the defendant. Plea, that the plaintiff was not ready and willing to deliver up the premises :- Held, that the acts to be done by the plaintiff were not conditions precedent to nor independent of, 4 L. T. 795; 9 W. R. 848.

the release described in the declaration was not | but concurrent with the payment of the 2001, co-extensive with that agreed to be given, and by the defendant; that it was therefore sufficient for the plaintiff to aver his readiness and willingness to do them, without alleging performance: but that this averment was necessary, and, therefore, that the plea was good, as raising a material issue. Giles v. Giles, 9 Q. B. 164; 15 L. J., Q. B. 387; 11 Jur. 83.

A declaration, after reciting that defendant was possessed, for the residue of a term of years, of a messuage and premises, and of fixtures annexed to the premises, averred, that the plaintiff agreed with the defendant to purchase of him the residue of the term in the messuage and premises, with the appartenances and the fixtures; and the defendant agreed to give up possession of the messuage, with the appurtenances and the fixtures, on a certain day. declaration averred that the plaintiff tendered to the defendant for execution an instrument, which contained a recital that the plaintiff had lately contracted with the defendant for the sale to him of the residue of the term granted to him by P. in the messnage or tenements and hereditaments, with their appurtenances, and also all and singular the fixtures belonging to the messuage or tenements and hereditaments, for a certain sum, the receipt of which was thereby acknowledged :- Held, that as the agreement between the parties was for the agreement between the parties was for the assignment of the fixtures only, which belonged to the defendant, the recital in the instrument tendered was too large, and, therefore, that it was not such an one as the defendant was bound to execute. Manning v. Bailey, 2 Ex. 45; 18 L. J., Ex. 77.

Another plea, that the plaintiff was not ready and willing to release the defendant:—Held, that as the release was to be prepared by the defendant's attorney, and it was averred that no such release was prepared, the plaintiff's readiness to execute it was immaterial; and the plea was therefore bad, as raising an immaterial issue. Ib.

A., being indebted to B., entered into an agreement, not under seal, for the repayment of the money, B. to hold a policy on A.'s life as security. B. died, and her executors reckoned the debt among her assets, and paid probate and legacy duty upon it. Communications took place between the debtor and the executors on the one hand, and the executors and residuary legatees on the other hand, as to not enforcing the debt upon payment by the debtor of the probate and legacy duty thereon. The debtor did in fact pay such duties, and the executors withdrew their claim on the policy, but neither was the agreement surrendered to A, nor cancelled, nor was any release of his debt executed:—Held, that the communications amounted to an agreement to release the debt, and that the payment of the duties was a sufficient consideration. Taylor v. Manners, 35 L. J., Ch. 128; L. R. 1 Ch. 48; 11 Jur. (N.S.) 986; 13 L. T. 388; 14 W. R. 154.

Reservation in Lease, |- By a deed of even date with a lease, the lessor covenanted that the lessee should retain part of each year's rent until satisfaction of a debt due from the lessor to the lessee :- Held, that though the covenant might be pleaded at law as a release pro tanto of the rent, this was only to avoid circuity of action, and the covenant was not for all purposes a release. Ledger v. Stanton, 2 Johns. & H. 687;

An indenture of lease was made on the 28th of January, 1832, for a term of nincty-one years, reserving a rent, and containing a covenant by the lessee to execute specified improvements upon the demised premises on or before the 1st of May, 1834, or pay an additional rent. The original rent was regularly paid, and receipts given for it; but the improvements, as specified in the covenant, were never made, while other and more expensive improvements were executed to the probable knowledge of the lessors; and the additional rent was never demanded or paid. In an action in 1869 to recover twelve and a half years' arrears of the additional rent :-Held, that it was not misdirection to instruct the jury, upon the issues raised, that they were at liberty, upon the facts, to presume that a release of the covenant had been executed. *Tennent* v. *Neil*, Ir. B. 5 C. L. 418-Ex. Ch.

A jury may be instructed that they are at liberty, upon evidence of long-continued nonobservance, to presume a release of a covenant, where, consistently with the evidence, the release to be presumed might have been executed before the accrual of the breach complained of. Ib.

Acknowledgment in Deed.]—An acknowledgment in a deed by a vendor that the purchasemoney has been paid, and that the vendor is therewith fully satisfied, amounts to a release.

Faweus v. Porter, 3 Car. & K. 309.

Action for dividends sold and assigned. the trial it appeared that the plaintiff agreed to sell to the defendant certain dividends for 1751., but after the bargain was made, it was found that an order of the Court of Chancery was necessary before the dividends could be received by the defendant, and a dispute having arisen as to which party was to pay the costs of obtaining this order, it was agreed that the deed of transfer should be executed, and the question of costs referred to two solicitors. The deed was accordingly executed, and 1251, paid to the plaintiff. The deed, however, stated that the whole purchase-money was paid, and contained a release in the usual way:—Held, that the plaintiff could not recover the remainder of the purchase-money, as the debt only accrued upon the execution of the deed, and at the same time the debt was released Baker v. Heard, 5 Ex. 959; 20 L. J., Ex. 444.

Testamentary Declarations.]-" I return A. his bond," in a will, is not a release, but a legacy, and having lapsed, the bond remains in force against a surviving co-obligor. Maitland v. Adair, 3 Vcs. 281.

Parol Expression of Intention.] entitled to a bond into which B. had entered to secure payment of a sum of money. B, was about to marry, and A. being informed of that fact, told him, "I will not distress you about the bond; I have given it up; I shall never enforce it"; but on being requested to give up the bond, she said, "No, I will be trusted, but he may rely on my word." B. married. A. afterwards married, and her husband and herself put the bond in suit. B. filed a bill in equity to restrain their proceedings, alleging that he had married on the faith of the promises made by B. : -Held, that he was not entitled to an injunction. for that what passed between the parties was neither a legal contract nor a misrepresentation of facts, but only an expression of an intention, the performance of which could not be enforced. tor is bound to make good. Yeomans v. Williams, Jorden v. Money, 5 H. L. Cas. 185; 23 L. J., Ch. 865. 35 Beav. 130; 35 L. J., Ch. 283; L. R. 1 Eq. 184.

A testator wrote in his account book, opposite an entry of two debts owing to him by his brother, one being due upon mortgage and the other upon a promissory note, the words, "Not to be enforced." He received interest upon both debts for several years after the date of the entry, and up to the time of his death. The document which contained the words referred to was not propounded as testamentary :-Held, that this memorandum of the testator did not amount to a discharge of either of the debts. Peace v. Hains, 11 Hare, 151; 17 Jur. 1091.

Semble, the eases in which the court has held a debtor liberated from his obligation to pay a debt which once existed, and from which he has not been discharged by any testamentary instrument, arc, first, where the act or declaration relied on creates an immediate discharge, which the debtor might plead as a release, or by way of accord and satisfaction at law, or which he might enforce in equity as against the creditor; second where the discharge, though not immediate and absolute, but conditional, becomes perfect by the condition having in the event been performed; third, where the creditor intended to discharge the obligation at his death, and communicated that intention to those who would, under this disposition, take or represent his interest upon his death, and relied upon their fulfilment of his intention, and, fourth (in strictness belonging to another class of cases), where the transaction supposed to create the debt or obligation is rather in the nature of an advancement by one in loco parentis, or is part of a family arrangement. Ib.

A. being indebted to B., C. and D., three sisters, who were his near relations, partly on his own account, and partly as executor of his father, executed to them a bond for 5007. At the time of the giving of the bond, A. objected to give it, and agreed to do so only on a verbal representation, that it was not intended to be enforced unless B., C. and D. should come to want, an event which did not happen. The bond remained in the hands of the three till the death of B., and after her death in the hands of the survivors, and after the death of C. in the hands of D., whose property (by mutual arrangements) it was at the time of her death. On the bond was found the following indorsement; "This bond is never to appear against A. Witness, C., D." It was not made clear that C.'s name was written by herself; it was said that D. had written it. It was however, proved, that if D. had written it, she did so with the authority of C. :- Held, that without saying whether the indorsement amounted to a release, which was a legal question, there was an equity under the circumstances against enforcing the bond; that if put in suit, the action would be restrained; and that there was nothing due on the bond to the estate of D. Major v. Major, 1 Drew. 165. Mere voluntary declarations, indicating the

intention of a creditor to forgive or release a debt, if they are not evidence of a release at law do not constitute a release in equity; unless, therefore, there be a consideration or some other equitable means of distinction, equity, in such a case, follows the law. Cross v. Sprigg, 6 Hare, 552; 18 L. J., Ch. 204; 13 Jur. 785.

A voluntary declaration by a creditor that he

intends to release his debtor from a debt, though not amounting to a release at law, may nevertheless be held in equity to be a representation which the credi-

R. G. having died intestate, possessed of considerable personal property, and entitled, after the death of his wife, to the principal of certain bank stock, standing in the name of a trustee; his brother, by letter, expressed his intention of relinquishing his share of the intestate's estate to the said widow, executed to the trustee (transferring to the widow) a release of the bank stock, and directed the preparation of a release of the general personal estate, the execution of which was prevented by his death, but his wish to execute it continued to his last hour; the release of the stock is effectual in favour of the intestate's widow; but the intention to relinquish the share of the general personal estate not being perfected, amounts not to a gift, and she, as administratrix, must account to the representatives of the brother, but without interest. Hooper v. Gondwin, 1 Swanst, 485; 1 Wils. 212; 18 R. R. 125.

Notwithstanding declaration of the testator to his executor that he never meant to call for payment of a promissory note, it was held part of the assets, which were insufficient for the legacies. a charge on the real estate failing for want of a proper attestation of the will, Byrn v. Godfrey,

Ves. 6; 4 R. R. 155.

C., who acted as the confidential adviser of a testator, was the obligor in a bond to the testator for 2,0001, conditioned to be void on the payment of that sum within six months after demand. The executors demanded payment of C, which he resisted on the ground, first, that he never received more than 1,500l; and, secondly, that what passed at an interview between himself and the testator amounted to a release of all obliga-tion in respect of the instrument. The court being of opinion that the evidence of what passed at the interview amounted to no more at the utmost than an intention to deliver up the bond as an act of bonnty, which intention was never fulfilled :-Held, that much more was necessary to establish the release of a debt, and payment of the debt was decreed. Woodward v. Humpage, Inspick, In rc, 5 L. T. 382.

Destruction by father of security given by sons for money advanced :- Held, under the circumstances, an advancement and release of debt. Gilbert v. Wetherell, 2 Sim. & S. 254; 3 L. J.

(o.s.) Ch. 138: 25 R. R. 203.

A legatee, son-in-law to the testator, was held entitled to his legacy discharged for debts due by him to the testator, and a debt for which the testator was his surety, upon evidence from the testator's accounts, letters and memoranda in his handwriting. Eden v. Smyth, 5 Ves. 341; 5 R. R. 60.

Circumstances under which a proposed codicil in the testator's handwriting, but not admitted to probate, was held not to operate (according to its stated effect) in discharge of the debt due from the legate to the testator. Observations upon Eden v. Smyth (5 Ves. 341; 5 R. R. 60). Chester v. Urwick, 23 Beav. 404.

, being indebted to his mother, and being under an obligation to execute a security to her, refused to do so. The mother then promised to bequeath the debt to her son if he would execute the security. This was done, but the mother died without having bequeathed the debt :--Held, that the promise to bequeath could not he enforced in equity, and that the debt formed part of the mother's estate. Luxmore v. Clifton, 17 L. T. 480; 16 W. R. 265.

1,100% from his step-mother, who lived in his against the estate of the debtor after his decease,

house, paying 2121, 10s. a quarter for board; and it was agreed that the debt should be paid off by a deduction of 1001, from each quarter's payment. Deductions of this amount were made for two quarters, but on the third quarter-day the creditor refused to make any further deduction, and paid the full amount of 2121. 10s., and continued down to the time of her death (which took place more than four years afterwards) to pay to B. the like quarterly sum. B, was appointed sole executor of his step-mother, and proved the will: -Held, that the debt was gone; first, because the appointment of B. as executor released the debt at law, and any claim in equity was rebutted by evidence of a continuing intention on the part of testatrix to give; and secondly, because the intention of the testatrix to give B, the 9001, was completed by nine quarterly payments of 212*l*, 10s, each. *Strong* v. *Bird*, 43 L. J., Ch. 814; L. R. 18 Eq. 315; 30 L. T. 745; 22 W. R. 788.

Testator gave his brother and nephew legacies, and appointed them executors, but did not dispose of the residue; they were indebted to him in unequal sums : this is no release of the debts, and they are trustees for the next of kin as to the residue. Curey v. Goodinge, 3 Bro. C. C.

Joint and several Liability-Bankruptcy of one. ]-A release to one of several persons jointly or jointly and severally liable is a release to all; but where the alleged release is informal and not under seal, it is a question of fact to be deter-mined on all the circumstances of the case whether a general release was intended to be given. Where one of several persons jointly and severally liable had become bankrupt, and the alleged release was given to his trustee in bankrnptcy:-Held, that, as the joint liability had become several by the bunkruptcy, and the bankrupt's estate was severally liable only, the release could not under any circumstances be a release to the other persons liable; that the facts shewed no intention to give a general release, but merely to compromise a right of proof against the bankrunt's estate. Wolmershausen, In re, Wolmershausen v. Wolmershausen, 62 L. T. 541; 38 W. R. 537,

Other Cases. ]-Courts of equity will presume a release within the same limits of time within which juries will be directed to presume it, whether any Statute of Limitations is applicable to the case or not. Baldwin v. Peach, 1 Y. & C.

A debtor conveyed his life interest in certain property in trust for creditors, parties to the deed; and the ereditors, in consideration thereof, granted to the debtor licence to reside and attend to his affairs in any place he might think proper, without suit or molestation, in his person or his goods, chattels and effects, by any such creditors; and that, in case of any suit or molestation by any of such creditors, contrary to the true intent and meaning of such licence, the debtor should be wholly released and acquitted of the debt, and the deed might be pleaded in bar :- Held, that this amounted only to a licence by the creditor to the debtor to live unmolested, and did not operate as a release of the debt or a discharge of the debtor's estate; and that neither a suit by creditors against the trustees and the debtor to enforce the trusts of the deed, By Appointment as Executor.]—B. borrowed nor an administration suit by the creditor

the trust deed or amounted to an acquittance of the debt. Held, also, that the existence of the trust deed, and the covenants and licence therein contained, prevented the operation of the Statute of Limitations during the life of the debtor, in respect of the debts, for the payment of which the trust was created. O'Brien v.

Osborne, 10 Hare, 92; 16 Jur. 960. S. L., to whom, by settlement (executed in 1800), an annuity of 2001. by way of jointure, was secured in the event of surviving her husband, continued, for many years after his death in 1809, to receive payment from her step-son, H. A. L., the inheritor of the estate upon which the annuity was charged. In 1830, the annuity being then two years in arrear, S. L. wrote a letter to her step-son, wherein she stated that to serve him she would feel happy in thenceforth giving up the 2007, annuity, which he had paid her since her husband's death, and would also make him a prescut of the 400*l*., the arrears then due. In 1834 H. A. L. died. By his will he charged his real estates with the payment of an annuity of 2001, to his step-mother. By a codicil he substituted a reduced annuity of 1001. for the annuity of 2001, granted by his will, accompanied by a declaration that it was upon condition that S. L. should not seek to raise the annuity of 2001, secured by the settlement of 1800. S. L. died in 1837, having previously made her will, and thereby appointed the plaintiff her residnary legatee and sole executor. It appeared that S. L. had never demanded either the annuity secured by the settlement or that granted by the will after the date of her letter in 1830. The plaintiff having filed a bill to raise the arrears of the annuity secured by the settlement, the court dismissed it, so far as it claimed relief in respect of the arrears which accrned in the lifetime of H. A. L., but directed an account of what was due from his death to the death of S. L. Langley v. Langley, 2 Ir. Eq. R. 313.

The assignce of a lease executes a bond to indenuify the original lessees against the covenants contained in the original lease; he afterwards quits the country; the house is left untenanted, and the original lessees are obliged to pay the rent reserved; the assignee having subsequently returned to England makes a compromise with them for the sum then due, in respect of his nonperformance of the covenants, and shortly afterwards goes abroad; they demise the house to a person who continues in the possession till the end of the term :-Held, that this mode of dealing with the premises does not give the assignee any title in equity to relief against the legal effect of his bond. Anderson v.

Bailey, 1 Russ. 313. Deed of release treated as a mere settled account, and liberty given to surcharge and falsify on proof of one or more mistakes in the recitals. Dundonald (Lord) v. Masterman, 38 L. J., Ch. 350; L. R. 7 Eq. 504; 20 L. T. 271; 17

### ii Consideration

What is. - In a deed executed, upon a separation between a husband and wife, by them and the trustees of their marriage settlements, the

for payment of so much of the debt as the trust | future | property acquired | by the wife. The property was insufficient to pay, was barred by | release of the husband is a good consideration for the grant of the annuity by the wife, and the court will enforce the payment of the annuity. Logan v. Birkett, 1 Myl. & K. 220; 2 L. J. Ch. 52.

As to consideration for a release, see the case of Nocl v. Rochfort, 5 Bli. (N.S.) 667; 4 Cl. & F.

Where a testator to whom a party was in-debted in one sum on a note and another on a bond, in his will bequeathed to a son part of the entire debt, and afterwards by codicil revoked the bequest, and by endorsement on the bond declared that he thereby acquitted the obligor of the sum, and stated that in consequence he had revoked by codicil of the same date the bequest to the same amount :- Held, that being a volunteer, and the release without consideration, he was not entitled to come into equity for relief. Tufnell v. Constable, 8 Sim. 69.

A., being entitled, under a deed of 1784, to a charge affecting the estate of B., in 1814 executed a release in order to enable B, to sell the estate for the payment of creditors claiming under a trust deed of 1809; a decree to account and report the priority of incumbrances having been made :- Held, that the charge of A. retained its priority under the deed of 1784, except as to purchasers who had bought upon the faith of the release; it appearing from depositions in aid of the account, that no consideration was paid upon the execution of the release, and that the charge had not been satisfied, although the release had not been set aside or impeached in any suit instituted for that purpose:—Held, also, that the acceptance by A. of a bond with warrant, though accompanied by a release, could not under the circumstances be considered as a substituted security. Hatchell v. Cremorne, Ll. & G. t. Plunk, 236.

In a defence founded upon an allegation that the plaintiff has released or assigned his rights for a pecuniary consideration paid to him, it is incumbent on the defendant to prove that the consideration was in fact paid. Vandaleur v.

Blugrave, 6 Beav. 578.

A., being indebted to B., entered into an agreement, not under seal, for the repayment of the money, B. to hold a policy on A.'s life as security. B. died, and her executors reckoned the debt among her assets, and paid probate and legacy duty upon it. Communications took place between the debtor and the executors on the one hand, and the executors and residuary legatees on the other hand, as to not enforcing the debt upon payment by the debtor of the probate and legacy duty thereon. The debtor did in fact pay such duties, and the executors withdrew their claim on the policy, but neither was the agreement surrendered to A. nor can-celled, nor was any release of his debt executed: -Held, that the communications amounted to an agreement to release the debt, and that the payment of the duties was a sufficient consideration. Taylor v. Manners, 35 L. J., Ch. 128; L. R. 1 Ch. 48; 11 Jur. (N.S.) 986; 13 L. T. 388: 14 W. R. 154.

## iii. Fraud and Ignorance of Rights.

Fraud by Releasee-Effect. ]-In an action for wife charged her separate property, comprised in the settlements, with the payment of an pleuded that the plaintiff had, upon payment of an annuity to the husband, and the husband areleased his marital rights, in respect of any facts and of the legal effect of the deed of release : Snowe, 2 De G. & Sm. 321. -Held, that the fraudulent misrepresentation alleged invalidated the deed. Hirschfield v. L. B. & S. C. Ry., 46 L. J., Q. B. 94; 2 Q. B. D. 1; L. B. & S. C. Ry, 40 L. J., Q. D. 34; 2 G. D. J.; 35 L. T. 473. And see Stewart v. G. W. Ry., 2 Dr. & Sm. 438. Affirmed 13 L. T. 79; Lee v. Laneaslive and Yorkshire Ry., L. R. 6 Ch. 527; 25 L. T. 77; 69 W. R. 729.

A release, ex vi termini, imports a knowledge in the releasor of what he releases; and therefore where executors (who had taken the opinion of counsel, which they had not communicated) obtained a release of the orphanage share from the husband of a freeman's daughter, they were deered to account that the parties might elect, the length of time and alleged loss of vouchers being no sufficient bar to such account. Salheld v. Vernon, 1 Eden, 64.

A release from the younger brother to the elder, of certain premises which had been devised to him by his father, executed in consequence of a threat to file a bill, set aside in favour of creditors. *Peat* v. *Powell*, Ambl. 387; 1 Eden, 479.

On suspicious circumstances in the answer, a general account was decreed against a steward, notwithstanding a receipt in full, which was allowed only as proof of a particular payment, not of a general release or discharge upon an account stated; though under eircumstances it might have that effect, as upon proof that the principal never would give any vouchers, and an account kept by the steward. Middleditch v. Sharland, 5 Ves. 87.

Releases set aside as fraudulent; and that, too, though there was no express prayer that they might be set aside. Williams v. Smith, 7 L. J. (0.S.) Ch. 129.

Before accounts which have been settled, and in respect of which a release has been executed, can be reopened, a case must be shewn for setting aside the release, nor is the existence of usurious items in the account of which both parties were cognisant sufficient ground for setting it aside. Very strong evidence is required for setting aside, on the ground of undue influence, a transaction between two persons actively engaged in business and competent to carry it on. Fowler v. Wyatt, 24 Benv. 232

A release of the equity of redemption was set aside at the instance of the mortgagee, he having been induced to accept of it, and in consideration thereof to covenant for the payment of a perpetual annuity to the mortgagor, and to give the mortgagor a perpetual right of redemption, by means of misrepresentations by the mortgagor and his solicitor (who was also the solicitor of the mortgagee) as to the title of the mortgagor, the value of the premises, and the nature of the contract he was entering into. Roddy v. Williams, 3 Jo. & Lat. 1.

Release of an annuity given by an illiterate person without professional assistance and for inadequate consideration set aside after several years, the price being held inadequate as to the defendant, by whose covenant the annuity was secured, although, considering the nature of the security, it might not have been so from a stranger. Garrey v. M'Minn, 9 Ir. Eq. R. 526.

Where a person represents to another that he is of age, and executes to him a release upon which the latter acts :- Held, that he could not afterwards impeach the validity of the release on v. Arash, 9 Bing, 341; ± M. & So., 162; 2 L. J., the ground of his minority, and that it was C. P. 17. See Brobles v. Sheart, 1 P. & D. 615; immaterial whether he was aware or not of the [9 A. & E. 85‡; 8 L. J., Q. B. 184.

been obtained by frandulent misrepresentation of incorrectness of the representation. Wright v.

Fraud by Releasor. ]--Where an action is commenced by A. in the name and with the consent of B., who is legally entitled to maintain the action on behalf of A., a release by B. pending theaction, and a plea founded on it, will, on motion made on behalf of A., be set aside by the court. Hickey v. Burt, 7 Taunt. 48; 17 R. R. 440.

A pauper plaintiff having, behind the back of his attorney, and under circumstances shewing a desire on his part to deprive him of his costs, agreed with the defendant, in an action for unliquidated damages, to execute a release, and the defendant having pleaded such release pais darrein continuance, the court, at the instance of the attorney, set aside the plea. Wright v. Burroughes, 3 C. B. 344; 4 D. & L. 226; 15 L. J., C. P. 277; 10 Jur. 860. And see Jones v. Bonner, 5 D. & L. 718; 2 Ex. 230; 17 L. J., Ex. 343; Furnival v. Weston, 7 Moore, 356; 24 R. R. 687.

Upon a very strong case of fraud, not otherwise, a common law court will control the legal wise, a common wave out a consequent power of a co-plaintiff to release pending the action. Jones v. Horbort, Taunt. 421; 18 R. R. 520. S. P., Arton v. Booth, 4 Moore, 192; 21 R. R. 740; Monatstephen v. Breake, 1 Chit, 300; R. R. 740; Mountstephen V. Bronke, I Chit. 530;
22 R. R. 805; Lloyd v. Meeking, 9 L. J. (0.8.) C. P.
50; Wells v. Gutteridge, 1 L. J. (0.8.) K. B. 248.
Where in an action by a provisional committee

suing on behalf of a railway company, one of the plaintiffs, who held fifty shares in the under-taking, executed to the defendant a release of the cause of action, the court refused to set aside the plea, the releasor having a valid interest in the concern, and not being a mere trustee. Rawstarno v. Gandell, 15 M. & W. 304; 4 Railw. Cas. 205; 3 D. & L. 682; 15 L. J., Ex. 291; 10 Jnr. 294.

After declaration the plaintiff executed a release to the defendant, and gave his own attorney notice not to proceed; the release was pleaded; to this plea there was a replication confessing the release; judgment was signed for the costs and execution issued. Notice was then given to the sheriff by the plaintiff not to execute process on peril of being treated as a trespasser, and thereupon the plaintiff's attorney obtained an order costs:—Held, that this was a proper case for the interference of the court, and that the form of the order was good. Games, Ex parte, 33 L. J., Ex. 317.

Where there are several plaintiffs, and one fraudulently gives a release to prejudice the real plaintiff, and that release is pleaded, the court will set aside that plea, and order the release given to be delivered up to be cancelled. Burker v. Richardson, 1 Y. & J. 362; 30 R. R. 795.

To induce the court, on a summary application. to set aside the plea of a release by one of two coplaintiffs, it must be clearly shown that the release had been obtained by fraud between the releasor and the defendant. Crook v. Stephens, 7 Scott, 48; 5 Bing. (N.C.) 688; 9 L. J., C. P. 209. S. P., Wild v. Williams, 6 M. & W. 490; 9 L. J., Ex. 277. Fraud upon the releasor is not a ground for

setting aside the plea, since that may be replied. Ib. To a plea that the plaintiff had released one of two joint obligors, the plaintiff replied that the release was given with an undertaking on the part of the other obligor that the release should not operate on his discharge :- Held, ill. Cocks

release which is good in law, but in the exercise of its equitable jurisdiction it may interfere to prevent a defendant from pleading a release when it would be a manifest fraud on a third party seeking to enforce a demand against the defendant, and where the defendant himself is a party to the frund. Phillips v. Claggett, 11 M. & W. 84; 2 D. (N.S.) 1004; 12 L. J., Ex. 275.

A general release given by a trustee, in fraud of his trust, is void; therefore, where an action had been brought in his name for the benefit of his cestui one trust, the court ordered a release of the cause of action to be delivered up to be cancelled and a plea of the release to be set aside. Munning v. Cox., 7 Moore, 617; 1 L. J. (o.s.) C. P. 36.

Ignorance of Rights. ]-Where a release had been executed and the parties have, for a long space of time, acquissed in it, the mere proof of errors will not, in the absence of fraud, induce the court either to set it aside, or to give leave to sureharge and falsify; but the nature and amount of the errors alleged and proved may have a very considerable effect in the consideration of the question whether the release was fairly obtained. Millar v. Craig, 6 Beav. 433.

A party who, upon a compromise, had executed a general release, claimed relief on the ground that a large item in which he was interested had been, by mistake, omitted in the account :-Held. that he was entitled to relief, but that to obtain it the release must be wholly set aside. Pritt v. Clay, 6 Beav, 503.

A release executed under a mistake held inoperative. Hare v. Becker, 12 Sim. 465; 11 L. J.,

Ch, 153; 6 Jur. 93. A release which had been executed by a person ignorant of his rights, and where it was proved that he had no intention of releasing such rights, set aside. Phelps v. Amoutt, 21 L. T. 167.

In 1841, 4,500l, was advanced by a testatrix to her son B., but no scenrity or acknowledgment was executed by B. No interest was directly paid, but an allowance covenanted to be paid to B. by the testatrix was set off against the interest, which, at 4 per cent., came to the same amount. In 1843 the testatrix made a codicil, containing a declaration that the 4,500%, was due and owing from B., and that his appointment as executor was not to have the effect of cancelling the debt. In 1854 a further codicil was made, revoking the appointment of B. as exeentor, but confirming the will and codicils in all other respects. In 1855 the testatrix wrote to B, as follows: "You must know when I gave you the money I never could intend it as a loan, but as an absolute gift; and I hope you will live many years to enjoy it" -Held, that this letter being written under a misapprehension of the nature of the original transaction, and being inconsistent with the previous conduct of the parties, did not discharge the debt thereby created. Knapp v. Burnaby,

Bequest to A. for life of annuity of 1001., "by interest arising out of money to be vested for that purpose by the executors" in public funds or other good security, and after his death "the capital stocks so purchased" to A.'s children. By a codicil the testator said, "What I mean in my will by seeuring money in the public funds is to purchase a capital stock in the consols by my executors" :- Held, that the executors might either purchase in the consols or in other good security, but having done neither in the life of A ..

A court of law has no jurisdiction to set aside a | his children were entitled to 3,3337, 6s. 8d. consols, and not to 2,000*l*. cash. A. died 1843, and his children, on receiving 2,000*l*., executed a release, which, after reciting that, according to the trust, 2,000%, had been set apart to answer the annuity, they released the representative of the testator from all claims and demands. In 1854 the children instituted a suit to recover the amount of consols which would be required to produce 100L.—Held, that having regard to the situation in life of the plaintiff, the inaccuracy of the recitals, and the absence of professional assistance, they were not barred by lapse of time.

Aspland v. Watte, 20 Beav. 474.

A testator bequeathed two legacies of 2,000%. The executor rendered an account of the estate to the plaintiff, one of the legatees, shewing it to be about 1,750%, in the whole. The legatec, on receipt of half, executed a general release. Afterwards it appeared that there was a further asset of 2,000l, belonging to the estate which had been omitted :- Held, that the release was binding pro tanto, and the executor was ordered to pay to the plaintiff a moiety of the 2,000l, Anon., 31 Beav, 310.

Lapse of Time.]—A release to a trustee was set aside after the lapse of more than twenty years. and after the death of the trustee, on evidence of the plaintiff (corroborated by the terms of the deed) that it was executed in error. In such a case it is not necessary to prove fraud. Garnett, In re. Gandy v. Macaulay, 31 Ch. D. 1-C. A.

Where Rights of Third Parties intervene. 1-A mortgagor induced his second mortgagee to release the mortgaged estate in consideration of the substitution of other securities; and then created a third mortgage on the estate so released. Afterwards he created a fourth mortgage on the estate. This mortgage was made with the concurrence of the third mortgagees, who joined to postpone their security, and who received part of the money raised on the security of the fourth mortgage in part discharge of the moneys due to them upon their own seemity. The mortgager then died, and it was for the first time discovered that the scenrities substituted in the hands of the second mortgagee, and which were the consideration for the release executed by him, were forgeries. The fourth mortgages sold the mortgaged estate, and after paying off the first mortgage retained the surplus in part discharge of the moneys due to them on their security. The net value of the estate, after paying off the first mortgage, having been thus ascertained, the second mortgagee filed his bill against the third mortgagees, seeking to recover the amount of that not value for them, they having received, as above mentioned, part of the moneys raised on the security of the fourth mortgage to an amount exceeding the net value of the estate :- Held, that he was not entitled to such relief. Eyre v. Burmester, 4 De G., J. & S. 435; 33 L. J., Ch. 652; 10 Jur. (N.S.) 687; 10 L. T. 673; 12 W. R. 993. And see 10 H. L. Cas. 90 : 6 L. T. 838.

S. being indebted to B., and other persons, agreed with B. for a further advance on a mortgage of various estates in Ireland. By the deed S. covenanted that the lands of K., which formed part of the security, were free from incumbrances, and for further assurance. No title was furnished by S., nor search in the registry made by B. Before the entire advance was paid over to S., it was discovered that the lands of K. were subject to a mortgage to E. B. thereupon applied to S., who tolk him that a by would recess the many his (S.'s) request, on which assurance B. paid over the residue of the loan to S. S. subsequently, by fraud, procured a release from E., of which release B. was made aware, but was ignorant of the fraud. The fraud was discovered after some months had claused :-Held, that B, was a purchaser for value of the release, as having been procured by S. in pursuance of the covenants in the mortgage deed, and that being ignorant of S,'s fraud he was entitled to retain the advantage which the release had given him. Burmester, In re, 11 Ir. Ch. R. 1.

Whole Transaction must be Set Aside. ]-A party who, upon a compromise, had executed a general release, claimed relief on the ground of a large item, in which he was interested, having by mistake been omitted in the account :-Held. that he was entitled to relief, but that to obtain it the release must be wholly set aside. A. B., the representative of a deceased partner, having filed his bill against C. D., the surviving partney, for an account, A. B., in consideration of 500%, released C. D. from all claims, and the bill was dismissed. By mutual error a debt of 2,0001, owing to the partnership, but which was not then known to exist, was omitted in the consideration by both parties. C. D. afterwards received it:—Held, that A. B., notwithstanding the release, was cutitled to his share of the debt. but that to obtain it the whole account must be reopened. Pritt v. Clay, 6 Beav. 503.

In an action by the plaintiff against the defendant for alleged breaches of covenants contained in their deed of partnership, and for fraud alleged to have been committed by the defendant in obtaining a deed of dissolution thereof; it appeared that as regards the breaches the plaintiff had, by the deed of dissolution, in consideration of the defendant having given up the whole of the partnership assets to the plaintiff, released the defendant from all matters and things whatever touching or concerning the joint trade, without prejudice nevertheless to the covenants and agreements in the deed of dissolution contained :- Held, that as the release could not be separated from the rest of the deed of dissolution. and as the plaintiff had not disaffirmed, and was not in a condition to disaffirm or rescind the contract, of which the release formed part, the same was binding upon him. Urquhart v. Mac-pherson, 3 App. Cas. 831—P. C.

Where a release in terms extends to sums of money which the release has openly, but without justification, taken from the releasor, the latter campot file a bill in equity to compel the releasee campor me a but in equity to compet the reneases to pay these sums, though at the time the release was given, the releasor was, in fact, ignorant of the fraud committed by the release. The remedy of the releasor in such a case is to have the release set aside in toto; and if, in consequence of dealings subsequent to the release, that cannot be done, the releasor can have no relief in equity. Skilbeek v. Hilton, L. R. 2 Eq. 587.

And see further TRUST AND TRUSTER.

c. Construction and Operation. i. In general.

Restraining Operation by Recitals.]-See col. 400, supra.

Unexpected Accession of Property not In-

who told him that E, would release the lands on | by an executrix, persons interested in the estate gave a release of all claims on the estate to the executrix. It was afterwards discovered that property in which the testator was entitled to a share had during his life been sold at an undervalue. The executrix instituted and succeeded in a suit to set the sale aside, and recovered a large sum of money as part of the testator's estate :- Held, that this money was not included in the release, and that the persons who gave the release were entitled to share in the money so recovered as part of his estate. Howkins v. Juckson. (2 Mac. & G. 372) distinguished. Turner v. Turner. Hall v. Turner, 14 Ch. D. 829; 42 L. T. 495; 28-W. R. 859; 44 J. P. 734.

W. H. was entitled for life to the interest of certain residuary estate, to the principal of which the wife of A. J. was entitled absolutely. W. H. being largely indebted to A. J., executed an indenture, assigning to A. J. all his, W. H.'s, interest in the said residuary estate. It was subsequently discovered that the residuary estate consisted partly of a fund, the existence of which was miknown to either of the parties at the time of the execution of the indenture. W. H. thereupon filed a bill which, not complaining that the indenture had been executed by fraud, sought to exclude from its operation the additional fund by treating the indenture merely as a security for the amount then due from W. H. The Lord Chancellor, however, dismissed the bill, holding that the words of the indenture were sufficient to pass the interests of W. H. in the fund in question, and that no case was made on the pleadings for reforming the instrument. Howkins v. Juckson, 2 Mac. & G. 372; 2 Hall & Tw. 301; 19 L. J., Ch. 451.

By a deed, reciting that all the testator's assets. save a small sum retained to meet contingencies, and some doubtful debts, had been received by the executrix and applied in payment of debts, and that there remained only a sum sufficient topay part of the legacies, the legatees, in con-sideration of the sums paid on account of these legacies, released the executrix from all claims which they then had, or thereafter might have. against her as executrix, or against the residuary estate :- Held, that the deed did not operate to release the right of the legatees to be paid out of further assets which afterwards came, unexpectedly, to the hands of the executrix. Lawe v. Lawe, Ir. R. 8 Eq. 327.

As to Strangers. ]-A deed inter partes cannot operate as a release to strangers; therefore, a charter-party between A, and B. in consideration of a former charter-party between A and C., which former charter-party in consideration of the freight B. was to pay, was thereby declared null and void, A. agreeing to caucel the first in consideration of the second, and C. being thereby acquitted of all claims which A. might have against him in virtue of the first charter-party, does not operate as a release from A. to C. of the first charter-party. Storer v. Gordon, 3 M. & S. 308 : 15 R. R. 499.

Where a debt, not assignable at law, has been equitably assigned for value, and the debtor has had notice of the assignment, all payments which he may thereafter make to the purchaser on account of the debt are well made so far as the debtor is concerned, although the purchaser may have sold the debt, provided the debtor has no notice of the sale; nor is it absolutely necessary cluded. ]-In consideration of certain payments for him, on making such payment, to require production of the original assignment. The pur- | be void, and the suits may proceed. Hull v. chaser of a debt may execute to the debtor a Levy, 44 L. J., C. P. 89; L. R. 10 C. P. 154; 81 release for value of the debt, valid as against the L. T. 727, 28 W. R. 398. assignce from the purchaser, if the debtor has not, at the time when the release is executed. notice of the assignment, Stocks v. Dobson. 4 De G., M. & G. 11; 22 L. J., Ch. 884; 17 Jur. 539.

Void or Voidable.]—A deed of inspectorship and composition made between a debtor and his creditors in Great Britain contained a covenant that in a certain event the debtor would, if required by the inspector, assign all his property to the inspector for the benefit of the creditors ; that upon such assignment the inspector should give a certificate that the debtor had so assigned, and that thereupon the debtor should be released from his debts. The deed contained a provise that it should "cease, determine and be void" The deed contained a proviso if all the creditors in Great Britain to a certain amount did not excente it within six months from its date. The debtor was duly required by the inspector to execute an assignment, and did so, and received a certificate :- Held, that the deed was not void, but voidable only; that the release constituted a good defence against a creditor who had excented the deed, and who, having had notice that all the creditors had not signed the deed, had endeavoured to obtain payment of a dividend out of the property assigned to the inspector. Dunn v. Wyman, 51 L. J., Q. B. 623.

Semble, the proviso was inserted in the deed for the benefit of the debtor, and a creditor who had executed could not take advantage of it. Ib.

Conditional or Absolute. ]-The estate of an intestate was divided between the persons claiming to be creditors pari passa, and they executed a release to the administratrix from all claims. A creditor executed the deed in respect of a particular debt, which was stated. Afterwards he made a further claim against the estate of the administratrix, who had charged it with the payment of the intestate's debts :-Held, that it was barred by the release. *Bisset* v. *Burgess*, 23 Beav. 278; 26 L. J., Ch. 697; 2 Jur. (N.S.) 1221.

A release of a debt "in like manner as if the debtor had obtained a discharge in bankruptey' is an absolute release, which, if given without the surety's consent, discharges the surety. Cragoe v. Jones, 42 L. J., Ex. 68; L. R. 8 Ex. 81; 28 L. T. 36; 21 W. R. 408.

A release reserving rights against a surety must be such that the surety's right to sue the debtor, if he pays the debt, is retained. Ib.

There may be a good release with a condition subsequent. Newington v. Levy, 39 L. J., C. P. 234. Affined 40 L. J., C. P. 29; L. R. 6 C. P. 180: 23 L. T. 595; 19 W. R. 473—Ex. Ch.

Therefore a plea of a composition deed executed according to the Bankruptcy Act, 1861, in which the creditors released the debtor from their respective debts, is a valid answer to an action for any such debt, although the release is made subject to be avoided by nonpayment of the composition on a subsequent day. Ib.

Where such deed is made after action, and the plea therefore is to the further maintenance, the plaintiff may reply that the release had become avoided by nonpayment of the composition, after

avoided by honpayment of the composition, at the plea has been pleaded. Ib.

A release from suits may be made subject to a condition subsequent, so that if such condition subsequent is not complied with, the release will plaintiff in 1421. 9s. 7d., an arrangement was

Hall v.

Purpose and Intent. ]-A lease must be construcd according to the particular purpose and intent for which it was made; as, where A, and B., being in partnership, and in insolvent eiremistances, A. alone gave a general release by deed to the plaintiffs, to whom himself and B. were jointly indebted, with provisions that it should not operate to release or prejudice any demands which the plaintiff had against B., either separately or as a partner with A., on the joint effects of A. and B., or either of them, and that they might commence an action either against A. jointly with B., or A. separately, for the purpose of enabling the plaintiffs to recover payment from the joint estate of A. and B., or from B.'s separate effects; and the plaintiffs brought an action for money paid against both, and A. pleaded the release, on which the plain-tiffs set it out in their replication, and averred that the action was prosecuted against both, for the purpose of enabling the plaintiffs to enforce payment from A. and B, either from their joint estate, or separate estate of B .: - Held, that the action was anthorised by the deed. Solly v. Forbes, 4 Moore, 448; 2 Br. & B. 38; 22 R. R. 641.

Where the words of a release, executed according to the directions of an award, might extend to matter the parties did not intend the arbitrators to adjudicate upon, and on which they did not adjudiente, the generality of the words will be restrained by the intention of the parties. Upton v. Upton, 1 D. P. C. 400.

Though a release is general in its terms, the court will limit its operation to matters contemplated by the parties at the time of its execution. Lyall v. Edwards, 6 H. & N. 337; 30 L. J., Ex. 193. General words in a release are limited to those matters which were specially in the contempla-

tion of the parties when the release was given. L. S. S. W. Ry. v. Blackmare, 39 L. J., Ch. 713; L. R. 4 H. L. 610; 23 L. T. 504; 19 W. R. 305. A release, general in its terms, limited so as not to include a particular debt unknown to exist at the time of its execution and not intended

to be released. Moore v. Weston, 25 L. T. 542. In an action by the plaintiff against the defendant for alleged breaches of covenants contained in their deed of partnership, and for fraud alleged to have been committed by the defendant in obtaining a deed of dissolution thereof, it appeared that as regards the breaches the plaintiff had, by the deed of dissolution, in consideration of the defendant having given up the whole of the partnership assets to the plaintiff, released the defendant from all matters and things whatever touching or concerning the joint trade, without prejudice nevertheless to the covenants and agreements in the deed of dissolution contained :- Held, that as the release could not be separated from the rest of the deed of dissolution. and as the plaintiff had not disaffirmed, and was not in a condition to disaffirm or rescind the contract, of which the release formed part, the same was binding upon him. Urquhart v. Macpherson, 3 App. Cas, 831—P. C.

What Debts.]—To an action for 3371. 1s. 10d. the defendant pleaded a release generally, to which the plaintiff replied non est factum. The which the plaintiff replied non est factum. facts were, that the defendant being indebted to

released on payment of 10s. in the pound to his creditors by a third party. Accordingly, a composition deed was executed by the plaintiff and the other creditors, which recited that the defendant was indebted to the several creditors, parties thereto, in the sums set opposite to their names; and such creditors, in consideration of the covenant to pay them 10s. in the pound on the amount of their debts, released the defendant from all debts then owing to them by the defendant. When the deed was executed by the plaintiff, a blank was left for the sum to be set opposite to his name. This blank was subsequently filled up, without his knowledge or authority, by inserting in it the full amount of 1s. 10d. due from the defendant to the plaintiff. The inry found that it was the intention of the parties that the deed should operate only on the balance due by the defendant to the plaintiff, after setting off the cross debt due by the plaintiff to the defendant:—Held, that the effect of the deed was to release the that the effect of the deed was to release the balance only, and not the whole debt of the 337l. 1s. 10d., and that the issue on non est factum ought to be found for the plaintiff. Facakerly v. M Kuight, 6 El. & Bl. 795; 26 L. J., Q. B. 30; 2 Jur (N.s.) 1020; 4 W. R. 677.

A release can only operate on an existing debt or liability. Askton v. Freestone, 2 Man. & G. 1; 2 Scott (N.R.) 278; 10 L. J., C. P. 53. S. P. P., Hartley v. Mowham, 5 Q. B. 247; 12 L. J., Q. B.

Judgment Debt.]—A debt of record may be discharged by a release under seal. Burker v. St. Quintin, 12 M. & W. 441; 1 D. & L. 542; 13

L. J., Ex. 144.

By a deed conveying the real and personal estate of a debtor to trustees for the benefit of his creditors, the creditors executing the deed covenanted that it should operate and cnure, and might be pleaded in bar, as a good and effectual release and discharge of all and all manner of actions, suits, bills, bonds, writings, obligations, debts, duties, judgments, extents, executions, claims and demands, both at law and in equity, which they or any of them had or might have against the debtor or his estate or effects, for or by reason of all or any of the debts or engagements to them respectively due or owing by him; such covenant not to destroy any mortgage, pledge, lien or other specific security which any creditor possessed:—Held, upon the construction of the entire deed, that such general words had not the effect of releasing a judgment previously obtained by one of the creditors who executed the deed, so as to affect the priority of the creditor as between himself and a judgment creditor who was not a party to the deed, or so as to preclude the judgment creditor who executed the deed from enforcing the rights executed the deed from enturing and against the which the judgment gave him as against the estate vested in the trustees. Squire v. Ford, 9 Hare, 47; 20 L. J., Ch. 308; 15 Jun. 619.

Plea of general release containing the words "decree and orders of the Court of Chancery," is good bar to any demand set up under a decree of that court made prior to the date of the release; and if the defendant, by his answer, denies all charges of fraud, &c., in obtaining the release, such answer is sufficient to corroborate the plea. Walter v. Glanville, 5 Bro. P. C. 555.

Jurisdiction in equity to restrain execution

made by which the defendant was to be on the ground of a subsequent release by the plaintiff at law of his claims under the judgment for a valuable consideration, paid by the defendant at law, notwithstanding that a rule obtained by the defendant at law to set aside the judgment on the ground of such subsequent release, had been discharged, and a writ of audita querela on the same ground had been set aside by the court of law. Williams v. Roberts, 8 Harc.

> Release of part of Lands.]—The decision of the Law Rep.) on the effect of a release of part of the debtor's lands from a judgment in discharging his other lands, donbted. Hundoock v. Hund-cock, 11 Ir. Eq. R, 472.

W. H. being seised of an estate in tail in Whiteacre, certain judgments were obtained against him in 1824. Upon his marriage subsequently in that year, Whiteacre was settled upon him for life, with remainders over for the benefit of the issue of the marriage, and a recovery was suffered to the uses of the settlement. In 1825 W. H., by purchase, acquired Blackaere in fee. In 1826 several other judgments were obtained against him. In 1829 the plaintiff agreed to lend W. H. 2,000L upon mortgage of his fee in Blackacre, and of his life estate in Whitenere, provided that the judgment creditors of 1824 would release Blackacre from their judgments, to which they assented; and then executed a deed-poll, which recited that W. H., being desirous to have Blackaere clear of incumbrances, had requested the judgment creditors of 1824 to release it from the incumbrances thereupon by the judgments, and that they, being satisfied that the residue of W. H.'s lands were a sufficient security for their judgments, agreed thereto, and by the operative part they released, exouerated, and for ever discharged Blackacre from their respective judgments, and from all writs of exeention and executions, and every other writ then sued out, or thereafter to be sued out, against Blackaere by virtue of their respective judgments or otherwise in relation thereto, and they agreed for their respective judgments only to indemnify W. H. for all costs, damages and expenses which should at any time be incurred by reason of Blackaere being attached in execution under those judgments: afterwards W. H. executed the proposed mortgage to the plaintiffs:—Held, that, both at law and equity, the operation and effect of the deed-poll of 1829 was to exonerate Whiteacre as well as Blackacre from the rights and remodies of the judgment creditors of 1824. Handoock v. Handoock, 1 Ir. Ch. R. 444.

Substituted Securities.]-R., on entering into partnership with a firm, procured in 1801 from N. & Co., bankers, on the security of four bonds and a warrant of attorney, a credit for 10,000%, to bring into the firm, which was afterwards exhausted in meeting bills drawn by his partners, The firm became insolvent in 1804, owing N. & Co. upwards of 120,000%, in respect of transactions, some of which were prior to R.'s joining it. In N. & Co.'s accounts the 10,000L was charged against the firm. A composition was entered into for 42,000l., whereof 10,000l. was to be paid by R., who gave a mortgage on his estate to secure the same. The remaining 32,000% was otherwise secured, and thereupon N. & Co. executed a release to the firm, releasing them, and upon a judgment against a defendant at law, every or any of them, from all claims or demands Bli. (N.S.) 483.

A., being entitled under a deed of 1784 to a charge affecting the estate of B., in 1814 excented a release in order to enable B. to sell the estate for the payment of ereditors claiming under a trust deed of 1809, a decree to account and report the priority of incumbranees having been made : -Held, that the charge of A. retained its priority under the deed of 1784, except as to purchasers who had bought upon the faith of the release; it appearing from depositions, in aid of the account, that no consideration was paid upon the excention of the release and that the charge had not been satisfied, although the release had not been set aside or impeached in any suit instituted for that purpose :-Held, also, that the acceptance by A. of a bond with warrant, though accompanied by a release, could not, under the circumstances, be considered as a substituted security. Hatchell v. Cremorne, Ll. & G. t. Plunk. 236.

A bond from the owner of an estate charged to incumbrancer, who signed a receipt for the amount, is not a substitution for the charge, but merely an additional security, and the estate is not thereby released. It is not incumbent on the creditor to prove that it was not the intention of the parties to this transaction that the bond should be a substitution of the charge, but it lies on the owner of the estate to make out that the estate is discharged. Saunders v. Leslie, 2 Ball & B. 509; 12 R. R. 114.

The wife of a partnership creditor of an intestate, being one of the intestate's next of kin, duly executed a proxy of renunciation of the administration of the intestate's effects. A few days afterwards the creditor executed a deed-poll, by which, after reciting the insolvency of the intestate's estate, and that a composition deed had been executed by the creditors, in which they had agreed that A. should have administration of the intestate's effects, and reciting that A. had executed to the creditor a bond, which the latter had agreed to accept in satisfaction of the debt, it was declared that the same when paid should be accepted by him, the creditor, in full payment and satisfaction of all and every sum and sums of money due, or owing by or from, the said intes-tate to him the said creditor on account of the partnership or any other account whatsoever, and of all claims and demands whatsoever of him the said creditor on the estate and effects of the said intestate:—Held, that this amounted to a release by the creditor of the wife's distributive share in the residue of intestate's personal estate, although such residue was not mentioned or referred to in the deed-poll. Sheffington v. Whitehurst, 3 Y. & C. 1; 7 L. J., Ex. Eq. 65.

Action on Security after Debt Released. ]-A., the purser of a mine, in order to earry it on, raised money by the deposit of a promissory note made in his favour by seven of the shareholders, and which two other shareholders had refused to sign, and applied the money so raised in paying the workmen. At a subsequent meeting of the shareholders and creditors, an assignment of the mine, in order to sell it, and pay the debts, was resolved upon, and A. then claimed to be admitted as a creditor "for money which he had raised on note of hand to pay the workmen." A deed of assignment was accordingly executed to which

by N. & Co.:—Held, that the mortgage was not a substitution for the bonds, and that the release add not, in equity, extend to the balance due on the bonds. \*Neel v. \*Rachfort, 4 Cl. & F. 158; 10 other persons therein described of the first part. as adventurers, for supplies to, and debts incurred by, them for or in respect of the mine, to the amounts set opposite their respective names," of the second part. This deed, after reciting that the sharcholders had in the prosecution of the mine incurred debts thereon with the persons parties thereto of the second part, contained a eonveyance in trust for those creditors, and a provision that no action should be brought by any of the persons parties thereto of the second part against all, any, or either of the persons parties thereto of the first part, for the recovery of any debts due or owing upon the mine, or in anywise relative thereto; and that, if any such action was brought the deed might be pleaded as a release. A. executed the deed, the amount of the note and interest thereon being placed against his name. To an action by A. upon the note against the seven persons who signed it, they pleaded the deed as a release, averring that A. signed it as a creditor of the parties thereto of the first part, in respect of the eauses of action in the declaration, which allegation was traversed by the replication:—Held, that A. must be held to have signed the deed in respect of his claim for the advance of money raised upon the note and applied for the use of the mine, and not in respect of his claim upon the note itself, which therefore was not released, and that consequently the plea was not proved. Langon v. Dacey, 11 M. & W. 218; 12 L. J., Ex. 200.

If A. gives B., without consideration, a promissory note, to be negotiated by B. as a security for money, and the indorsee for a valuable consideration, without notice, releases B, from the note, and all claim and demand touching the matters in respect of which the maker's promises were made, this does not so extinguish the consideration of the note, but the indorsee may still recover against the maker. Curstairs v. Rolleston, 5 Tannt, 551; 2 Marsh, 207.

To an action on a joint and several promissory note against one of the makers he pleaded a release. The replication set out the release, which was contained in a deed of assignment to a trustee for the benefit of ereditors, made prior to the Bankruptcy Act of 1861, wherein was contained a recital that the debtor was indebted to his several creditors in the sums set opposite to their names in the schedule thereunder written, and it averred that the note declared on was not, nor was it intended to be, included in the sum set opposite to the plaintiff's name in the schedule, or in the release, and that no payment on account of the note had ever been made to the plaintiff under the deed :- Held, notwithstanding, that the effect of the deed was to release the note declared on. Wigens v. Pickwick, 14 L. T. 521.

Principal and Surety. - In general a release to the principal debtor is in equity a release to the surety, but if the surety has previously to the release given by the creditor paid part of the debt, and given a security for the remainder, the general rule will not apply, but the creditor, notwithstanding the release, will, in the absence of evidence to the contrary, retain his right against the surety. *Hall* v. *Hutchons*, 3 Myl. & K. 426; 3 L. J., Ch. 45.

A., and B. his surety, executed a joint and

tuted by A.'s creditors after his death. Afterwards B. paid the 5,0001, and thereupon C. executed to him a general release of all claims and demands in respect of the bond, and by the same deed covenanted to stand possessed of all moneys to be received under the proof and of all the securities for the 5,000l. in trust for B., and to use his utmost endeavours to obtain payment of that sum for B.'s benefit :- Held, that the legal effect of the release was not controlled by the covenant, and that the master, when he made his report, in pursuance of the decree, was justified in disallowing the 5,000L as a specialty debt, and in allowing it merely as a simple contract debt to B. Warwick v. Richardson, 14 Sim. 281:

Married Women.]-The release by hasband and wife of a sum of money secured by bond to A., and payable to the wife after A,'s death :-Held, not binding on the wife on her surviving both A. and her husband. Rogers v. Acaster, 14 Benv. 445.

When a feme covert is entitled to a reversionary interest in a chose in action, the release of the husband is as inoperative as his assignment to bind his wife's right by survivorship. 1b.

A settlement was made of the choses in action of a female infant, on her marriage, in trust for her husband for life; and after his decease, in trust for her for life; and after the death of the survivor, and in default of children, in trust for such persons as she should by will appoint, with ultimate trust for her next of kin. The marriage, of which there was no issue, was dissolved by act of parliament, and the husband excented a release of his rights in her property under the settlement:—Held, that the property of the wife was not bound by the settlement, and that she was at liberty to resettle it on her second marriage. Hustings v. Orde, 11 Sim. 205.

Family Arrangements, ]-An aunt and niece lived together, the former being devisee, residnary legatee, and executrix under her husband's will, and the latter being a legatee of 2,000*l*, under the same will. An agreement was entered into between them, that the niece should release her legacy on the aunt making a will devising to the niece part of the lands devised by the original testator. A release and will were accordingly executed, and the will remained unrevoked till the niece's death; after that event the aunt married again :- Held, that the release must be treated as binding on the niece's representative. Penny v. Watts, 2 De G. & Sm. 501; 12 Jur. 993.

Upon appeal the decision was reversed upon another point, and issues were directed with a view to ascertain the facts. The case was eventually compromised. S. C., 1 Mac. & G. 150; 19

L. J., Ch. 212.

. Mistake as to Amount.]—To an action for re-covery of interest due to the plaintiff, on the sale by him to the defendant of a policy of insurance on life, he pleaded that, by indenture between plaintiff and defendant, the plaintiff released, exonerated, and discharged the defendant of and from all claim and demand whatsoever for, upon, or in respect of the purchase of the policy; and all moneys due to the plaintiff in respect thereof.

several bond to C., conditioned to be void on [It appeared that the policy was sold subject to a payment of 5,000L by A.; C. proved 5,000L as a condition that the purchaser should pay down a specialty debt under the decree in a suit insti-[deposit of 20L] per cent, and sign an agreement for payment of the remainder on the 8th of June, 1835; but should the completion of the purchase be delayed, the purchaser was to pay interest on the balance of the purchase-money, at 51. per cent. per annum, from that day until the purchase was completed. The defendant did not complete the purchase till January, 1836, when he paid the purchase-money in full, with interest from the 8th of June ; and an assignment of the policy, duly executed by the plaintiff, containing a release in the terms stated in the plea, and having a receipt for the whole purchase-money indorsed, was handed to the defendant. It was afterwards discovered that the plaintiff's attorney, on that occasion, under-enculated the interest by 347. Held, that the release was a bar to an action for that sum. Harding v. Ambler, 3 M. & W. 279; 1 H. & H. 48; 7 L. J., Ex. 132; 2 Jur. 305.

Mistake as to Effect-Signature in what-Character.]-Declaration on a guarantee by the defendant for payment of goods supplied by the plaintiffs to J. Plea, that after J. became indebted to the plaintiffs, J. being also indebted to other persons, by deed between J. of the first part, E. and B. (one of the plaintiffs), trustees, but themselves and J. defendance of the plaintiffs). for themselves, and the rest of the creditors, of the second part, and the several other persons whose names and seals were thereunto subscribed and set, being creditors of J. of the third part, after reciting that J, was indebted to the parties thereto of the second and third parts in the several sums set opposite to their names in the schedule thereunder written, which he was unable to pay in full, it was witnessed, that J. assigned all his estate and effects to the trustees. to pay ratably and without preference to themselves and their partners, and the parties theretoof the third part, the sums set opposite their names in the schedule, and in consideration of the assignment, the several creditors, parties thereto of the second and third parts, released J. from all debts which they or their partners might have against J. up to the date thereof. Replication, that B. executed the deed in his character of trustee, and not in his character of creditor, and that he did so merely for the purpose of declaring the trust of the deed, and not with any intention of releasing the debt, that he did not sign or seal the schedule, nor was the debt of the plaintiffs contained therein, and that if the deed operated in law as a release, it was executed by mistake, and in ignorance that such would be its legal effect:—Held, first, that the release being general in its terms, the execution of the deed by B. operated as an extinguishment of the debt due to the plaintiffs. Tecde v. Johnson, 11 Ex. 840; 25 L. J., Ex. 110.

Held, secondly, that the facts disclosed by the replication did not afford any answer to the pleaon equitable grounds. 1b.

Other Cases.]-Acceptance of the release of a right or compromise of dispute is in no case an acknowledgment that a right existed. Underwood v. Courtown (Lord), 2 Sch. & Lef. 68.

Purchasing quiet of an adverse claimant no admission to him of right. Ib.
Plaintiff, having released the principal in a

Finance, naving received the principal in a fraud, cannot go on against the other parties, though they would have been secondarily liable. Thompson v. Harrison, 2 Bro. C. C. 164.

be extinguished by a release, or the remedy destroyed by conduct operating as a release. Motz v. Moreau, 13 Moore, P. C. 377,

Effect of a general release by a party entitled to a charge on real estate secured by a term of years to the trustees of the term, the term itself not being assigned or merged. Clifford v. Clifford, 9 Hare 675

Release expressing that administrator had re-ceived "all" the property, court will not suppose he has received anything since so as to direct an account. Taunton v. Pepler, 6 Madd. 166.

Quasi entail of an estate for lives barred by release. Mondy v. Walters, 16 Ves. 313.

The rule that an executor who pays a legacy is personally liable to pay the amount of the legacy to any creditor of the testator whose claim is unsatisfied, whether he has notice or not of the claim, applies to a case in which the creditor has given the testator what purports to be a release of his claim, and the executor bona fide believes the release to be valid, and the creditor does not question its validity till some years after the executor has paid the legacy, and fails in the first instance, but succeeds in setting aside the release on appeal. Jefferys v. Jefferys, 24 L. T. 177; 19 W. R. 464.

#### ii. Joint or Separate Claims.

Co-Debtors. ]-M. & H., who were partners, were jointly liable to G. on a bill of exchange accepted by them for goods sold to them by him. They dissolved partnership, and after their acceptance had been dishonoured H. filed a petition for liquidation by arrangement, and a composition was accepted by his creditors and duly paid; B., to whom G. had indorsed the bill, proving under the liquidation and receiving the composition. G. himself afterwards filed a petition for liquidation by arrangement, and a composition was agreed to and paid, the trustee being authorised by the creditors to transfer to G. the debts which were set forth in a schedule annexed, but which did not include the liability of M. in respect of the acceptances given by him and H.; the reason for such omission being that B. was at that time the holder of the bill, and the debt was considered by the trustee of G.'s estate of no value, and not from any intention of reserving to the trustee any right in respect of it. The bill was afterwards given by B. to G., and in an action against G. by M. for a debt due to him separately, G. set off what was due to him on the acceptance of M. & H.:-Held, that the disdeepfunce on a R. R. Frank, that the cus-charge of H. under the liquidation by composi-tion under the Bankruptey Act, 1869, did not release M., but left him liable to G., who, whether the right to sue for it was legally in him or in his trustee in trust for him, might maintain an equitable plea of set-off. Megrath v., Gray, 43 L. J., C. P. 63; L. R. 9 C. P. 216; 30 L. T. 16; 22 W. R. 409.

Joint Debtors. ]-A bank proved in the liquidation of A, for a debt of 5,6007, which they claimed from him, and afterwards sucd for the same debt S., who had given them a guarantee of 1,0007, on behalf of A., and whom they alleged to have been a partner with A. S. denied the partnership, and ultimately a compromise was entered into between him and the bank, by which their claim against him and against another per- the discharge of the separate debt of the defen-

Claims, though not barred by prescription, may son who had given another guarantee on behalf a extinguished by a release, or the remedy of A. The guarantee of S, was given up to him, with a receipt indorsed upon it by the bank, expressed to be for 1,000%, "in payment and discharge of the within guarantee, and also of all claims against him in reference to or in con-nection with " A.'s firm:—Held, that assuming S. to have been a partner with A., this receipt did not operate as a release of S., and consequently that the bank was entitled to maintain their proof. Good, Ex parte, Armitage, In re, 46 L. J., Bk. 65; 5 Ch. D. 46; 36 L. T. 338; 25 W. B. 422—C. A.

The rule that a release of one joint debtor operates to release the other is founded upon the fact that the second would, if he was sued by the ereditor, have a right to enforce contribution from the first. The rule, therefore, does not apply to a release of a merely ostensible partner, between whom and the person with whom he has held himself out to be a partner, no such right of contribution exists. S. C., 46 L. J., Bk. 65; 5 Ch. D. 46; 35 L. T. 554; 25 W. R. 83. A release to one of two joint acceptors enures

to discharge both. Rew v. Bayley, 1 Car. & P. 435. S. P., Slater, Exparte, 6 Ves. 146.

Where three persons entered into a joint bond, and it did not appear either on the bond or by the condition, that two of them were sureties for the other :- Held, that a release given by the obligee to the representative of one of the deceased obligors was no answer to an action Gaisset Johnsons was no answer to all nation against the surviving obligors. Ashbev v. Pidduck, 1 M. & W. 564; 2 Gale, 116; 1 T. & G. 1016; 5 L. J., Ex. 251.

A general release by the plaintiff held not to extend to causes of action existing between the plaintiff and the defendant jointly with other parties. Simons v. Johnson, 3 B. & Ad. 175; 1 L. J., K. B. 98.

Where separate Debts. ] - A testator bequeathed all debts and sums of money which should at the time of his death be due to him by B., unto B., his executors, administrators, and assigns, for his and their own use and benefit, and he directed his trustees to deliver up to B., his executors, administrators, or assigns, all securities which he should at the time of his death hold for such debts and sums of money, and also, when required by B., his executors, administrators, or assigns, to execute to him or them a release from all such debts and sums of money. At the date of the will and of the testator's death, B. owed the testator a debt of 50%, and he and his partner owed the testator 2,6001.; which the latter had lent to the firm, and for which B, and his partner had given the testator their joint and several promissory notes. B. and his partner having filed a liquidation petition, the executors claimed to prove in the liquidation for the 2,6001. :- Held, that as there was a separate debt due from B, to which the release could apply, it could not be extended to the partnership debt, and that the executors' proof must be admitted. Kirk, Ex parte, Bennett and Glare, In re, 46 L. J., Bk. 101; 5 Ch. D. 800; 36 L. T. 431; 25 W. R. 598-C. A.

The defendant and N. gave the plaintiff their joint and several promissory note to seenre a separate debt due from each of them. The plaintiff afterwards executed a deed of release to N.:-Held, that although this release disthe bank was to receive 2,8001. in satisfaction of charged both as to the note, it did not enure to

To an action by a banking company, on a guarantee given by the defendant to secure advances made by the company to M., M. and B., earrying on business under the name of M. & Co., the defendant pleaded, that by deed between M., M., L. and B., of the first part, W., H. and O., of the second part, and the several persons or partnership firms who should execute the deed being creditors of M., M., L. and B., of the third part, H. being a member and partner in the banking company, released M., M., L. and B. from all actions, debts, &c. The defendant, in support of his plea, gave in evidence a composition deed made between M., M., L. and B., of the first part, W., H. and O., of the second part, and the several persons or partnership firms being creditors of M., M., L. and B., who should have executed or who should execute the composition deed, of the third part. The deed, after reciting that M., M., L. and B. were indebted to W., and O., and to the several parties to the deed of the third part, and being mable to pay their debts, had conveyed all their property to W., H. and O., in trust for payment of their debts, stated that in consideration thereof, each of the creditors parties to the deed of the second and third parts, did for themselves, their heirs, executors, &c., and partners, release M. M., L. and B. from all actions, debts, demands, &c. At the B. from all actions, debts, demands, &c. At the date of this release, a separate debt of 2l. 15s. was due from M. to H., and H., at the date of the release, was a shareholder in the banking com-H. executed the deed in his own name : -Held, that the plea was not proved, the release from M., M., L. and B. not including the debt due from M. & Co. to the banking company, but applying only to debts due to such partnership firms as should execute the deed of the third Bain v. Cooper, 9 M. & W. 701; 1 D. (N.S.) 11; 11 L. J., Ex. 325.

An action was brought by the plaintiff against the defendant to recover the rent of property which had originally belonged to R. being made by the executors of M. (the father of the plaintiff) to the rent, an issue under the Interpleader Act was directed (in which the executors were plaintiffs, and the present plainexecutors were plaintiffs, and the present plain-tiff defendant), to try the right to the rent. A vertice was obtained by the executors, and a deed was subsemently executed by the bubbleth of the was subsequently executed by the plaintiff, of the was subsequency executed by one parametr, or the first part, the children of M., of the second part, and the executors, of the third part, whereby, after various recitals, in none of which any reference was made to the issue, the plaintiff released the parties of the second and third parts from all costs incurred by them, and all claims and demands in respect of certain transactions therein mentioned; but there was a proviso in the release, that it should not extend to or affect, or in any manner prejudice, the rights or title which the plantiff claimed in the estate or effects of R., or any costs, charges or expenses incurred by the plaintiff in relation thereto. The parties of the second and third parts, in turn, also released the plaintiff from all costs, charges, or expenses which they, or either of them, might have incurred in and about all the matters therein particularly mentioned, and also of and from all claims and demands which the parties of the second and third parts might have or claim

dant. Cocks v. Nash, 4 M. & Sc. 162; 9 Bing. of the interpleader issue were not included in the 341; 2 L. J., C. P. 17. extended only to joint claims which the parties of the second and third parts had against the plaintiff, and not to a claim which those of the third part alone had against him. Major v. Salisbury, 2 D. & L. 763; 14 L. J., Q. B. 118; 9 Jur. 623.

There being no right of contribution between the person carrying on a business and an ostensible partner, the release of the ostensible partner does not operate as a release of the person carrying on the business. Halifux Joint Stock Bankling Co., Ex parte, Armitage, In re, 46 L. J., Bk. 65; 5 Ch. D. 46; 35 L. T. 554; 25 W. R. 83.

Reservation of Rights.]—When a release is given to one of two partners, with a proviso that it shall not prejudice the claims of the releasor against the other partner, it only operates in favour of the partner to whom it is given. Solly v. Forbes, 2 Br. & B. 38; 4 Moore, 448; 22 R. 16. 641.

A release to one of two surcties who had entered into a joint and several covenant to pay an annuity, in default of payment by the grantor, was accompanied by a proviso, that such release should not prejudice the right of the grantee to enforce its payment against the grantor and the other surety, or either of them :-Held, that the proviso restrained the operation of the release, and that the liability of the co-surety was not affected by such release. Thompson v. Luck, 3 C. B. 540; 16 L. J., C. P. 75. S. P., Kearsley v. Cole, 16 M. & W. 128; 16 L. J., Ex. 115. Currey v. Armitage, 6 W. R. 516.

- Parol Evidence. - To a declaration against a maker of a note, he pleaded that the note was a joint and several note of his and A., and that A. had been released, Replication, that A, had been so released at the defendant's request, and that the defendant, in consideration of such release at his request, ratified the promise in the declaration, and promised that he would remain liable on the note, as if there had been no such release :- Held, that the replication,

# d. Pleading and Evidence.

Pleading.]—A plea of release which does not answer all that it professes to do, being bad in part, is bad in the whole. St. Germains (Eurl) v. Willan, 3 D. & R. 441; 2 B. & C. 216.

In an action by payee against acceptor of a bill of exchange, he pleaded, that, before the bill became due, and whilst the plaintiff was the holder, and before action, the plaintiff released the bill, without alleging that the release was after the acceptance :- Held, that the plea was bad for not averring that the release was after the acceptance. Ashton v. Freestone, 2 Man. & G. 1; 2 Scott (N.R.) 273; 10 L. J., C. P. 53.

Action by indorsees against the maker of a promissory note. Plea, that the promise was a joint and several one, by the defendant and A., to whom one of the plaintiffs executed a release against the plaintiff on account of any transaction which might have taken place between them executed at the request of them:—Held, that the costs afterwards and while the note was unpaid, in consideration of such release, ratified his promise, and promised to remain liable to the plaintiffs for the amount of the note :- Held, bad, because it set up a parol exception to a release under seal. Brooks v. Stuart, 9 A. & E. 854; 1 P. & D. 615; 8 L. J., Q. B. 184.

Where a declaration was for goods sold and delivered, and for money due on an account stated, and the defendant pleaded that by a deed the plaintiff released the defendant, to which the plaintiff replied non est factum :- Held, that, under this issue, the plaintiff was not entitled to shew that the cause of action accrued subsequently to the date of the release, but should have made it the subject of a new assignment.

Jubb v. Ellis, 3 D. & L. 346; 15 L. J., Q. B. 94; 9 Jur. 1057.

To an action to recover the amount of several bills of exchange and promissory notes, the defendant pleaded a general release by deed, which on being set out, appeared to be a composition deed, by which the plaintiff and other creditors of the defendant released him from all liability in respect of their demands, on condition of his agreeing to pay 11s. in the pound, by promissory notes, payable at periods therein specified; and the deed contained a proviso, that, in the event of any default in the payment of any of those notes, the composition and release should be void. The plaintiff having replied, that default had been made in payment of one of the notes, the defendant rejoined, that before any default was made, the plaintiff accepted a fresh note, at a longer date, in lieu and satisfaction of the former:—Held, that this rejoinder was a depar-ture from the plea. Nexill v. Boyle, 2 D. (N.S.) 747; 11 M. & W. 26; 12 L. J., Ex. 220; 7 Jur. 132.

To a declaration on a promissory note, the de-fendant pleaded that the note was the joint and several note of himself and G.; that the plaintiff, by deed-poll, without the defendant's consent, released G. from the note and all actions, and thereby also released the defendant from the same. Replication, non est factum :—Held, that as the plea did not set out the deed, the replication put in issue the execution of such a deed as released the defendant; and that a deed of release executed by the plaintiff and other creditors of G., containing an express clause that the release to G. should not operate to discharge anyone jointly liable with G. on securities to the orelitors, did not release the defendant; and that, therefore, the plaintiff was entitled to the verdict on this issue. North v. Wakefield, 13 Q. B. 536; 18 L. J., Q. B. 214; 13 Jur. 731.

In an action on a bond, the defendant pleaded, that after executing the bond, an agreement was made by and between the plaintiff and the defendant and divers other persons, and scaled with the plaintiff's scal; and that it was agreed by the agreement, that the agreement might be pleaded by the defendant in bar to all demands and proceedings with respect to the alleged claim on the bond:—Held, that the plca ought to have set out so much of the deed as operated as a release, and to have expressly averred that the deed did so operate; and that, therefore, the plea was bad in substance. Wilson v. Braddyll, 9 Ex. 718; 23 L. J., Ex. 227; 2 W. R. 419.

A plea of a release pleaded puis darrein continuance after a demurrer and joinder in de-murrer, operates as a retraxit of the demurrer. Solomon v. Graham, 24 L. J., Q. B. 332; 1 Jur.

(N.S.) 1070.

Action by a shipowner, upon a charterparty for nonpayment of freight by the charterer Pleas : a discharge before breach, payment, and a release after the cause of action accrued. plication, that before action accrued, and before rclease or discharge or payment, all the right, title and interest of the plaintiff in the ship, and in the charterparty, was assigned to S., and became, and were vested in him, of which the defendant had notice before the release or discharge or payment; that the defendant released and discharged the defendant, and made the payment without the authority, knowledge or consent of S.; that the release and discharge was given by the plaintiff to the defendant, and obtained by the defendant from the plaintiff, and the payment made fraudulently, and with the intent todefraud S. from recovering in respect of the causes of action, and that the action was brought by S. in the name of the plaintiff on bchalf of S.; that the plaintiff had no interest in the action, and that it had been commenced and carried on for the sole use and benefit, and at the sole expense and costs of S. :-Held, a good replication on equitable grounds. De Pottonier v. De Mattos, El. Bl. & El. 461; 27 L. J., Q. B. 260; 4 Jur. (N.S.) 1034; 6 W. B. 628.

A plea of release, if the consideration be impeached, must contain averments supported fully by an answer covering the grounds upon which the consideration is impugned, and cannot extend to a discovery of the consideration.. Purker v. Alcock, 1 Y. & J. 432.

Evidence-Presumption. ]-If, in an action on a covenant for arrears of an annuity, the defendant pleads a release, lost by time and accident, and, to induce the jury to pressure a release, shews that the annuity was not paid for seven-teen years, and that the plaintiff lad borrowed money of the grantor of the annuity and regularity. larly paid him interest, without setting off theannuity; the jury ought not to find for the defendant, unless they are satisfied that there is fair ground for supposing that at some particular period during the seventeen years the plaintiff actually executed a release of the annuity; and to rebut the presumption of such release, the jury may look at the situation of the parties, and take into their consideration the circumstances of the plaintiff being a near relative of the grantor of the annuity, having large expec-tations from him, and of the grantor being a very old man, peremptory with his relatives, and very exact and attentive to his pecuniary conannuity deed in the hands of the plaintiff, if it had never been intended that it should be enforced. Bigg v. Roberts, 3 Car. & P. 43.

A jury may be instructed that they are at liberty, on evidence of long-continued nonobservance, to presume a release of a covenant, where, consistently with the evidence the release to be presumed might have been executed before the accrual of the breach complained of, Tennent v. Neil, Ir. R. 5 C. L. 418-Ex. Ch.

—— Secondary.]—The entries in the bill of eosts of a deceased attorney are good secondary evidence of the execution of mutual releases. Skeffington v. Whitehurst, 3 Y. & C. 1.

- Evidence of Fraud. ]-In an action in a county court by executors, the defendant having shewn that the action was brought by oneto him the day before the trial by the non-coucurring executor. The judge refused to allow the plaintiff's counsel to examine the executor, who had executed the release, as to the efreumstances under which he had executed it, for the purpose of eliciting from him whether it had been frauduleutly obtained:—Held, that the judge was wrong in so refusing, and that such examination ought to have been allowed. Robinson v. Vernon (Lord), 7 C. B. (N.S.) 231; 29 L. J., C. P. 135; 6 Jur. (N.S.) 610; 1 L. T. 67; 8 W. R.

On the morning of the trial of a plaint, in a county court, at the suit of several parties, the clerk of the defendant's attorney went to one of the plaintiffs, an illiterate person, and obtained his mark to a peculiarly-worded release. The judge, observing that the release was evidently a trick, gave judgment for the plaintiff :- Held. that the cirenmstances under which the release was obtained offered some evidence of fraud, so as to justify the judge in declining to give effect to it. Surgent v. Wedlake, 11 C. B. 732 : 15 Jur. 1184.

To support a replication of fraud to a plea of release of the debt, for which an action is brought, there must be evidence that the contents of the deed were misrepresented to the plaintiff, or that fradulent mispresentations were made to him to induce him to exceute it. But if he merely lent his name for a collateral purpose, as to enforce contribution from a shareholder, and the action was not instituted for his benefit, and he did not instruct nor retain the attorney who brought it, such evidence will be no evidence to support the replication of fraud to a plea of the release. Richards v. Turner, 1 F. & F. 1. See also ante. col. 454.

#### G. REGISTRATION.

Memorial-Form. ]-A lithographed memorial is a memorial put into writing, within 7 Anne, c. 20, s. 5, and ought to be registered by the registrar. Rep. v. Middlesen Registrar, 7 Q. B. 156; 14 L. J., Q. B. 200; 9 Jur. 871.

Where the deed, of which a memorial is to be registered, is indorsed on an earlier deed, it is not sufficient to describe the premises by such memorial in the terms used in the carlier deed without express reference to it, if the deed to be registered describes the premises simply by reference to the earlier deed. Reg. v. Middlesew Registrar, 15 Q. B. 976; 19 L. J., Q. B. 537; 14 Jur. 1001,

Clerical mistakes do not vitiate involment under the Registry Act. Wyatt v. Barwell, 19 Ves. 435; 13 R. R. 236.

A deed contained recitals which described two persons as concurring in settling property to which they were "respectively entitled." It afterwards contained a grant to trustees of a certain part of this property, as if made by one of these persons, when in fact that part belonged to the other. The memorial of the deed desorbed both as the granting parties; this description was not one of the things required by the statute:—Held, not to vitiate the effect of the memorial under the Registration Act. Mill v. Hill, 3 H. L. Cas. 828.

Execution — Corporation.] — Under the S. P. Church Building Acts land in Middlesex was 290.

executor without the concurrence of his co-conveyed to the ecclesiastical commissioners, by executor, put in a release which had been given deed-poll executed by the grantor. The comdeed-poll executed by the grantor. The com-missioners assented by affixing their seal:—Held that under 7 Anne, c. 20, s. 5, the registrar was not bound to register a memorial of the conveyance without the attestation of the party who witnessed the execution by the grantor, and that the affixing the seal of the commissioners was not an execution by them of the deed, and was not an excention by them to the deet, and an attestation of the affixing such seal did not satisfy the statute. Reg. v. Middlesex Registrar, 1 El. & El. 322; 28 L. J., Q. B. 77; 5 Jur. (N.S.) 98 : 7 W. R. 64.

> Execution—Attestation.]—The provisions of 7 Anne, c. 20, s. 5, are imperative and not directory, and one of the attesting witnesses of the memorial must have attested the deed of which it is a memorial. Essew v. Baugh, 1 Y.& C. C. C. 620; 11 L. J., Ch. 374; 6 Jur. 1030.

Effect-Where Fraud. -A son who was heirat-law to his father, who was one of the executors and trustees of his father's will, though he had not proved the will, and whose christian names and description were identical with those of his father, after his father's death executed mortgages of freehold and leasehold property of the father, and applied the mortgage money to his own purposes. He handed over the title deeds to the mortgagees. The transaction took place without the knowledge of his mother and sister, who were co-trustees and co-executrices with him, and who had proved the will. The will had not been registered in the Middlesex registry, though the property was situate in that county. The mortgage deeds were registered. They purported to be executed by the absolute owner of the property, and the solicitor who acted for both parties believed the son to be the absolute owner. The son told him nothing about the father's will. The solicitor searched the Middle-sex registry. The son took a beneficial interest under the trusts of the father's will. After the son's death the fraud was discovered, and the mother and sister, as trustees of the father's will, brought an action against the mortgagees, claiming a declaration that the mortgages were void against them, and delivery up of the title deeds.
The other beneficiaries under the will were made defendants :- Held (by Kay, J., and the Court of Appeal), that the son in executing the mortgage deeds was personating his father; that the deeds were forgeries, and passed nothing to the mortgagees, except the son's beneficial interest under the father's will; and that the mortgagees could obtain no title by virtue of the Middlesex Registry Act. Cooper, In re, Cooper v. Vesey, 51 L. J., Ch. 862; 20 Ch. D. 611; 47 L. T. 89; 30 W. R. 648—C. A. Affirming, 51 L. J., Ch. 149; 45 L. T. 532; 30 W. R. 148. Per Lindley, L.J.: - The son could have been

convicted of forgery by reason of his executing the mortgage deeds. Ib.

Where there were two assignments of the same lease of premises in Middlesex, and the last executed was registered first :- Held, that at law the deed last registered must be considered as fraudulent and void, under 7 Anne, c. 20, s. 1, although the party claiming under the second assignment knew, when it was executed, of the prior execution of the first assignment. Doe d. Robinson v. Allsop, 5 B. & Ald. 142. S. P., Doe d. Winser v. Rowley, 5 L. J., C. P.

Rents Received under Unregistered Deed.]—
A debtor deposited the title deeds of his houses with his creditors as a security, and afterwards executed an assignment of his interest in the houses to the same party; but this instrument was never registered, pursuant to 7 Anne, e. 20. The debtor afterwards became bunkrupt, and the assignment of his effects under the commission was duly registered. The assignees brought an action against the creditor for the rents of the houses which he had received from the time of the assignment made to him by the bankrupt:—Held, that although this instrument was void, the rents which the defendant, being equitable mortgagee, had received, could not be taken out of his hands by virtue of the registered assignment under the commission. Stampter v. Cooper, 2 B. & Ad. 228: 9 L. J. (O.S.) K. B. 226.

After an assignment of a mortgage, payment to the mortgage with notice must be allowed by the assignee; the registry of the premises being in Middlesex is not untice for this purpose. Tender after the bill filed of the balance, deducting the payments to the mortgagee with costs, departed the assignee of subsequent costs. Will-linus v. Surrell, 4 Ves. 389.

The registry of a deed is not of itself notice as against a subsequent purchaser or incumbrancer. Wiseman v. Westland, 1 Y. & J. 117; 30 R. R.

765.
The register of a mortgage will not by itself affect a subsequent incumbrance without notice. \*\*Cutor v. Cooley, 1 Cox, 182.

Befford Level Act.]—By the Belford Level Act (15 Car. 2, c. 17) it was enacted that all conveyances by indenture of any part of the 95,000 ences allotted to the Earl of Bedford and bis co-adventurers entered with the registrar of the level should have equal force to convey the freehold and inheritance as a bargain and sale involled under the statute Hon. 3 and it was also provided "that no lease, grant, or conveyance of any part of the stall and, except leases for seven years or under in possession, should be of force but from the time it should be entered with the registrar." —Held, in a sult for specific performance, that the condition of registration was required only for the purpose of entitling the party to the corporate privileges conferred by the act, and that the absence of registration did not vitiate the title to the land. Willis v. Brown, 10 Sim. 127; 8 L. J., Ch. 321.

A conveyance of or charge upon lands in the Bediford Level is valid as against persons affected with notice thereof, although the same is not registered at the Fen Office. The enactment (15 Car. 2, c. 17, s. 8), that such instrument (15 Car. 2, c. 17, s. 8), that such instrument with the properties of the form of the shall be entered with the registrar has application only to the special purposes contemplated by that act, for the government of the corporation and the

benefit of the undertaking. Ib.

A lesse of laud in the Bedford Level cannot object to an action by his landlord for a breach of covenant in not repairing that the lease was void by 15 Car. 2, c. 17, for want of being registered; such act enacting that "no lease, &c., should be of force but from the time it should be registered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers registering their titles before. Hodson v. Sharpe, 10 East, 350; 10 R. B. 324.

A., owner of estates in the Bedford Level. wishing to give his son a qualification as bailiff. for which, according to the Bedford Level Act, it is necessary to "have" 400 acres in the Level. wrote to the registrar of the Level, stating his wish, and asking him to find a qualification. The registrar thereupon, without any further instructions, selected out of A,'s land the smallest lot that exceeded 400 acres, and sent to him a deed, by which he purported to convey it to the son in fce, in consideration of natural love and affection. This deed was at once executed by A., and registered. The son died soon after, without having ever heard of the transaction. It clearly appeared that neither A, nor the registrar intended to consider the transaction to have the effect of making the son beneficial owner, nor intended any fraud or illegality. On a bill being filed by A. to establish his title to the land:—Held, that A. to establish his tole to the man — read, that the letter written by A. to the registrar excluded any defence grounded on the Statute of Frauds. Childers v. Childers, 1 De G. & J. 482; 26 L. J., Ch. 743; 3 Jur. (N.S.) 1277; 5 W. R. 859. Reversing 3 Kay & J. 310.

Held, also, in the construction of the Bedford Level Act, that a mere legal estate was a sufficient qualification, and that, therefore, there was nothing illegal in A.'s design, no intention to represent the son as beneficial owner appear-

ing. Ib.

Held, that on the ground of trust, or of mistake, or on both grounds, the plaintiff was entitled to the relief sought. Ib.

Held, that this conclusion was not affected by the circumstance that the legal estate was outstanding under a mortgage in fee not known to the registrar. Ib.

Non-Registration — Effect.] — The want of registration of a conveyance invalidates the deed as to subsequent purchasers only, not as to assignees of the party conveying the property. Coles. Exparte, Rucker, In re, 1 Deac. & C. 100; 1 L. J., Bk. 18.

The object of Registry Acts is only to protect subsequent purchasers. They have no effect therefore to vitiate the conveyance for want of registration, as between party taking conveyance and him who conveyed, or his assignees under commission of baukruptcy. Jones v. Gibbons, 9 Ves. 407: 7. R. k. 247.

The East Riding Registration Act (6 Anne, 23) is imperative, and nules a will of lands in that riding is registered within six months after the testator's death, or a memorial of the impediment which disables the devisee from doing so registered in the manner pointed out by s. 15, the will is void as against subsequent purchasers and mortgagess. Chaddoids v. Terner, 34 Beav, 634; 34 L. J., Ch. 356. Aftirned, 35 L. J., Ch. 356. Aftirned, 35 L. J., Ch. 359. L. R. 1 Ch. 319; 12 Jur. (8.8) 239; 14 L. 7.86; 14 W. R. 491.

A. executed a legal mortgage of property in Yorkshire to B. for 700*L*; at the same time he borrowed 100*L* from C. and signed a memorandum agreeing to give C. a second mortgage on the property to secure that amount. A. sub-sequently executed another mortgage of the property for 500*L* to D. The first and the third mortgages were registered at Wakefield, but not the second. —Held, that the third mortgage had priority over the second. Wight or Wright, In re, 43 L. J., Ch. 66; L. R. 16 Eq. 41; 28 L. T. 491; 21 W. R. 667.

Inquiries respecting Unregistered Instruments. ]-A purchaser or mortgagee is not discovery of unregistered instruments, though he may be bound by actual knowledge of such instruments. Lee v. Clutton, 46 L. J., Ch. 48; 35 L. T. 84; 24 W. R. 942—C. A.

— Notice.] — A landowner by deed in February, 1872, charged his land with two life annuities. He subsequently made several mort-gages of the property by deeds, some of which recited the annuity deed. The annuity deed had not been registered as required by 18 & 19 Vict. c. 15, s. 12:—Held, by the Master of the Rolls, that the annuity deed not being registered, was void as against all the subsequent incumbrancers, whether they had notice of it or not. But held, by the Court of Appeal, that as the 18 & 19 Vict. c. 15, s. 12, was in similar terms to the clauses in the Registry Acts, which had been decided not to make an unregistered conveyance void as against a subsequent purchaser who had notice of it, the legislature must be taken to have used the words in the later act in the sense given to them by those decisions, and that the annuities therefore were valid as against all the subsequent incumbrancers, who took with notice of them, and against the trustee in bankruptcy of the grantor. Greaves v. Tofield, 50 L. J., Ch. 118; 14 Ch. D. 563; 43 L. T. 100; 28 W. R. 840—C. A.

The plaintiff had lent money to a solicitor on the security of the deposit of deeds in Middlesex, with a letter charging the land, the legal estate in which was outstanding. The solicitor afterwards, by way of security, for money due to a client, made a mortgage of the land to the client, which mortgage was registered :- Held, that the client must be presumed to have had notice of the plaintiff's charge, which, therefore, though unregistered, retained priority. Bradley v. Riches, 47 L. J., Ch. 811; 9 Ch. D. 189; 38 L. T. 810; 26 W. R. 810.

- Where Registration unnecessary-Eswhere Registration unnecessary—Ratoppel.—Vendors allowing Vendees to Register—Lien—Unpaid Purchase-money.]—Trustees of a charity conveyed land in Yorkshire to R. and W., part of the purchase-money remaining un-paid, and allowed R. and W. to register the conveyance, knowing that they wanted to do so in order to re-sell the land in lots :- Held, that the trustees had, by their conduct, precluded themselves from asserting their lien for unpaid purchase-money against bona fide sub-purchasers from B. and W. without actual notice, though the sub-purchasers had not examined, as it was their duty to have done, the conveyance to B. and W., a memorial of which was registered, and though the estate of one of the sub-purchasers was equitable only. Kettlenedl v. Watson, 53 L. J., Ch. 717; 26 Ch. D. 501; 51 L. T. 185; 32 W. R. 865—C. A.

What must be Registered—Copyhold Estate— Enfranchisement Deed.]—As, on the execution of a deed enfranchising copyhold land in the county of Middlesex, such land ceases to be copybold and becomes freehold, in such a case the exemption in s. 17 of 7 Anne, c. 20, does not apply, and therefore a memorial of such a deed must be registered under s. 1 of the act. Reg. v. Truro (Lord), 57 L. J., Q. B. 577; 21 Q. B. D. 555; 59 L. T. 242; 36 W. R. 775—C. A.

Appointment of Trustee in Bankruptcy. -The 1 & 2 Will. 4, c. 56, s. 27, does not require bound to make any inquiries with a view to the certificate of the appointment of assignees to be registered in order to protect them against subsequent purchasers of bankrupt's freehold property without notice, unless the property is in a register county. Anon., I Deac. & C. 349.

> Lease.]-Covenants imposed upon and to be performed by the tenant, are not equivalent to a rack rent, so as to bring the case within s. 17 of the Middlesex Registry Act, 7 Anne, c. 20, by which it is provided that the act shall not extend to leases at a rack rent. Doe d. Winser v. Rowley, 5 L. J., C. P. 290.

> Contract respecting Buildings to be Erected on Land-"Memorandum of Charge." ]-The owner of land in Yorkshire made an agreement in writing with the plaintiff by which the former agreed, in consideration of 2001, paid to him by the plaintiff, to complete certain buildings on the land, and the plaintiff agreed to purchase the buildings when completed for 7501., less the 2001. already paid: Held, that this agreement was not an "assurance" within the meaning of the Yorkshire Registrics Act. 1884, and could not therefore be registered. *Rodger v. Harrison*, 62 L. J., Q. B. 213; [1893] 1 Q. B. 161; 4 R. 171; 68 L. T. 66; 41 W. R. 291—C. A.

> - Mortgage-Equitable Mortgage-Memorandum. ]-A memorandum agreeing to mortgage leasehold premises in Middlesex with money leut, is not required to be registered, under 7 Anne, Wright v. Stansfeld, 27 Beav. 8: 28 L. J.

> Ch. 183; 5 Jur. (N.S.) 5.
>
> An equitable charge on the equity of redemption of lands in Middlesex must be registered.
>
> Moore v. Cuberhouse, 27 Beav, 639; 29 L. J., Ch.
> 419; 6 Jur. (N.S.) 115; 1 L. T. 386.

A memorandum of further charge in favour of the first mortgagee of lands in Yorkshire requires registration as much as the original mortgage, and in the absence of registration will be postponed to a second registered mortgage without notice of such further charge, nor will the first mortgagee be entitled to tack his further chargeit the second mortgage has given him notice of his charge. Chedland v. Patter, 48 L. J., Ch. 484; L. R. 18 Eq. 350; 30 L. T. 356; 22 W. R. 511. Affirmed, 44 L. J., Ch. 169; L. R. 10 Ch. 8; 31 L. T. 522; 23 W. R. 36.

A memorandum not under seal, accompanying a deposit by way of equitable mortgage of deeds relating to lands in Middlesex, requires registraton under 7 Anne, c. 20. Neve v. Pennell, Hunt v. Neve, 2 H. & M. 170; 33 L. J., Ch. 19; 9 L. T. 285; 11 W. R. 986.

— Registration of Final Order of Fore-closure.]—An order for foreclosure absolute in respect of lands in Middlesex is not a judgment within the meaning of 7 Anne, c. 20, s. 18, and 1 & 2 Viet. c. 110, so as to require a memorial tobe entered at the Middlesex Registry Office ; and a direction to the registrar of deeds to that effect was refused. Burrows v. Holley, 56 L. J., Ch. 605; 35 Ch. D. 123; 56 L. T. 506; 35 W. R.

- Share in Proceeds of Sale of Land-Mortgage.]—The local Registry Acts are intended to apply only to dealings at law or in equity with the land itself. Mortgagees of a share of the upon trust for sale do not acquire priority by registration, but by notice given to the trustees of the will. Arden v. Arden, 54 L. J., Ch. 655; 29 Ch. D. 702: 52 L. T. 610: 33 W. R. 593.

 Legacy Charged on Land—Assignment. -An assignment of a legacy charged upon land is an assignment of money only, and does not affect the land within the meaning of the Registry Acts. The registration of such an assignment therefore does not postpone a prior unregistered assignment of the same legacy. Malcolm v. Charlesworth, 1 Keen, 63. S. C., nom. Wilkinson v. Charlesworth, 5 L. J., Ch. 172.

 Sale under Decree—Transfer of Lien from Land to Purchase-money. ]—Where premises had been sold under a decree:—Held, that the lien of an incumbrancer was not transferred to the purchase-money, so as to be out of the Registry Acts, and he was, therefore, postponed to subsequent incumbrancers. Hennand v. More, 1 Eden,

- Equitable Interest of Married Woman.] -The statute of 7 Anne, c. 20, was intended to prevent fraud by secret conveyances, and consequently, if there has been notice, a subsequent incumbrancer who was first to register does not gain priority. Punchard v. Tomkins, 31 W. R.

A married woman, who was equitably entitled for life for her separate use to property in Middlesex, charged her separate estate by an instrument, dated the 29th of May, 1880, with the payment of a debt due from her husband. The property had been previously mortgaged by a deed, dated the 8th of April, 1880, which had not been registered. A receiver had been obtained by the plaintiffs in the action, who claimed under the deed of the 29th of May :- Held, that the deed of the 8th of April was entitled to priority, notwithstanding the want of registration, on the ground that the instrument of the 29th of May only operated upon what the married woman could honestly charge. Ib.

Vendor's Lien for Unpaid Purchasemoney.]—A vendor's lien for unpaid purchasemoney need not be registered under 2 & 3 Anne, e. 4. Kettlewell v. Watson, 53 L. J., Ch. 717; 26 Ch. D. 501; 51 L. T. 135; 32 W. R. 865—C. A.

- Will.]-A testatrix, having lands in the East Riding, died in 1854. Her will was discovered in 1861, which devised these lands, but before any registration of it, or of any impedi-ment, had been made, the heir mortgaged the property:—Held, that the mortgagee had priority over the devisee. *Chadwick* v. *Turner*, 35 L. J., Ch. 349; L. R. 1 Ch. 610; 12 Jur. (N.S.) 239; 14 L. T. 86; 14 W. R. 491.

To defeat the title of a registered purchaser from the heir-at-law, there must be clear and distinct notice amounting to fraud. Ib.

A registered conveyance of premises in Middlesex for valuable consideration, established against a prior devise not registered, the evidence of notice, which ought to amount to actual fraud. not being sufficient. Jolland v. Stainbridge, 3 Ves. 478; 4 R. R. 64.

on Same Day. ]-According to the memorandum their client, A., upon premises in Middlesex, which

proceeds of sale of real estate in Middlesex devised of registration indorsed on two mortgaged securities of different dates brought to the Middlesex registry, they were both registered on the same day and at the same hour; but one was numbered 764, the other 768 :- Held, that the scenrity numbered 764 must be regarded as having been registered first. Neve v. Pennell, Hunt v. Nere, 2 Hem. & M. 170; 33 L. J., Ch. 19; 9 L. T. 285; 11 W. R. 986.

Mortgage by demise for a term of years; the mortgagor does not deliver to the mortgagee the purchase deed conveying the freehold to the mortgagor, but keeps it back, and subsequently deposits it with another person as a security for a loan. The conveyance to the mortgagor and the mortgagee were executed within a day of each other, and were both registered on the same day. The deposit was not made for a considerable time afterwards; but no notice by the subsequent incumbrancer of the mortgage being proved, and being denied by his answer, it was held that he was entitled to the benefit of the deposit, as against the mortgagee, and was not bound to deliver up to him the conveyance. Wiseman v. Westland, 1 Y. & J. 117; 30 R. R. 765.

—— Notice—What Necessary.]—Notice of an unregistered mortgage held to affect subsequent mortgagees, who had registered. Sheldon v. Cox. 2 Eden, 224.

To affect a registered deed by notice of a prior unregistered deed (the policy of which has been much doubted), actual notice must be clearly proved, amounting to fraud. Wyatt v. Barwell 19 Ves. 435; 13 R. B. 236. S. P., Jolland v. Stainbridge, 3 Ves. 478. Chadwick v. Turner, 35 L. J., Ch. 349; L. R. I Ch. 310; 12 Jur. (N.S.) 239; 14 L. T. 86; 14 W. R. 491,

A conveyance of, or charge on, lands within the Bedford Level is valid as against persons affected with notice, though not registered as required by the Bedford Level Act. Brown, 10 Sim. 127; 8 L. J. Ch. 321.

A solicitor induced a client to advance money for A., on mortgage of lands in Middlesex, and soon afterwards induced a second client to advance money on mortgage of the same lands without informing him of the existence of the first mortgage. The solicitor afterwards left the country, and the holder of the second mortgage registered it before the first mortgage was registered:—Held, that the holder of the second mortgage must be taken to have had, through the solicitor, notice of the first mortgage, and could not by the prior registration obtain priority. Rolland v. Hart, 40 L. J., Ch. 701; L. R. 6 Ch. 678; 25 L. T. 191; 19 W. R. 962.

A purchaser or mortgagee is not bound to make any inquiries with a view to the discovery of unregistered instruments, though he may be bound by actual knowledge of such instruments. The policy of the Registration Acts is to free a purchaser from the imputation of constructive notice. In the absence of actual notice, there-fore, to the principal or his agent, and of fraud, a later registered deed will have priority over a prior unregistered charge, notwithstanding that the purchaser knew that the title deeds were not in the possession of the vendor, but were in the hands of certain other persons, and abstained from inquiry. Lee v. Clutton, 46 L. J., Ch. 48; 35 L. T. 84; 24 W. R. 942—C.A.

A firm of solicitors took an equitable charge, Priority—Registration of Several Instruments | by a memorandum and deposit of title deeds, from

they omitted in the register. A. subsequently | mortgage thereof to M. by way of under-lease, sold the premises to the defendant, who duly registered the conveyance. The solicitors filed a bill claiming priority for their charge, alleging that the defendant, when he took his conveyance, knew that the deeds were in their hands, and made no inquiry:—Held, that the facts alleged amounted only to constructive notice, and that in order that an unregistered charge should have priority over a subsequent registered conveyance, it must be shewn that the purchaser or his agent had actual notice of the prior charge, or if it is sufficient to allege anything other than actual notice, the allegation must amount to a clear charge of fraud, and not of omission to inquire only. Ib.

The plaintiff had lent money to a solicitor on the security of the deposit of title deeds of land in Middlesex, with a letter charging the land, the legal estate in which was outstanding. The solicitor afterwards, by way of security for money due to a client, made a mortgage of the land to the client, which mortgage was registered: Held, that the client must be presumed to have had notice of the plaintiff's charge, which therefore, though mnegistered, retained priority.

Bradley v. Riches, 47 L. J., Ch. 811; 9 Ch. D.
189; 38 L. T. 810; 26 W. R. 910.

A testatrix, who died in 1871, by her will devised real estate in Middlesex to trustees upon trust for sale. The will was not registered in Middlesex. The heir-at-law of the testatrix having learned that the will had not been registered, mortgaged the property to different mortgagees, and registered the mortgages. mortgage deeds were prepared and registered by the heir-at-law himself. The surviving trustee received the rents of the property down to 1878, when he died, and in 1879 a receiver was appointed in an action to administer the estate of the testatrix. order of the court, and notice of the mortgages was then given by the mortgagees to the purchasers, and the purchase-moneys were paid into court subject to the claims of the mortgagees. The heir-at-law died in 1885. An application was made to transfer the purchase moneys to the account of the devisees under the will. The mortgagees resisted the application on the ground that the act of 7 Anne, e. 20, gave them a title, because the will had not been registered. Neither of the securities was for moneys advanced, but both for old debts, and the heir-ut-law acted in the mortgage transactions as agent of both the mortgagees :—Held, that, if persons claiming under the act had notice of the will, they could not set up the title of the heir-at-law; that in the present case the mortgagees were affected by the notice which their agent the heir-at-law possessed; and that consequently their claims failed. Weir, In re, Hollingworth v. Willing, 58 L. T. 792.

- Of Prior Equitable Interest.]-A party taking an equitable mortgage with notice of prior equitable mortgage, cannot, by assignment to another without notice, give him a better title. Ford v. White, 16 Beav. 120.

Property in Middlesex was mortgaged to A

and afterwards to B., and subsequently to C. with notice of B.'s incumbrance. C. registered before B. and afterwards assigned to D., who had no notice of B.'s mortgage:—Held, that the interests being equitable, D. had no priority over

retaining in himself a reversion of two days, He subsequently made an equitable mortgage by way of written memorandum to P. He again made a third mortgage to S., and assigned to S. the original term, including the reversion of two days. S. had no notice of the equitable notice to P., but had notice of M.'s incumbrance. P. registered in Middlesex, but S. did not search the register, and was therefore not affected by notice:—Held, by Malins, V.C., that the equities being equal, S. had a legal estate by virtue of the assignment to him of the original term, and the reversion of two days, which entitled him to priority over P. On appeal, the Lords Justices expressed themselves not prepared to affirm this view, and therefore desired a further question of fact to be argued; but the ease was compromised before any judgment was given. Russell Road Purchase-Moneys, In re, 40 L. J., Ch. 673; L. R. 12 Eq. 78; 23 L. T. (N.S.) 839; 19 W. R. 520, 706.

- When effectual.]-A subsequent incumbrancer, who at the time of taking his security has no notice of the prior incumbrance, may, by properly memorialising his security, though after notice, obtain priority over the prior incum-brancer, if the memorial of the security of the Latter be defective. Lessex v. Baugh, 1 Y, & C. C. C. 620; 11 L. J. Ch. 374; 6 Jur. 1030.

A conveyance of lands in Middlesex, by settle-

ment upon a marriage of the settler, registered under the statute 7 Anne, c. 20, is effectual against a prior unregistered conveyance, notwithstanding the party claiming under the settlement had notice of the unregistered conveyance after the marriage, but before the registry of his settlement. Elsey v. Lutyens, 8 Hare, 159.

A registered marriage settlement of leaseholds The property was sold in 1882 under an in Middlesex postponed to an equitable mortgage by deposit prior in date, but registered subsequently to the settlement, the trustees not having inquired for the title deeds when the abstract was delivered to them. Warmald v. Maitland, 6 N. R. 218; 35 L. J., Ch. 60; 12 L. T.

535; 13 W. R. 832.

- From Search of Register.]-Where incumbrancer on estate in Yorkshire searched the registry from a certain date only, it will not be presumed that he had notice of any of the contents prior to that date. *Hodyson* v. *Dean*, 2 Sim, & S. 221; 3 L. J. (o.s.) Ch. 95; 25 R. R.

A subsequent incumbrancer is not bound, finding a memorial of a first mortgage on the register, to inquire how much is due to the first mortgagee, and will not be affected with notice of a prior unregistered second charge, made in favour of the first mortgagee. Credland v. Potter, 44 L. J., Ch. 169; L. R. 10 Ch. 8; 31 L. T. 522; 23 W. R. 366.

Expunging Registration.]-A judge of the High Court has no jurisdiction to make an order that the registration of a deed in the Middlesex Registry be vacated. By the indement in an action in the Chancery Division, a deed which had been entered in the Middlesex Registry was set aside on the ground of fraud :-Held, that, although it might be within the jurisdiction of the Master of the Rolls to direct that the registration be vacated, a judge of the High Court P., having a term of years in a house, made a could give no further relief than a declaration

that the registration ought to be vacated. Gibbs 14 L. J., Ex. 76. And see Sichlemore v. Thistleton, v. Sidney, 49 L. T. 132. 6 M. & S. 9; 18 R. R. 280.

Other Matters.]—As to what length of time, and what species of adverse possession, is sufficient to raise a presumption of grant in a register county. Due d. Beanland v. Hirst, 11 Price, 675.

# H. PROCEEDINGS ON BONDS.

### 1. WHEN MAINTAINABLE,

Upon Lost Bond. |- Though a court of law will permit a plaintiff to declare upon a lost bond, that does not oust the jurisdiction of the Court of Chancery. Atkinson v. Leonard, 3 Bro. C. C. 218.

The jurisdiction of equity upon lost bonds is very ancient, and is founded upon the want of a remedy at law without profert, till that jurisdiction was lately assumed. East India Co. v.

Boddam, 9 Ves. 464; 7 R. R. 275.
Relief was given upon a lost bond against sureties, the principal being out of the jurisdicsureties, the principal being out of the jurisdictivity of action. Binas v. Fisher, 43 L. J., Ch. tion, upon giving an indemnity against demands 188. See Neede v. Deman, 43 L. J., Ch. 409; of the plaintitis or persons claiming under them L. B. 18 Eq. 127, 30 L. T. 200; 22 W. R. 400. by virtue of the bond, and such costs, damages and expenses as they may be put to by the loss of the bond. Ib.

A bill was filed for relief in respect of a lost bond, which was alleged to have been altered after execution: Held, that the doctrine laid down in Simpson v. Hoveden (Lord) (3 Myl. & Cr. 97: 6 L. J., Ch. 315) did not apply, for the bond being lost the objection would not, at law, appear on the face of it. Williams v. Flight, 5 Beav. 41.

Bond given up by Mistake.]—A. gives three bonds to B. for 500%, each, payable at different times. The two first are paid; but upon the parties settling an account relative to other matters, the third bond is delivered up by mistake, instead of a particular voucher belong-ing to that account. Equity will relieve against this mistake, by directing an issue to try whether there were two bonds or three, and whether the last bond was paid or not. Vanhoven v. Giesque, 4 Bro. P. C. 622.

Bond improperly obtained.]—The court has jurisdiction to restrain the East India Co. from paying money secured by their bonds, which have been wrongfully obtained possession of, to any other than the true owner. Glasse v. Marshall, 15 Sim. 71; 15 L. J., Ch. 25.

Obligation to pay Interest regularly-Default -Forfeiture.]-On a bond with a penalty conditioned for the payment of money at a given day, and interest at stated intervals in the meantime, the whole sum becomes demandable on default in the regular payment of interest. It is no defence to plead that the obligors credited the obligee with interest in their books upon which the obligee could draw. Goad v. Empire Printing Co., 52 J. P. 438.

Demand, when Necessary.]-Where to an action on a bond conditioned for the payment of a sum of money on demand, there is an issue as to the demand, the plaintiff must prove an

An action on a bond conditioned generally for the payment of a specified sum with interest, may be brought without a demand being made. Gibbs v. Southam, 5 B. & Ad. 911; 3 N. & M. 155.

At what Time.]—If an instalment secured by bond is not paid on the day, the bond is forfeited, and the penalty is the debt in law. Judå v. Ecans, 6 Term Rep. 399. S. P., Chates v. Hewitt, 1 Wils. 80; Talbot v. Hodson, 2 Marsh. 527 ; 7 Taunt, 251.

Where a bond becomes absolute, the penalty is the debt in law. Worthington v. Wigley, 3 Bing. (N.C.) 454; 3 Scott, 558; 5 D. P. C. 504; 1 Jur. 183.

Delivery up, on Payment. ]-A bill in equity will not lie for the delivery up of a bond, after the bond debt is paid, though by the tenor of the bond the money secured would be payable at a future date, so that there was no present

Assignment of Bond-Breach of Trust.]The obligor of a bond, which had been afterwards assigned to a trustee, of which assignment the obligor of the bond had notice, but not of the particular term of the trust, was held not liable for payments not warranted by the trust made by him under the direction of the trustee. but only for such payments as he had made without such direction. Roberts v. Lloyd, 2 Beav. 376.

Parties to Sue. ]-See col. 356.

# Under 8 & 9 Will, 3, c. 11.

How affected by Modern Practice. ] - The indorsement on a writ claimed 500L, as the principal sum due on a bond conditioned for the payment by the obligor to the plaintiff of an annuity of 261. during the life of a child, and until she should attain the age of sixteen years, by specified quarterly payments, and alleged that two of such payments were due and unpaid: two of such payments were due and anpara :— Held, that the plaintiff was not entitled to pro-ceed under Ord. XIV. r. 1, to obtain final judgment, but was limited to the procedure Specified in 8 & 9 Will. 3, e. 11, s. 8, and Ord, XIII. r. 14. Tuther v. Cavalampi, 21 Q. B. D. 414; 59 L. T. 141; 37 W. R. 94; 52 J. P. 616.

The plaintiff advanced 250L to a limited

company, upon the security of ten mortgage debentures for 251, each, dated the 1st of September, 1890, and repayable the 1st of September, 1891, with interest. By his bond, dated the 1st of November, 1890, the defendant bound himself to the plaintiff in 500l, to repay the 250l, on the 1st of September, 1891, if the company should then dishonour their mortgage debentures, with a defeasance if the company should honour them, The company failed to pay, and the plaintiff issued a writ against the defendant, and applied for final judgment under Ord. XIV. r. 1:express demand before action. Corter v. Ring, Held, that this was a common money bond, and 2 Jenkins, 1 D. & L. 605; 12 M. & W. 614; the procedure under Ord. XIV., was applied to Jenkins, 1 D. & L. 605; 12 M. & W. 614; the procedure under Ord. XIV., was applied to the control of the control that the writ was specially indorsed within the rules; but that if the defendant brought into court the sum of 250d., he should have leave to defend. Gerard v. Clurces, 61 L. J., Q. B. 487; [1882] 2 Q. B. 11; 67 L. T. 204.

Bonds within.]—Bail bonds are not within the statute. Selby v. Lewes, 1 Tidd's Prac. 633. In an action of a bond conditioned to perform

an award, the plaintiff must assign a breach, and cannot have judgment for the penalty, and take out execution for the single sum awarded, though the measure of damages is ascertained by the award. Welsh v. Ireland, 6 East, 613; 2 Smith, 666.

Breaches need not be assigned on nonpayment of an annuity seemed by a warrant to confess judgment on a mutuatus. Shaw v. Worcester (Murquis), 6 Bing. 385; 4 M. & P. 21; 8 L. J. (0.8.) C. P. 98.

A post-obit bond, upon which a forfeiture has taken place, is not within the statute. Murray v. Stair (Envl.), 3 D. & R. 278; 2 B. & C. 82; 26 R. R. 282.

But a bond, conditioned for payment of a certain sum by instalments is. Willoughby v. Swinton, 6 East, 550; 2 Smith, 663.

But a bond, conditioned for the payment of a sum of money at the end of five years, with half-yearly interest in the meantime, with a proviso that, upon default in payment of interest, the principal shall be payable, is not. James v. Thomas, 2 N. & M. 663; 5 B. & Ad. 40; 2 L. J., K. B. 207. S. P., Smith. V. Zond, 3 M. & Scott, 528; 10 Bing, 125; 2 L. J. C. P. 280.

A bond upon the face of it appeared to be conditioned for the payment of a sum certain, but lya deed of the same date, declaring the purposes for which the bond warder, declaring the purposes for which the bond warder, declaring the purposes of the same date it should be lawful to the obliges to commence an action and that fit; and upon judgment being obtained, to issue scentrion, and that the judgment being obtained to issue scentrion, and that the judgment should be security for the payment to the obligees, and demand, of all sums of money which then were might thereafter become due to them :—Het in the variety of the programment of the obligees, and the standard of an agreement within the obligees ought to have assigned breches.

Hinst v. Jennings, 5 B. & C. 650; 8 D. & R. 424.
The stautic extends to a liability created by
the breach of an indemnity bond, whereby the
obliges is so far damulfied as that he may be required to pay moncy in consequence of a forfeiture, although the matter of the liability should
be in some sort collateral to the direct breach, and
actual damulfication has not ensued. Harrop v.
Armitags, 12 Price, 441.

In an action on a bond (with non est factum pleaded), to secure payment by instalments of the consideration for the purchase of a business, the plaintiff ought to suggest breaches. *D'Aranda* v. *Houstoun*, 6 Car. & P. 511.

To an action on a bond conditioned for payment of 1,000. on a day certain, and for the performance of the covenants in a deed, the defendant pleaded a general plea of performance of all aliangs mentioned in the condition. The plaintiff denied that the defendant paid the 1,000.—Held, that as the plaintiff was proceedings as 1—Held, that as the plaintiff was proceedings of the plaintiff was proceedings to the breach in nonpayment of the morey, it was not necessary for him to assign the plaintiff was proceeding the plaintiff was proceedings. The plaintiff was proceedings of the plaintiff was proceedings of the plaintiff was proceedings and the plaintiff was proceedings of the plaintiff was proceedings of the plaintiff was proceedings of the plaintiff was proceedings.

# 3. UNDER 4 & 5 ANNE, C. 3.

How Affected by Modern Fractice.]—It is competent to the plaintiff in an action upon a common money bond within the meaning of 4 & 5 Amer. c. 16, s. 12, to proceed under Ord, XIV. for the purpose of obtaining final pindgment, ereman v. Clares, 61 L. J., Q. B. 487; [1892] 2 Q. B. 11; 67 L. T. 204.

Bonds within.]—A bond for payment by the executors of the obliger of a sum of money within six months after his death, in case of his dying before his wife, or, in the event of her dying first, for payment by the obliger of such a sum, not exceeding the same amount to such persons as she should appoint, is not a bond within the above statute. Empland v. Watson, 9 M. & W. 333; 1 D. (N.S.) 398; 11 L. J., Ex. 102; 6 Jur. 763.

A bond was given for the penal sum of 4,000L, the condition of which recited that the obligor was indebted to the obligee in 2,000%, and that the obligee had agreed to accept interest for the same at the rate of 5%, per cent., during the lives of the obligee and another party, in satisfaction of the debt, provided the same was regularly paid. If the interest was paid half-yearly, on the 1st July and 1st January, the bond was to be null and void; but, in case of failure for twenty-eight days next after each half-yearly payment had become due, the same having been demanded, the bond to be in full force; and in case of failure in making the payments within the respective times, the bond or payments made under it should not be taken in discharge of any part of the 2,000%, but the same should immediately after such default become payable under the bond. To an action on the bond, a plea as to one of the half-yearly payments, that payment had not been demanded on the day when it became due, or any time within twenty eight days, but that after the expiration of the twenty-eight days, and, before action, it was paid, and that no other sum was due, is bad as a plea of solvit post diem ; because, if the principal had become payable under the bond, payment of it should have been pleaded; and, if it had not become payable, the plea should have shewn that it had not, which it did not. Marriage v. Marriage, I C. B. 761; 14 L. J., C. P. 244; 9 Jur. 581.

To a bond, conditioned for the payment of a sum of money at the expiration of soven years, and interest, in the interval, half-yearly, noney cannot be paid into court where the breach assigned is the nonpayment of interest, the principal not having become due. Holdpienson

principal not having become due. Hodykinson v. Wyatt, 1 D. & L. 668; 13 L. J., Q. B., 73; But the defendant may plead a plea of solvit

post diem to the interest alone. In.

To an action upon a bond, the defendant may plead as to part payment in satisfaction, post diem. Husband v. Davis, 2 L. M. & P. 50; 10 C. B. 645; 20 L. J., C. P. 118.

# 4. WHAT RECOVERABLE.

Amount.]—Where there is a bond for payment of rent, the bond is only a security to the amount of the penalty. White v. Sealey, 1 Dougl. 49.

A bond, whereby the obligor bound himself "in 20%, to be paid yearly," is not like a bond

with a penalty which can be forfeited, and so become a debt in law. Morrant v. Gough, 7 B. & C. 206; 1 Man. & Ry. 41; 6 L. J. (o.s.) K. B. 14; 31 R. R. 171.

In an action on a bond, conditioned for payment of the same sum as the penalty, with interest, the jury may give interest by way of damages for the detention of the debt. Francis v. Wilson. B. & M. 103.

In an action on a bond to secure the repayment of money with interest, the plaintiff can only recover to the amount of the penalty, with lw. for the detention of the debt. Hellen v.

Ardley, 3 Car. & P. 12.
On a bond to pay interest half-yearly, and the principal in three years, indement may be entered on failure of paying interest, but with a stay of execution on discharging it. Masjon v. Twuchet. 2 W. Bl. 706.

When a defendant is charged in execution with the penalty of a bond, it may be reduced to the principal and interest. Amery v. Smalridge, 2 W. Bl. 763.

To an action on a bond in the penal sum of 2,800, given by the defendant and O. to the plaintiff to scenre payment of 1,400L, he pleaded, that the plaintiff sued O. on the bond and obtained judgment, and thereupon sued out a fi. fa. against the goods of O. for the debt and damages, indorsed to levy 1,417L 178. 8d., that the sheriff took goods of O. to that amount, and thereout paid the plaintiff his debt and damages:—Held, that such levy was no answer to an action on the bond for the penal sum of 2,800L. Parker v. Watson, 8 Ex. 404; 22 L. J., Ex. 167.

A bond was given from A., B. and C., to D. reciting "that A., having received from D. a certain sum of money in the East Indies, had drawn bills of exchange there payable to D. on a house in Engand; and that the obligors had agreed with D., if the bills should not be accepted and paid, that they would pay the amount thereof, with interest, from the day of their respective dates, by way of penalty"; with a condition to be void if the bills should be accepted and paid according to the tenor thereof. On non-payment of the bills, D. was entitled to recover no more than the amount of them with interest from the time of their becoming due.

Orr v. Churchill, 1 H. Bl. 227; 2 R. R. 750. Interest is due in the case of a bond conditioned for the payment of a lesser sum, though not expressly reserved. Farquhar v. Morris, 7 Term Rep. 124.

But interest was held not payable on a single bond. Hogan v. Page, 1 Bos. & P. 337.

A bond and warrant of attorney executed in reland by a landed proprietor in that country to receive a sum of &——"sterling, good and lawful money of Great Britain," the lawful money of Great Britain," to English bunkers who had advanced the money, was held payable in British currency, in London. Nord v. Rockfort, 4 Cl. & F. 158; 10 Bli. (N.S.) 483.

— Voluntary Bond—Contingency. ]—A bond conditioned for the payment of a specified sum to A., after the death of B. and C., and the Survivor of them, will bear interest after the death of B. and C., although the engagement was perfectly voluntary, and although the principal was payable on a contingency. Hellier v. Franklin, 1 Stark, 291.

Joint and Several Bond-Bankruptcy of one Obligor. - Where one of two obligors in a joint and several bond had become bankrupt. and the obligee having by several dividends in the bankruptcy been paid 20s. in the pound upon the amount of principal and interest due at the rate of the commission, also carried in a claim in respect of the same bond, under a decree in a suit for the administration of the estate of the co-obligor who had died :- Held, that the amount due to the obligee in respect of such claim was to be computed by treating the dividends as ordinary payments on account, that is, by applying each dividend in the first place to the payment of the interest due at the date of such dividends, and the surplus, if any, in reduction of the principal; and, semble, the same principle of computation is applicable in bankruptcy as between the bankrupt and the creditors, where there is a surplus of the estate after payment of 20s, in the pound upon all the debts proved. Bower v. Marris, Cr. & Ph. 351: 10 L. J., Ch. 356.

— Monthly Instalments.]—By the condition of a bond, the obligor was to pay the money by mouthly instalments, and "when and as often as he should make default in the payment of any of the mouthly instalments, he should pay to the obligees is. in the pound for each and every pound of the said instalment so left unpaid", the obligees were not entitled to anything in respect of fractional parts of a pound. Three Towns Loan Society v. Doyle, 13 C. B. (N.S.) 200; 7 L. T. 276; 11 W. R. 22.

The plaintiffs lent money to 8, upon his bond, under which the principal was to be paid in five years by instalments, in case the debtor should so long live, the instalments being calculated so as to cover the principal of the loan, interest thereon, the expenses of negotiating it, and a nuargin representing a premium for the insurance of the debtor's life. The condition of the bond made it void; first, if the instalments were regularly paid till the expiration of the five years or till the debtor's life. The condition of the five years which would have become payable at the expiration of the five years, if the debtor lived so long, were at any time paid up, the balance of instalments being at once payable on the failure of any single instalment. The defendant as surety executed the bond, and default having been made in payment of one instalment, the leftled, that the amount claimed was not a penalty, and could be recovered. Protector Endowment Loan. Company v. Grice, 49 L. J., Q. B. 812; 5 Q. B. D. 592; 48 L. T. 564.—Cl. A. J., Q. B. 812; 5 Q. B. D. 592; 48 L. T. 564.—Cl. A.

Costs.]—In an action on a money bond, conditioned for payment of a less sum than 20t, the penalty not exceeding 20t, no costs are recoverable by virtue of 18 & 14 Vict. c. 61, s. 11. Goncess v. Moure, 3 H. & N. 540; 27 L. J., Ex. 391; 31 L. T. 20s.

And see PENALTY-DAMAGES.

Interest — Apportionment.] — Apportionment of interest upon a bond according to the general rule as according de die in diem, not as dividend or rent not provided for by the statute, is not prevented by the condition, reserving it by equal

half-yearly payments. Banner v. Lonce, 13 Ves. | be recovered at law in an action of debt on the

Mortgage Bonds of Railway Company.] Railway contractors issued a public loan secured by mortgage of their railways, and concessions, in bonds bearing 7 per cent. interest, redeemable in ten years by semi-annual drawings, at each of which drawings at least 5 per cent, of the loan was to be paid off. By a clause of the mortgage deed the trustees were to apply the residue of the moneys come to their hands, first, in payment of arrears of interest actually due on outstanding bonds; secondly, in redemption of any such bonds as ought to have been redeemed at the previous drawing, but were not so re-deemed; and thirdly in payment of future interest and future redemption of bonds. A holder of bonds which had been drawn for payment, but were unpaid, sought to recover interest on the bonds from the time at which they were drawn for payment, until payment :-Held, that he was so entitled to payment pari passu with the holders of andrawn bonds. Gardillo v. Weguelin, 46 L. J., Ch. 691; 5 Ch. D. 287-C. A.

Interest beyond Penalty-When Recoverable. Interest reyond remaity—when recoverance.

—No interest beyond penalty of bond, except on special grounds. Clarke v. Seton, 6 Ves. 411, 8. P., Mille, Emperte, 2 Ves. J. 301; Gravenon v. Cook, Dick. 305. Gibson v. Egeron, 1d., 408. Kettleby v. Kettleby and Bundler, Pettil, 1d. 514. Montan v. Bullandskil 1 Siss. 22. 107, 7 Ch. Crosse v. Bedingfield, 12 Sim. 35; 10 L. J., Ch. 219 ; 5 Jur. 836.

In an action on a bond, damages cannot be recovered beyond the amount of the penalty. Branscombe v. Searbrough, 13 L. J., Q. B. 247.
Arrears of an annuity secured by bond not

allowed beyond the penalty in the administration Mackworth v. Thomas, 5 Ves. 329; S. P., Maore v. McNamara, I Ball & B. 309. Atkinson v. Atkinson, Ib., 238; Sharpe v. Scarborough (Earl), 3 Vcs. 557.

Where, in a creditor's suit, bond ereditors had been allowed by the master their principal and interest to the extent of the penalties of the bonds, and had received an apportionment upon the amount of the penalties upon further funds becoming available for the creditors, they were beld entitled to subsequent interest on the sums mentioned in the conditions of the bonds remaining due, provided that such interest, together with the sums remaining due, did not exceed the penalties. Walters v. Meredith, 3 Y. & C. 264.

Obligees in a bond held entitled to be paid out of the assets of a deceased obligor a sum exceeding the penalty of the bond. Jendwine v. Agate, 3 Sim. 129; 30 R. R. 136.

A person conveyed estates to trustees upon trust to sell, and apply the produce of sale in discharging all his bond debts, together with the interest then due and to grow due for the same, to the day of payment. A bond creditor claiming under this deed is not entitled to principal and interest beyond the amount of the penalty of the bond. Hughes v. Wynne, 1 Myl. & K. 20; 2 L. J.,

Interest beyond the penalty of a judgment claimed in a creditor's snit; 1, because the cognizor had assigned his property in trust to pay scheduled creditors, of whom the cognizee was seneumen creamors, or when the cognitive was one; 2, because there had been a decree to account, before the arrear reached the penalty under which the creditor might have been prejudgment; but not allowed. Elliott v. Tynte, Beat, 478.

Where a mortgagee has tacked a judgment to his mortgage, he shall not be confined to the penalty of his judgment; but he is entitled to interest upon his judgment debt, though it should exceed the penalty. Id. 518.

A declaration in a decree, that a bond should be paid with interest from the 21st August, 1828: Held, not sufficient to exclude the general rule, that the interest should not exceed the penalty. Purcell v. Blennerhassett, 10 Ir. Eq. R. 470.

Where prevented from Suing. ]-In court of equity a debt secured by bond may be carried beyond the penalty of the bond if the debtor has, by injunction, restrained the creditor from proeceding at law, and there has been no misconduct on the part of the creditor. Grant v. Grant, 3 Russ. 598; 3 Sim. 340; 27 R. R. 135; 30 R. R.

Where in a suit by annuity creditors against the Crown (as the personal representative) and no contest between them and any other creditor, and by reason of the debt having been ascertained by a former decree, payment could not have been enforced by any proceeding:—Held, that interest was allowable at 5 per cent, as on a legal debt, out of the fund in court, and beyond the penalty of a bond. Hyde v. Price, C. P. Cooper, 193; 8 Sim. 578.

Interest beyond penalty of bond not allowed to assignee of judgment, although he had been restrained by injunction for a short time from proceeding at law. Denny v. Ennishillen (Lord), 2 Moll. 535.

- Surety. ]-Interest beyond the penalty of a bond upon a mortgage for the same debt, though by a surety. Clarke v. Abingdon (Lord), 17 Ves. 106; 11 R. R. 31.

- Against Purchaser for Value. \_\_\_ A mortgagee had also a bond on which the interest due exceeded the penalty. The mortgagor conveyed the equity of redemption for the use of his creditors, paying this bond first. Nothing beyond the penalty can be claimed. Lloyd v. Hatchett, 2 Austr. 525. S. P., Hatton v. Harris, 62 L. J., P. C. 24; [1895] A. C. 547; I R. I; 67 L. T. 722—H. L. (Ir.)

- Stale Demand.]-Interest on an old bond caunot be computed beyond the penalty. Two v. Winterton (Earl), 3 Bro. C. C. 489; 1 Ves. J. 451. S. P., Knight v. Muclean, 3 Bro. C. C. 496.

\_\_\_\_ In other Cases.]—Annuity bond forfeited when the grantor was discharged under an insolvent act which provided that future estate should not be discharged. The penalty being less than the subsequent arrears was allowed as the debt, and not only in favour of the purchaser of an annuity, but also of a co-obligor, as surety, having compounded with the purchaser, and obtained possession of the securities by repaying the money advanced with the arrears then due, being at that time less than the penalty. Butcher

v. Churchill, 14 Ves. 567. One of the residuary legatees of a testator owed his estate three bond debts, under heavy penalties. One of the bonds was in the penalty vented suing at law; 3, because interest might be paid within three months next after the

legatee should take an absolute interest in one | death of the person, at whose decease the money moiety of the testator's residuary personal estate. The testator charged the legatee's share of the residue with the payment of all debts at that time due from him, and of all interest thereon, and directed the same to be deducted from his share of the residue. The testator died in 1821, and the bond debtor obtained the prescribed interest in the residuary estate in 1864. At that time the principal and interest on the bond debts far exceeded in amount the penalties in each case:—Held, that in settling the amount due to the bond debtor, or his representatives, in respect of his moiety of the testator's residuary personal estate, there was to be deducted the full amount of the penalties of the bonds, and no more for the interest. *Matthews* v. *Keble*, 37 L. J., Ch. 657; L. R. 3 Ch. 691; 19 L. T. 243, 246; 16 W. R.

#### 6. Pleadings.

#### a. Claim.

What must be Stated. ]-If a person enters into a bond by a wrong christian name, and is sued on such bond, he should be sued by such name. A declaration against him by his right name, stating that he by the wrong name executed the bond, is bad. Gould v. Barnes, 3 Taunt. 504. See Bryant v. Williams, 5 M. & W. 447 : 7 D. P. C. 502.

In an action on a money bond, it is not necessary to aver a breach in non-payment of the money. The bond creates the debt, and therefore it is sufficient for the plaintiff to shew the debt due, and then it lies on the defendant to discharge hinself. Ashbev. Pidduck, 1 M. & W. 564; 2 Gale, 116; 1 Tyr. & G. 1016; 5 L. J., Ex.

251.

In an action on a bond, the declaration stated, that the defendant and L acknowledged themselves bound to the plaintiff in 8,0001., to be paid to the plaintiff, or to one E., on request, and that thereby, and by reason of the non-payment thereof, an action hath accrued:—Hekl, that it was unnecessary to allege a request, and that nonby agreet 6 C. B. 280; 6 D. & L. 96; 17 L. J., C. P. 295; 12 Jur. 831.

In an action upon a bond for the penalty, where there are alternative parts of the condition, the plaintiff must confine himself to a particular breach. Cornwallis v. Savery, 2 Burr.

772; 2 Ld. Ken. 492.

Upon demurrer to a declaration upon a bond, the judgment of the court is upon the declaration, and not upon the breaches assigned. Kingsford v. Dutton, 1 L. M. & P. 479.

Where, therefore, a declaration upon a bond assigned two breaches, one of which was good and the other bad, the court gave judgment generally for the penalty of the bond; and not for the plaintiff upon the good breach for the damages to be assessed upon it, and for the defendant as to the bad breach. Ib.

In an action on a bond to H., not to enter into the service of another person within ten miles of S., during two years after leaving H.'s service, some good consideration ought to be shewn on the face of the declaration, as the court will not presume one. Hutton v. Parker, 7 D. P. C. 739.

Where an obligor of a post-obit bond craved over, and set out the condition:—Held, that it over, and set out the condition:—Held, that it — Satisfaction.]—In an action upon an was not necessary for the obligee to aver the obligation without any condition, satisfaction

secured by the bond was to become payable.

Murray v. Stair (Earl), 3 D. & R. 278; 2 B. & C. 82 : 26 R. R. 283.

The breach of the condition of a bond, otherwise well assigned, is not vitiated by the superaddition of immaterial allegations. Stothert v. Goodfellow, 1 N. & M. 202.

#### b. Defence.

What must be Pleaded. —A defendant eannot take advantage of a void condition in a bond without setting it out. Collon v. Goodridge, 2 W. Bl. 1108.

A plea of payment before the day is bad in an action on a bond. Anon., 2 Wils. 150.

But where to an action on a bond, conditioned to pay money on or before a certain day, the defendant pleaded that he did pay it before the day, to wit, on such a day, held good. Anon., 2 Wils, 173. S. P., Hetcher v. Hennington, 2 Burr. 941; 1 W. Bl. 944.

To an action upon a bond, the defendant may plead as to part payment post diem. *Husband* v. *Davis*, 2 L. M. & P. 50; 10 C. B. 645; 20 L. J.. C P 118

In an action on a bond, conditioned for payment to third persons, solvit post diem is a good plea. Giddings v. Giddings, 1 Ld. Ken. 335.

The defendant may plead solvit post diem as to interest due on a bond. Hodghinson v. Wyatt,
1 D. & L. 668; 13 L. J., Q. B. 73; 8 Jur. 216.
Nil debet pleaded to a bond, is bad on general

demurrer. Anon., 2 Wils. 10.

Non damnificatus cannot be pleaded to an action on a bond, conditioned for the payment of a sum of money at a certain day, though it appears by the condition that the bond was given by way of indemnity. Holms v. Rhodes, 1 Bos, & P. 638.

So, a plea that was given as an indemnity to the plaintiff's testator against another bond, and not damnified, is bad, Mease v. Mease,

Cowp. 47.

To an action by husband and wife on a bond conditioned for the payment of a certain sum at a certain day, the defendant pleaded, that by articles of agreement between the wife, her sister, and the defendant, the interest of the money was to be paid to one of the sisters upon an event which had happened; but as the plea did not allege the payment of the interest accordingly it was bad. Buldee v. Elers, 5 Term Rep. 250.

A tender and refusal of principal and interest due on a bond after the day mentioned in the condition, and before action, cannot be pleaded. Underhill v. Mathews, Bull. N. P. 171.

Action on a money bond for 2,800L, the penal m. Plea, after setting out the condition (which was for securing the repayment of 1,400l. and interest), as to 800%, parcel of 1,400%, in the condition mentioned, that after the day named of 1,400*l*. is bad. *Ashbee* v. *Pidduch*, 1 M. & W. 564; 2 Gale, 116; 1 Tyr. & G. 1016; 5 L. J., Ex. 251. in the condition, the defendant paid 800%, parcel

Where the condition of a bond is not to indemnify, but to do substantive acts, the plea in discharge should show what has been done to satisfy the conditions. Collins v. Gwynne, 7 Bing. 423; 5 M. & P. 276; 9 L. J. (0.s.) C. P. 130.

v. Christmas, 2 Wils. 86.

Where to an action on a bond, which contained a condition that the defendant should not open a shop within a certain distance of premises demised in a lease, he pleaded that he opened a shop by the licence of the plaintiff:—Held, that such plea was bad, on the ground that a licence, after breach, was not good unless by deed. Sellers v. Bickford, 1 Moore, 460.

Where J. H., being indebted on simple contract to W., prevailed on his father to execute a bond for the payment within four years, within which period the latter died, and W. obtained from the son, who was the heir, and also from the representative of the father, a fresh bond for payment by yearly instalments; upon a creditor's suit for administering the father's estate, W. having elaimed to come in upon the original bond, which he had retained :--Held, that the second bond was to be presumed a satisfaction of the first. Clarke v. Henty, 3 Y. & C. 187.

Loss.]-Where, to an action on a bond, to save harmless from expenses by reason of naming one to a curacy, or from suits by reason thereof, the defendant pleaded non damnificatus, and the plaintiff replied, and assigned for breach, that he was obliged to pay such a sum by reason of such nomination, but did not say how he was obliged : -Held, well enough. Simmons v. Langhorne, 2 Wils, 11.

By Executor.]-Action on a common money bond, by executor of obligee against executor of an obligor; plea, that the money mentioned in the condition was part of the personal estate of A., deceased, by whom it had been bequeathed to the testator of the plaintiff and the testator of the defendant, and the survivor of them, and the executors and administrators of such survivor, upon trust to put and place the same out at interest, upon such real or other sufficient security as they might approve of, and to pay the interest; and that the testator of plaintiff died, leaving the testator of the defendant surviving; where-upon the estate of A. vested in the defendant's testator, to be by him applied according to the trusts of the will of A .- is a bad plea. Gleadow v. Athin, 2 C. & J. 548.

Performance.]-To an action on a bond, the defendant, after setting out the bond, which recited that G. had been appointed elerk to a banking company, and was conditioned for his fidelity while in the service of the company, pleaded that before any breach, "to wit on the 1st January, 1836, he was appointed manager; that the office of manager is different from that of a clerk, and the responsibilities greater; that G., from the day and year aforesaid, ceased to be clerk of the company, and that he performed the condition whilst he was clerk, and before he was appointed manager":—Held, that the plea was bad, because the time of G's appointment as manager being immaterial and laid under a videlicet, the plea, if put in issue, might have been supported by proof that G. had been appointed manager on some day previously to the day mentioned, and that he ceased to be the clerk on the day mentioned, or some subsequent day, so as to leave an interval between the appointment to be manager and ceasing to be clerk; and therefore the plea did not shew that clerk; and therefore the plea did not shew that G. ceased to be clerk when he became manager. on a bond for 4,000% conditioned to indemnify

must be pleaded to have been by deed. Preston | Anderson v. Thornton, 2 G. & D. 502; 3 Q. B. 271; 11 L. J., Q. B. 265; 6 Jur. 1109.

To an action on a bond, by the executors of the obligee, the defendant, after setting out the condition, which was, that "if the obligor should practise as a surgeon or anothecary at S., at any time, without the consent in writing of the obligee, then, if the obliger should pay the obligee 1000%, the bond should be void, otherwise it should remain in force," pleaded that he did not practise as a surgeon or anothecary at S. without the consent in writing of the obligee :-Held, bad, for not shewing the performance of the condition which rendered the bond void, Hastings v. Whitley, 2 Ex. 611.
The condition of a bond, after reciting that

the defendant and S. had indorsed to the plaintiff a bill of exchange, drawn by S. and accepted by A., was, that the defendant and S., or either of them, should pay or cause to be paid to the plaintiff the sum secured by the bill, within one month after it should become due, in case it should not be then paid by the acceptor to the plaintiff, according to the tenor of the bill, together with interest from the time the bill became due :-Held, in an action on the bond, that it was not a good plea, that the bill, when due, had not been presented for payment to the acceptor, or that due notice of its dishonour had not been given to the defendant and S, or either of them. Murray v. King, 5 B. & Ald, 165. Action on a bond, conditioned for the performance by G, of all the covenants on his part

mentioned in an indenture, bearing even date with the bond, made or expressed to be made between the plaintiff and G. Plea, that before the execution of the boud it was agreed that the plaintiff should grant to G. a lease under certain covenants, and that the defendant should enter into a bond as surety for the performance of those covenants: that the defendant did accordingly cuter into the bond on which the action was brought, and that the indenture mentioned in the condition was the lease so agreed upon, and no other, but that the lease never was executed :- Held, that the defendant was estopped by the condition of the bond from pleading this plea. Hosier v. Searle, 2 Bos. & P. 209.

Foreign Law.]-To an action on a bond the defendant pleaded, that the bond was executed by him in France, where he was then domiciled; that it was not taken or passed by any public officer authorised by the laws of that kingdom, nor was it written throughout by the hand of the defendant; that though the defendant signed the bond with his own hand, he did not write thereon with his proper hand the formula styled in the French tongue a "bon," or "approuvé," bearing in words at length the sum secured, nor was the defendant at the time a merchant or tradesman, &c.; concluding that, by reason of the premises, the bond, by the laws of France, never was nor is obligatory or binding on the defendant, but always was and is of no force, effect, or validity" :- Held, that the plea was bad, as being a mere argumentative and inferential statement of the French law; which, being pleadable only as matter of fact, ought to have been distinctly and affirmatively alleged. Benham v. Mornington (Eurl), 3 C. B. 133; 4 D. & L. 213; 15 L. J., C. P. 221.

the condition, whereby C. covenanted with the obligees to repay 2,000%, lent him on mortgage of a policy of insurance, to keep the policy up, pay the premiums, and pay the interest on the loan. Breaches were assigned, inasmuch as C. had not paid interest, and had not paid premiums, and the defendant had not indemnified. Plea, by way of equitable defence, that the defendant was surety for C. only, and that he had offered and was ready to pay all that was in equity due to the obligees, on receiving an assignment of the securities :- Held, that, assuming that the facts entitled the defendant to an equitable decree, giving him relief on condition of his hereafter paying what was due, a court of common law could pronounce no such decree, and that a plea on conitable grounds in a court of law was not good, unless disclosing facts which would, in equity, entitle the defendant to a decree such that the common-law judgment that the defendant go without day, would do complete and final justice between the parties. Wodehouse v. Farebrother, 5 El. & Bl. 277; 25 L. J., Q. B. 18; 1 Jur. (N.S.) 798.

Finding of Jury—Laches.]—Where a defendant conveyed an estate to the plaintiff, with a covenant for quiet enjoyment, and also gave an indemnity bond with sureties against "all costs, claims, demands, damages, and expenses whatsoever," the plaintiff having been obliged to pay divers sums for arrears of an annuity charged on the estate, such the defendant on the bond to recover them back with interest; the jury found that the plaintiff had been negligent in not suing the sureties on the bond at the time the payment was made:—Held, that this finding prevented the plaintifffrom recovering the interest. Anderton v. Arrowsmith, 2 P. & D. 408.

Set-off. |- In an action on a bond, where the interest of the sum secured has not been paid on the appointed day, a set-off, equivalent to the interest which existed before the commencement of the action, though not at the time of the interest falling due, may be pleaded under 8 Geo. 2, c. 24, s. 5. Lee v. Lester, 7 C. B. 1008; 7 D. & L. 137; 18 L. J., C. P. 312.

Other Equitable Defences-Release. ]-Creditor having, among other things, a bond with a surety taking a mortgage from the principal debtor, and agreeing to receive the residue by instalments, secured by warrant, &c., without prejudice to any security he now holds; injunction granted against suing the surety. Boulthee v. Stubbs, 18 Ves. 20; 11 R. R. 141.

Bond for a sum of money ordered to be delivered up to be cancelled, the Lord Chancellor being of opinion, upon the cvidence, first, that the bond was not intended to operate as a security for money at all events, but was given for a collateral purpose, which had been fully satisfied; and, secondly, if that were doubtful, that the obligec's subsequent conduct and mode of dealing with the bond during the whole of his life amounted in equity to a release of the debt. Flower v. Marten, 2 Myl, & Cr. 459; 6 L. J. (N.S.) Ch. 167; 1 Jnr. 233.

A. bequeathed to B. 700L, part of 1,200L which B. owed him on bond. A. afterwards revoked the bequest, but made an indorsement on the bond, by which he forgave B. the 700%. creditor subsequently took from the principal

the obligors against the defaults in observance the 1,2001., B. filed a bill to restrain the action. by C. of the covenants in a deed, referred to in offering to pay to the executors the balance of 5007. The court refused the injunction, because B. had given no consideration for the indorsement on the bond. Tufnell v. Constable, 8 Sim. 69.

> Agreement to give Time. ] - Where a bond ereditor agrees to postpone the time of payment and takes interest on his debt by anticipation, a court of equity will restrain an action on the bond, whether brought against the principal or the surety. Blake v. White, 1 Y. & C. 420; 4 L. J., Ex. Eq. 48.

- Collateral Matters. ]-Where the penalty of a bond is only to secure the enjoyment of a collateral object, equity will grant an injunction against a suit for the recovery, and an issue quantum damnificatus to try the real damage. Sloman v. Walter, 1 Bro. C. C. 418.

A bond for performance of covenants to build a bridge, and the sum agreed for actually paid ; an injunction granted to restrain an action on the bond, and an issue quantum damnificatus ordered, the sum mentioned in the bond being a penalty. Errington v. Aynesly, 2 Bro. C. C. 341; Dick. 692.

Bond for a sum of money ordered to be delivered up to be cancelled, the Lord Chancellor being of opinion, upon the evidence, that the bond was not intended to operate as a security for money at all events, but was given for a collateral purpose, which had been fully satisfied.

Flower v. Marten, 2 Myl. & Cr. 459; 6 L. J., Ch. 167 : 1 Jur. 233.

- Accord and Satisfaction.]-In equity joint creditors are prima facie tenants in common. A defence of accord and satisfaction with one of two joint creditors in an action by both is a good answer as an equitable defence to the elaim of the joint creditor to whom satisfaction was made; but it is no answer to the claim of the other. Steeds v. Steeds, 58 L. J., Q. B. 302; 22 Q. B. D. 537; 60 L. T. 318; 37 W. R. 378.

- In Other Cases. ]-The court will not grant an injunction to restrain a confidential agent from suing his employer upon a bond given by the latter, in respect of demands that arose during the continuance of the agency, but given after its termination. If a case were made of peculiar distress at the time of the bond given, the court might interfere. Strathmore v. Fortune, 1 L. J. (o.s.) Ch. 108.

Where a policy of life insurance had been effected as part of a family arrangement to secure to the wife and children of the insured a sum of money, and the husband, in breach of the condition of a bond which he had executed, omitted on one oceasion to pay the premium on the policy, whereby the insurance dropped, but afterwards revived it; the court, under the circumstances, and being of opinion that the manner in which the object and intention of the insurance and the bond had been described to the husband in a correspondence on the subject, had misled him, and that he was mistaken as to the consequences of the omission to pay the premium, restrained an action on the bond in respect of such breach, upon the terms of the husband paying the costs. Shearman v. M'Gregor, 11 Hare, 106.

A. B. entered into a bond as a surety; the A.'s executors brought an action against B. for debtor a promissory note for the amount, payable in two months, but afterwards, in consequence formance of covenants, breaches may be assigned of the insolvency of the debtor, sued A. B. on the bond. A. B. then filed his bill to restrain the action on the ground that he was discharged from liability by the giving of the promissory note: the creditor, by his answer, denied that such was the effect of the transaction; and, on the hearing, an inquiry was directed in respect of the circumstances under which the promissory note had been given. The master reported that though there was not any written or any distinct parol agreement between the parties, yet there was a general understanding that the giving of the note was not to affect the bond:—Held, on further directions, that under these circumstances there was no case for the interference of a court of equity. Wyke v. Rogers, 1 De G., M. & G. 408; 21 L. J., Ch. 611.

The loyalists' estates in America were, under the forfeiting acts, to be sold for the payment of debts. This no ground for injunction to restrain an action here on a bond.

Antill, 2 Bro. C. C. 11.

# c. Assignment of Breaches.

Necessity of .]-Although, to the ordinary condition of a common money bond—upon which judgment has been entered—there is added to and incorporated into the scaled instrument a proviso containing an agreement that the sum secured shall be paid by instalments, yet a suggestion of breaches is not necessary, if, upon the construction of the condition and proviso taken together, it appears to have been intended that the whole sum remaining secured by the judgment should become payable upon default made as to any one instalment. Buchanan v. Jack, Ir. R. 5 C. L. 41.

A fortiori, where such an agreement is not under senl. Ib.

An unsealed agreement not to proceed for payment, except on defaults differing from those mentioned in the sealed instrument, cannot have the effect of rendering a suggestion of breaches necessary. Ib.

Under 8 & 9 Will. 3, c. 11. ]—The 8 & 9 Will. 3, c. 11, s. 8, is compulsory on the plaintiff, and he cannot enter up judgment for the whole penalty on a judgment by default, as he might have done at common law. Roles v. Rosewell, 5 Term Rep. 538. S. P., Hardy v. Bern, 5 Term Rep. 636.

An assignment of breaches in an action on a bond to perform an award in the words of the award generally, is sufficient. Willcocks v. Nichols, 1 Price, 109.

Time. and Method of.]-The plaintiff may suggest breaches at the conclusion of his replica-tion, or in making up the issue. Humphrey v. Rigby, 2 Chit. 298; 5 M. & S. 60; Ethersey v. Jackson, 8 Term Rep. 255.

Where a defendant pleaded to a declaration that all sums of money which became due on the bond were paid :-Held, that the plaintiff might reply generally, negativing the allegations in the words of the plea, without assigning any special breach. Turner v. McNamara, 2 Chit. 697.

The breach of the condition of a bond otherwise well assigned, is not vitinted by the addition of immaterial allegations. Stothert v.

Goodfellow, 1 N. & M. 202.

In an action on a bond, with a penalty for per- requires. Anon., M. & M. 496, n.

in the replication; and on demurrer, an interlocutory judgment may be given, and final judgment stayed till after award and execution of a writ of inquiry. Johnes v. Johnes, 3 Dow, 1; 5 Taunt. 656.

After judgment for the plaintiff on demurrer in an action on a bond conditioned to pay an annuity, the plaintiff cannot issue execution for the arrears due, but must assign breaches. Wal-

cot v. Goulding, 8 Term Rep. 126.

In an action on a bond, conditioned not toassault, molest, or injure the person of the plaintiff, a replication alleging that the defendant assaulted, molested, and injured the person of the plaintiff, by beating and otherwise ill-treating him, is a sufficient assignment of a breach of the condition for which the jury is to assess damages, although such breach is not alleged in formal terms, according to the statute. Tombs v. Painter, 13 East, 1.

Where one gives a counter security to another, containing a covenant to pay an annuity and indemnify him, and also a warrant of attorney by way of collateral security, and it is agreed that in default of any one payment of the annuity, judgment may be entered up, and execution issue for the whole sum specifically, being the price of the annuity, it is not necessary to assign breaches, but execution may issue for the whole sum. Howell v. Stratton, 2 Smith, 65.

In an action against executors on a bond of their testator, conditioned for making it void on payment of a certain sum at a future day, or within one month after his decease, whichever should first happen, it is unneccessary to suggest breaches. Cardozo v. Hardy, 2 Moore, 220.

Where in an action on a bond, a plaintiff has suggested breaches on the roll, the court, after a plea of non est factum, refused a rule to shew cause why some of them should not be struck out, or judgment by default suffered on them, with entry of nominal damages; for, by the statute, the plaintiff may suggest breaches on every part of the condition, and the jury is to inquire of the truth of them : and the defendant had another course, viz., by pleading performance of the condition, and suffering Judgment by default on the replication. Conterbury (Archbishop) v. Robertson, 3 Tyr. 419; 1 C. & M. 181; 3 L. J., Ex. 101.

The 8 & 9 Will. 3, c. 11, s. 1, does not authorise the assignment of breaches in a replication which traverses a material averment in the plea. Webb v. Jumes, 8 M. & W. 645; 1 D. (N.S.) 36; 11 L. J., Ex. 38.

Where breaches must be assigned or suggested under the statute, if the defendant does not rejoin, the ordinary course is for the plaintiff to sign judgment for want of a plea, strike out all the pleadings subsequently to the declaration and suggest breaches, if the declaration itself does not state them. But this is only a rule of convenience; and, if the nature of the case requires that the pleadings, down to the default, should continue on the record, they ought to be stidate constitue of the record they origin to me retained. Marriage v. Marriage, 1 C. B. 761; 14 L. J., C. P. 244; 9 Jur. 581. S. P., Lawes v. Shaw, D. & M. 714; 5 Q. B. 322; 8 Jur. 461.

To an action on a judgment on a bond the defendant cannot plead that the bond was conditioned for the performance of covenants, and that no breaches of covenant were suggested or assigned in the original action as the statute

was that A. should deliver a true account of all moneys received by him in pursuance of his office, the defendant pleaded performance generally. The plaintiff assigned for breach that A. was requested to deliver a true account of all moneys received by him in pursuance of his office, but refused so to do :-Held, that this assignment of the breach was bad, in not alleging that A. had received any moneys by virtue of his office. Serra v. Fyffe, 1 Marsh, 441. S. C., nom. Serra v. Wright, 6 Taunt. 45.

And see Belfast Banking Co. v. Hamilton,

12 L. R., Ir. 105-C. A.

Assessing Damages on. ]-Where the breaches are assigned in the declaration, the jury, upon non est factum pleaded, may assess the damages without a special award of venire for that purpose. Quin v. King, 1 M. & W. 42; 4 D. P. C. 736; 1 Gale, 407; 1 Tyr. & G. 407; 5 L. J., Ex. 140.

Where in an action on a bond for securing a sum of money payable by instalments, there are no breaches alleged in the declaration, but the defendant in his plea sets out the condition and alleges performance, to which the plaintiff replies that mouey is in arrear, it is competent for the jury to assess the damages on that issue, without a special award of venire. Scott v. Stuley, 6 D. P. C. 714; 4 Bing. (N.C.) 724; 6 Scott, 598; 1 Arn. 274; 2 Jur. 518.

Judgment being entered on a bond to secure the quarterly payment of an annuity, and a fi. fa. having issued for the arrears of the last half-year, a second fi. fa. may be taken out for the past quarter, without reviving the judgment. Scott

v. Whalley, 1 H. Bl. 297.

In an action for a penalty for non-performance of covenants, a judgment on densurrer may be entered up for the penalty, in like manner as before the statute, but it can stand only as a security for the damages sustained. Goodwin v.

Crowle, Cowp. 357. Leave was given to a plaintiff in an action on a bond conditioned to perform an award, after judgment for him upon a plea of judgment re-covered, to execute a writ of inquiry under 8 & 9 Will. 3, c. 11, s. 8, after a writ of error allowed, and to sign a new judgment, on the terms of paying costs, and putting the defendant in statu quo. Hanbury v. Guest, 14 East, 401.

In an action on an administration bond, judgment by default having been suffered and breaches assigned, the court allowed a writ of inquiry to be executed before the chief justice, notwithstanding 3 & 4 Will. 4, c. 42, s. 16, but only granted a rule nisi in the first instance. Canterbury (Archbishop) v. Burlington, 1 D. (N.S.) 285.

Waiver of Irregularities. - Where a defendant was present and suffered an inquiry to proceed to assess damages, upon breaches which occurred after verdict, he cannot afterwards set aside the inquisition on the ground of surprise, nnless as a matter of indulgence, and on terms. Gilling-ham v. Myers, 13 Price, 791.

# d. Other Subsequent Pleadings.

Effect of. ]-Declaration upon a bond, conditioned for the payment of all moneys which S. defendant pleaded general performance: the sum named in it, notwithstanding that such

To an action on a bond, the condition of which | attorney-general replied that S., or some other person or persons by his order, received :- Held, that the averment of the receipt was only the introduction to the breach, the real assignment

of the breach being the non-payment of the money; but however this would have been our demnrer, it was cured by the defendant's rejoining that he had paid the money, which was an admission of his having received it. Tale v. Rew (in error), 6 Bro. P. C. 27.

In an action on a bond conditioned for the performance of covenants, if the defendant pleads performance of each covenant specially, and also general performance, the plaintiff must assign specific breaches in his replication, if he has not done it in his declaration; and if he merely takes issue on the general performance, and enters a separate assignment of breaches on the record, no damages can be assessed on them, and the court will award a repleader. Plomer v. Ross, 5 Taunt. 386; 1 Marsh. 95.

To an action on a bond, against one of two obligors, he pleaded that the plaintiff released his co-obligor. The plaintiff replied that the release was executed by him with the consent and at the request of the defendant, and ou an express promise and nudertaking by him that the release should not operate to discharge the defendant from or in any way prejudice the plaintiff's rights or remedies against the defendant in respect of the bond :- Held, that the

replication was bad, as the plaintiff could not, by parol averment, vary the terms of an instrument

under seal. Cheks v. Nash, 2 M. & Scott, 434; 9 Bing, 431; 2 L. J., C. P. 17.

In an action by A. against B., on a bond entered into jointly and severally by B. and C. to A., in the penal sum of 5001., the condition, after reciting that C. had been appointed collector of taxes, and that A. had consented to become one of his sureties, was stated to be that B. and C. should keep harmless and indemnify A, from and against all costs and charges which he should incur in consequence of his becoming surety. B. pleaded that A. had not, at any time since the bond, been in any way damnified by reason or means of any matter, cause or thing in the condition mentioned. A. replied that, during the time that C. continued collector, there came to the hands of C., as such collector, sums of moncy exceeding 500l., to wit, 2,006l. 7s. 10d.; and that C. did not pay over the same to the receiver-general; and A., for assigning a breach of the condition of the bond, said, that by reason of such default he was called upon by the receiver-general and forced and compelled to pay to the receiver-general a sum of money, to wit, 500%, parcel of the moncy so received by C. as such collector. B. rejoined that A. was not forced or obliged to pay the sum of money in the replication, or any part thereof .—Held, that, by this rejoinder, the receipt by C. of 5001, was not admitted; and that, in the absence of evidence to shew that some money had been received by C., noninal damages only could be assessed on the breach assigned. King v. Norman, 4 C. B. 884; 17 L. J., C. P. 23; 11 Jur. 824.

# 7. STAYING PROCEEDINGS.

Where Equity exists.]-A bond of indemnity given to protect a purchaser of land against ndverse claims threatened at the time of the purshould receive on account of the revenue; the chase, is valid to the full amount of the penal

penal sum greatly exceeded the original purchase- | payable by instalments, on condition that if any money; there being no equity in the circumstances of the case to justify an interference with the legal right, and the purchaser having, in discharge of the claim and expenses incidental, expended a larger sum than the full amount of the penal sum named in the bond. Osborne v. Eales, 2 Moore, P. C. (N.S.) 125; 12 W. R. And see Protector &c. Co. v. Grice, col. 490, supra.

A parish being indebted to A. for repairs done to the church, the parishioners agreed, at a vestry, that the parish officers should give a bond for the amount; that A. should give the parish twelve months' notice when he required payment, and that the parish should be at liberty to pay the debt by instalments. At another vestry held shortly afterwards it was resolved that the obligors should be indemnified by the parishioners and out of the rates, and the parish officers for the time being were anthorised and directed to pay the interest and the principal when required out of the rates. A., who was himself a parishioner, and several of the other parishioners, signed the agreement and the resolution. A. received the interest on his debt for several years, and part of the principal also, out of the rates, and never called on the obligors to pay the interest :- Held, that, as the parishioners had no power to bind the parish, the obligors were not exempted from their liability on the bond, notwithstanding A. had signed both the agreement and the resolution. Juquet v. Lewis, 8 Sim. 480; 6 L. J., Ch. 313 ; 1 Jar. 511.

Relief granted under exceptional circumstances on the ground that the plaintiff would have been under a mistake as to his liabilities under a family arrangement. Sheurman v. Mc Gregor, 1 W. R. 302.

Default-Interest.] - If default is made in payment of the interest on a bond, the principal whereof is not yet due, the court will not stay proceedings on payment of the interest and costs. Tighe v. Crafter, 2 Taunt. 387.

A joint and several bond was conditioned for payment of the principal after six months' notice, and in the meantime for payment of interest on the usual quarter-days; default having been made in payment of one quarter's interest (as it was said, through inadvertence); the obligee gave notice to pay the principal, and the next day brought actions on the bond against the several obligors :- Held, that the court had no power to stay the proceedings on payment of the interest due, and costs. Wheelhouse v. Ladbrooke, 3 H. & N. 291; 27 L. J., Ex. 307; 4 Jur. (N.S.) 417;

Instalments. - Proceedings on bond for payment of money by instalments, and on default to stand in force for the whole sum due, will not be stayed upon payment of the instalments in arrear. Gowlett v. Hariforth, 2 W. Bl. 958.

A bond was conditioned to pay 165% by instalments, until the whole should be paid; but if default was made in paying any one, the obligation was to remain in force. An action having been brought upon the bond, in consequence of a default in payment of the second instalment, a judge ordered that, on payment of the 15£ and costs, proceedings should be stayed:—Held, that the judge had no power to make such order.
Anylor v. Mopsey, 4 D. P. C. 669. And see
Protector, &c. Co. v. Grice, col. 490, supra.

one instalment was not paid at the time it became due, then that the whole sum should be payable. The court, on the appearance of fraud in not accepting one instalment when offered, stayed execution; but ordered the judgment to stand as a security. Stafford's Case, 1 L. J. (o.s.) K. B.

In other Cases. ]-Proceedings were stayed in an action on a bond for performance of mortgage covenants, on payment of principal and interest, and costs to be computed and faxed on 5 & 6 Anne, c. 16. Skinner v. Stacy, 1 Wils. 80.

The court will not interfere, under 4 & 5 Anne. c. 16, s. 13, to stay the proceedings in an action upon a bond, where it is at all doubtful that the payment stipulated by the condition is not subject to a contingency. Robinson v. Brown, 3 C. B. 54.

In an action against surcties on a bond, particulars of several breaches of the condition were given, of which only one was contested; the conrt has no power to order a stay of proceedings as to the admitted breaches upon payment into court of the damages sustained on those breaches. Kepp v. Wiggett, 4 C. B. 678; 5 D. & L. 164; 16 L. J., C. P. 235; 11 Jur. 876.

If a man agrees not to do an act, and enters into a bond, with a penalty to be forfeited on his doing it, the penalty is never to be considered as the price for doing such an aet; but the court relieve by injunction, until the actual damage sustained is ascertained by an issue. Hardy v. Martin, 1 Cox, 26.

A vendor conveyed his estate to a purchaser and took a bond for the purchase-money. He afterwards sued on the bond, and in equity, insisting on his equitable lien. He was put to his election in which court he would proceed. Burker v. Smark, 3 Benv. 64.

A bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron. Legh v. Lewis, 1 East, 391. Affirmed (in error), 3 Bos. & P. 231; 6 R. R. 290.

Under 7 Geo. 2, c. 20.]—On applications under 7 Geo. 2, c. 20, s. 1, to stay proceedings in an action on a bond, securing the principal and interest payable on a mortgage, if the mortgagee seeks to obtain interest for the interval between granting the rule and the actual payment of the principal into his hands, he must make his claim to it at the time when the rule is diseussed. Jordan v. Chowns, 8 D. P. C. 709.

Form of Order.]—The court granted an application, on behalf of the defendants, to refer it to the master to see what was due for principal, interest, and costs on a bond, which was the cause of action; and to stay all proceedings upon payment of the sum due and costs. Smith v. Alsop, M'Cl. 309.

A bond was conditioned to pay 165l. by certain instalments until the whole should be paid, And if default was made in paying any one, the obligation was to remain in force. An action having been brought upon the bond, in consequence of a default in payment of the second instalment a judge ordered that, on payment of 151, and costs, proceedings should be stayed:—Held, that the judge had no power to make an order A sum of money, secured by a bond, was made in this form. Naylor v. Mapsey, 4 D. P. C. 669.

#### 8. PAYMENT INTO COURT.

On Equitable Defence.]—In 1827, a bond to secure the payment of a sum of money was given to S. by L. M. joined in the bond as surety. In 1829 L. died. In 1832 S. brought an action in Ireland against M. upon the bond, and M. then filed a bill in Ireland for an injunction to restrain the action, on the ground that the bond was founded on a gambling transaction. An injunction was granted, and subsequently a decree nisi for taking the bill pro confesso was made against S., and the order was served upon him two days before his death, which happened in 1833. In 1837 S.'s personal representatives brought an action upon the bond against M. in England. M, then filed a bill for an injunction. S.'s representatives in their answer, stated that they were entirely ignorant as to the nature of the consideration for the bond, and that they had found among S.'s papers certain memorandum books relating to bets upon horse races, which books they had destroyed as useless; but they denied that the books showed the consideration for the bond. Upon this answer the Vice-Chancellor granted an injunction, which was continued upon appeal, without obliging the plaintiff to bring the money into court. Military (Eurl) v. Stewart, 3 Myl. & C. 18; 6 L. J., Ch. 298. Affirming 8 Sim. 371.

Since 23 & 24 Vict. c. 126. |-Payment of money into court, in discharge of principal and interest on a bond, and costs, could not be pleaded to an action on the bond before this enactment. England v. Watson, 9 M. & W. 333; 1 D. (x.s.) 398; 11 L. J., Ex. 102; 6 Jur. 763. S. P., London (Bishop) v. Mr.Niel, 9 Ex. 490; 2 C. L. R. 561; 28 L. J., Ex. 111; 18 Jur. 211; 2 W. P. 232 And 256 K. J. W. Thur. 314; 2 W. R. 232. And see *Kidd* v. Walker, 4 B. & Ad. 705; 1 D. P. C. 331.

The Common Law Procedure Act, 1860, s. 25. which permits payment into court to be pleaded by leave of the court or a judge in any action on a bond "which has a condition to make void the a som: which has a condition to make void the same upon payment of a lesser sum at a day or place certain, does not apply to an action on a bond conditioned to be void upon payment of a lesser sum by instalments. Preston v. Dunia, 42 L. J., Ex. 33; L. R. 8 Ex. 19; 27 L. T. 612; 21 W. R. 128.

#### 9. EVIDENCE.

Presumption of Payment. - Presumption of payment of a bond upon twenty years or less, without payment of interest, unless repelled by Hillary v. Waller, 12 Vcs. 266. circumstances.

The presumption of payment of a bond after twenty years, may be repelled by evidence that obligor had no opportunity or means of paying.

Fladong v. Winter, 9 Vcs. 196.

To support Plea of Payment.]—M., a solicitor, by whom an advance of 2001. from L. to W., secured by the bond of W., had been negotiated, upon being applied to by L. for payment of the bond, pledged the bond with bankers in his own name, and paid the money thus obtained to L. in respect of the money due on the bond. In doing so he acted without the knowledge or consent of the obligor, W.:—Held, that these facts did not support a plea of payment in an action on the bond at the suit of L, but in which the bankers were the real plaintiffs. Lucas v. Wilkinson, 1 H. & N. 420.

To support Pleadings. |- If issue is joined on non est factum, the only proof required on the part of the plaintiff is proof of the execution of the bond by the defendant. Hutchinson v. Keams, 1 Selw. N. P. 589.

A bond was executed by a person who could not write:—Held, that if there was no other plea besides non est factum, the defendant's counsel could not ask whether the bond was read over to the defendant before he signed it, nor what was the transaction respecting which it was given. Cranbrook v. Dodd, 5 Car. & P. 402.

It cannot be proved under non assumpsit that a bond was accepted by the plaintiff, in satisfaction of money which was lent and advanced two days before the bond was given. Weston v. Foster, 2 Hodges, 59; 3 Scott, 155; 2 Bing. (N.C.) 693; 5 L. J., C. P. 242. Weston v.

Illegality. ]-A defendant cannot give in evidence illegality in the consideration of a bond, nnless he pleads specially. Harmer v. Rowe, 2 Chit. 334; 6 M. & S. 146; S. C. nom. Harmer v. Wright, 2 Stark. 35; 19 R. R. 673.

Fraud and Mistake.]—On a plea that a bond was obtained by fraud and covin, evidence is not admissible to shew that the defendant executed it with full knowledge of its contents, but in consequence of previons fraud. Muson v. Ditch-bonrue, 1 M. & Rob. 460. But the court afterwards made a rule for a

new trial absolute, that the admissibility of such evidence might be more distinctly raised. S. C., 2 C., M. & R. 720, n.

In an action on a bond to secure the payment by instalments of the consideration for the purchase of a business, to support a plea that the bond was obtained by frand, covin and misrepresentation, it is not enough to shew that the business did not produce to the purchaser the sum represented by the seller; but if it is shewn that it did not produce to the seller himself, it will be enough, as in such case it may be assumed that the representation was untrue to the know-ledge of the party making it. D'Aranda v. Houson, 6 Car. & P. 511.

Where a party who executes a bond is at the time competent to execute it, he cannot, under ome competent to execute it, he cannot, under non est factum, shew that he was misled as to the legal effect of the bond. Edwards v. Brown, 1 C. & J. 307; 1 Tyr. 182; 9 L. J. (O.S.) Ex. 84; 3 Y. & J. 423.

In an action on a bond, the plaintiff com-plained against W. F. B., sued by the name of W. B. The defendant pleaded non est factum. At the trial, it appeared that the defendant did in fact execute a bond, agreeing with that described in the declaration by the name of W.B., and that, at the time of the execution, he was known by that name :- Held, that the proof was sufficient to sustain the issue, and that it was no variance. Williams v. Bryant, 5 M. & W. 447; 7 D. P. C. 502; 9 L. J, Ex. 47

Held, secondly, that even if the objection was valid, it was not one of which the defendant could avail himself under non est factum. Ib.

Reduction of Damages. |- The defendant was a surety by bond to the plaintiff for the due performance of a contract by S., according to an agreement. By that agreement, S. was to complete the works for a certain sum, and pay-ment was to be made to him by the plaintiff, during the continuance of the work, by instalcertified to have been done every two months seals:—Held, that the deed was not avoided by and the remaining one-fourth one month after the erasure. Caldwell v. Parker, 3 Ir. Eq. R. the whole was completed. S. applied for and 519; 17 W. R. 955. received advances from the plaintiff, exceeding in amount the value of the work done by him, for some of which advances he gave security. The work not being done at the specified time. the plaintiff called in another builder to complete the work, and the amount paid to him, added to the advances made to S., greatly exceeded the original contract price. In an action against the surety on the bond, to which there was a plea of non est factum :- Held, first, that he might shew in reduction of damages, that the advances were made by the plaintiff not according to the contract, and that, as the work had been completed within the contract price, the plaintiff was only entitled to nominal damages; and, secondly, that it would have been improper to plead non damnificatus. Warre v. Calcert, 2 N. & P. 126; 7
A. & E. 143; W. W. & D. 528; 6 L. J., K. B. 219; 1 Jur. 450,

Bond and mortgage given by an only son to his father :- Held, under the circumstances of the case, to be a running security for advances actually made, and not a security for the precise amount expressed in the instrument; and there being no evidence against the son, as to the amount of the actual advances, he was charged in that respect to the extent of his admissions only. Melland v. Gray, 2 Y. & C. C. C. 199.

#### I. ALTERATION.

By Deed. -An obligation by deed cannot be altered but by deed. Thompson v. Brown, 1 Moore, 358; 7 Taunt, 656.

But it is not necessary that a power of attorney given by deed should be revoked by deed. Rev v. Wait, 11 Price, 508; 7 Meore, 473; 1 Bing, 121.

Interlineations. —A memorial executed by the grantee only is admissible to shew that interlineations in the original deed, existing and produced, were made before its execution. Brown v. Armstrong, Ir. R. 7 C. L. 130.

The presumption is, that an erasure or interlineation in a deed was made at the time of the execution of the deed. Doe d. Tatham v. Catta-more, 16 Q. B. 745; 20 L. J., Q. B. 364; 15 Jur. 728.

Effect of. ]-What alterations in a document invalidate it, considered. Love v. Fox, 56 L. J., Q. B. 480; 12 App. Cas. 206; 56 L. T. 406; 36 W. R. 25; 51 J. P. 468—H. L. (E.)

Three persons who had taken shares in a company proved, that when they signed the company's deed, it contained a false sheet (which had been fraudently inserted, and to all appearance formed an integral part of the instrument), limiting the liability of shareholders to the amount of their shares, whereupon in winding up the company, and settling the list of contributors, they were released :-Held, that their release did not affect the liability of those who executed the deed after the false sheet had been removed, and the deed restored to the form in which it was originally registered, notwithstanding the latter had executed the deed upon the faith of those persons being shareholders. Richards, In re. Painter, In re, 4 K. & J. 305.

An indenture was made between A., B., C. and

ments, viz. three-fourths of the cost of the work signatures of B. and C., without breaking the

A, and B, entered into a joint and several bond to C., D. and E. C. delivered the bond to A., who was her son, for safe custody, and after for some time receiving the interest from A., she and D., another of the obligees, died. B., one of the obligors, also died, when his executors and A. made an arrangement together, without the privity of E., the surviving obligee, and crased the name and seal of B. from the bond :-Held, that this did not invalidate the bond against A. Smith, Ex parte, 3 Mont. D. & D. 378.

Alterations made in a deed after execution by the grantee named in it, though material, will not prevent the deed being received in evidence on his behalf to shew the estate which passed by it, and which was not divested by the alterations. Stewart v. Aston, 8 Ir. C. L. R. 35-Ex. Ch.

Where a deed is altered in a material part, it ceases to have any new operation, and no action can be brought in respect of any pending obliga-tion which would have arisen from it, had it remained entire, but it may still be given in evidence to prove a right or title created by it having been executed, or to prove any collateral fact. Agricultural Cattle Insurance Co. v. Fitz-gerald, 16 Q. B. 432; 20 L. J., Q. B. 244; 15 Jur. 489.

Affixing two seals after signature of a document, held a material alteration. Davidson v. Cooper, 13 M. & W. 343; 1 D. & L. 377; 13 L. J.,

Ex. 276-Ex. Ch. Filling in by a mortgagee of the date, the period for redemption, and the names of the tenants of the mortgaged premises after the execution of the deed by the mortgagor, are not such alterations as will invalidate the deed. Adsetts v. Hires, 9 Jur. (N.S.) 1063; 9 L. T. 110.

Action against surety on a bond for securing a loan of money. Plea, that after sealing the bond a material addition was made to the condition by the plaintiff without the defendant's knowledge, namely, that the giving day of payment to the principal should not discharge the sureties, whereby the bond was void; the plea not alleging in what way the addition was made, nor that it was in writing, is bad. Harden v. Clifton, 1 Q. B. 522; 1 G. & D. 22; 10 L. J., Q. B. 159; 5 Jur. 962.

- Deed Carrying out Several Objects-Alteration in One Particular. ]-Where a mortgagee conveyed the legal estate to the mortgagor by a deed on being paid the mortgage-money, and the latter re-conveyed it to trustees for the purpose of securing an annuity, and at the time of the execution by the mortgagee there were several blanks left in the deed, but not in that part which affected him, but merely for the sums to be received by the mortgagor from the grantees of the annuity, which were all filled up at the time of the execution of the deed by the mortgagor, but several interlineations were made in that part of it after the execution by the mortgagee :- Held, that the deed was not void. but operated as a good conveyance of the estate from the mortgagor to the trustees for the payment of the annuity. Due d. Lewis v. Bingham, 4 B. & Ald. 672; 23 R. R. 438.

Insertion of Omitted Word by Stranger, 7 -In a bond conditioned "for the payment of one D., and after it was executed, B., without any hundred pounds by instalments, till the full sum fraudulent intention, drew a pen through the of one pounds be paid," the word "hundred."

having been omitted in the second place where it occurred in the condition :- Held that the insertion of it by a stranger was an immaterial alteration, and did not avoid the instrument. Waugh v. Bussell, 1 Marsh, 214, 311; 5 Taunt, 707; 15 R. R. 624.

By Parol. -At the time of executing a bond to secure a sum of money, the obligors procured a letter from the obligee, stating his intention not to call in the money within a specified period if the interest was regularly paid:—Held, to be a binding undertaking. Norton v. Wood, 1 Russ, & M, 178; 32 R, R, 181.

To debt, upon bond, against a surety, he pleaded that after the making, &c., "a certain material addition was made to the condition thereof by the plaintiff, and with his privity, and without the knowledge or consent of the defendant, which addition is as follows," &c. :—Held, that the plea was bad for not stating that the addition was in

writing. Harden v. Člifton, 1 G. & D. 22; 10 L. J., Q. B. 159. A. being indebted to B., C. and D., three sisters, who were his near relations, partly on his own account, and partly as executor of his father, executed to them a bond for 500%. At the time of giving the bond, A. objected to give it, and agreed to do so only on a verbal representation, that it was not intended to be enforced unless B., C. and D. should come to want, an event which did not happen. The bond remained in the hands of the three till the death of B., and after her death in the hands of her survivors, and after the death of C. in the hands of D., whose property (by mutual arrangement) it was at the time of her death. On the bond was found the followagainst A. Witness, C. & D." This was dated eleven years after the date of bond. It was not made clear that C.'s name was written by herself; it was said that D. had written it. It was, however, proved that if D. had written it, she did so with the authority of C.:—Held, that without saying whether the indorsement amounted to a release, which was a legal question, there was an equity under the circumstances against enforcing the bond; that, if put in suit, the action would be restrained; and that there was nothing due on the bond to the estate of D. Major v. Major, 1 Drew 105.

A bond having been given for 2,000l., the obligor died, and his executor gave the obligee a fresh bond, and received back the original bond. with a memorandum indorsed upon it and signed by the obligee, in which he declared that he had accepted the fresh bond in lien of the first : Held, that the obligee could only claim under the second bond, and that the estate of the original obligor was discharged so far as the obligee was concerned. Shore v. Shore, 2 Ph. 378; 17 L. J., Ch. 59

A bankrupt, previous to his bankruptey, gave a bond to trustees for the payment of 5,000*l*., and interest as a provision for his daughter on her marriage. The trustees having proved the amount under the commission, a petition was presented to expunge the proof, the bankrupt alleging, that when the bond was given it was understood between him and the obligees that it was only to be available in the event of the success of a certain speculation:-Held, that such parol evidence was not admissible to control the absolute effects of the bond. Morley, Ex parte, 2 Deac. & C. 50.

A. having previously borrowed 1,000% of B., executed to him a bond for that sum, and B., two days afterwards, executes deed, whereby he covenants that bond shall not be enforced; and some years afterwards, B. having become bankrupt, his assignees bring action on bond, and file bill to have deed of covenant declared fraudulent :- Held, that court will not interfere against legal operation of deed, there being nothing to show that B, was insolvent when he executed it, and there being evidence that A. had also, at that time, peemiary claims on B., and that execution of bond was accompanied by agreement that payment of it should not be enforced. Slach v. Tolson, 1 Russ, 553,

A, bequeathed to B, 700l, part of 1,200l, which B, owed him on a bond. A, afterwards revoked the bequest, but made an indorsement on the bond by which he forgave B, the 700L. A.'s executors brought an action against B, for the 1,200l.; B. filed a bill to restrain the action, offering to pay to the executors the balance of 500l. The court refused the injunction, because B. had given no consideration for the indersement on the bond, Tuffnell v. Constable, 8 Sim. 69.

----- Burden of Proof.]--Two ladies entrusted much of the management of their affairs to A.. who was not a professional person. In the course of business A. became bound with them in a bond for 10,000l., given on their account; on the same day they executed a bond to A, for 12,000%. The survivor of the two ladies afterwards, by her will, left a legacy of 2,000l, to A. The bond for 12,000l. was, on the face of it, a simple money-bond :— Held, that it must be taken to be a simple moneybond, unless impeached by evidence, which showed that it was partly for indemnity, and that the barden of proving it to be an indemnity bond lay on the party impeaching the bond. Nivol v. Vaughan, 2 Dow & Cl. 420; 1 Cl. & F. 49; 6 Bli. (N.S.) 104.

To effectuate Objects.]—Lease of lands by A. to B., at the request of C., D. and E., out of which B. was to grant underleases at the direction of C., D. and E. (the object of which underleases was to secure a ground-rent to A. and C.), and, subject to such underleases, B. was to stand possessed of the lease in trust for D, and E., who were parties to the original lease; after C., D. and E. had executed that lease, and before A. or B. had executed it, the lease was altered with the consent and privity of C. only, by an erasure which excluded a certain portion of land inserted by mistake, but in which D. and E. had no interest. A, and B, then executed the lease :-Held, that this alteration did not render it invalid.

Chandless, 4 Bing. 123; 12 Moore, 316.

The necessary parties met to execute a marriage settlement. Immediately after the conveying party had executed, and before the execution or assent by any other party, the father of the intended wife objected to a clause; the objection was acquiesced in, and the clause was struck out, and then the conveying party immediately re-executed, and the other parties exe-euted:—Held, that the execution of the deed was in fieri only when the alteration took place, and that the alteration did not make a fresh stamp requisite. *Jones* v. *Jones*, 1 C. & M. 721; 3 Tyrw. 890; 2 L. J., Ex. 249.

Annexing Names.]—A defendant pleaded to an action on a bill of exchange a composition deed. The deed had been executed by the requi-

site majority of creditors, and had then been registered; afterwards, the names of two others of the creditors, with the amounts respectively due to them, were added to the schedule of ereditors annexed to the deed :- Held, that this was not an alteration which invalidated the deed. Wood v. Slack, 37 L. J., Q. B. 130; L. R. 3 Q. B. 379; 18 L. T. 510; 16 W. R. 859.

In an action on a joint and several bond, the obligecs declared against one of three obligors, and set out the condition to be for payment by the defendant. C. and D., any or either of them. On the production of the bond it was conditioned for payment by the defendant, C. and E.; and it appeared that after its execution by the defendant the name of E. was substituted for that of D., at the request of the party to whom the money for which the bond was given was advanced, and with the assent of the obligees; but without the knowledge or assent of the defendant :- Held, that this was a fatal variance, and avoided the bond as against the defendant, although he afterwards assented to the alteration, and paid some instalments due on the bond. Adams v. Bateson, 3 M. & P. 839; 6 Bing, 110; 7 L. J. (0.8.) C. P. 251.

Principal and Surety—Separate Agreements.]

—By an agreement between the plaintiff and S., the plaintiff agreed to purchase of S. a ship called the "Devouport," the price of such purchase being the payment of a sum of money, and the transfer to S, of the plaintiff's ship called the "Lord Dalhousie"; and upon the delivery of the "Devonport," the plaintiff agreed to lend S. 6,000L on mortgage of the "Lord Dalhousie," and S. agreed to repair the "Lord Dalhousie" so as to class her eight years A 1 at Lloyd's, and anything remaining to be done to the "Devonport was to be done by S. within two weeks after the ship's arrival in London. The defendant, as surety for S., gave a bond to the plaintiff, which, after reciting the agreement, was conditioned to be void if S. forthwith repaired the "Lord Dalhousie, and if that vessel should within three months be classed eight years A I at Lloyd's, and if S, should within two weeks after the arrival of the " Devonport" in the port of London do all that remained to be done to that vessel. The plaintiff and S. afterwards, without the consent of the defendant, made another agreement, by which the time for the completion of the "Devonport" was accelerated, and more things were required to be done to complete that vessel than remained to be done according to the original agreement :- Held, that the stipulations in the condition to the bond as to the "Lord Dalhousie" were so separate from those as to the "Devonport" that the defendant was liable on the bond for a breach of the condition as to the "Lord Dalhousie," notwithstanding his liability under the bond, so far as related to the "Devonport," was discharged by the alteration which the second agreement made in the terms of the first, Harrison v. Seymour, 35 L. J., C. P. 264; L. R. 1 C. P. 518; 12 Jur. (N.s.) 924.

# J. CANCELLATION AND RECTIFICATION. 1. CANCELLATION.

# a. By Court.

delivery up of a void lease may not be demurface of it. Melesworth v. Howard, 2 Coll, 145. been made for an illegal consideration not

Equity has jurisdiction to order an instrument to be delivered up, though void as law, as if against policy. St. John (Lord) v. St. John (Lady), 11 Ves. 535. S. P., Hogward v. Dimadale, 17 Ves. 111; Colchester (Mayor) v. Lowten, 1 V. & B. 244; 12 R. R. 216.

Jurisdiction of equity to order instruments to be delivered up, even upon legal objections, as under the Annuity Act; arising incidentally in the exercise of equitable jurisdiction; as upon extreme inadequacy of consideration and contribution among several sureties. Ware v. Horwood, 14 Ves. 28. Affirming 10 Ves. 200.

Principles on which courts of equity proceed, in ordering the delivery up of instruments on which actions may be brought. Cooper v. Joel, 27 Beav. 313; 1 De G., F. & J. 240; 1 L. T. 351.

A written guarantee was given for moneys payable by instalments; though invalid, there was no invalidity on the face of it. In an action for the first justalment the plaintiff was nonprossed :- Held, that, although there was a legal defence, the instrument ought to be cancelled, on the ground that future actions were contemplated, and that the future defence might fail from the loss of evidence. Ib.

- Order Discretionary.]-The cases in which equity orders instruments, to which there is a legal objection, to be delivered up, are rare, and the relief on terms. Browley v. Holland, 5 Ves. 618, 6 R. R. 58. S. P., Sathevland (Duke) v. Heathcate, 61 L. J., Ch. 248; [1892] 1 Ch. 475; 66 L. T. 210-C. A.

The court refused to decree a bond for which no money passed at the time of its execution, to be cancelled on the evidence of the petitioner alone against the affidavit in auswer of the respondent, that the bond was the free and voluntary act of the petitioner and given for past services and advances of money. Wyse v. Lambert, 16 Ir. Ch. R. 878.

Bill to have deeds, assigning stock, delivered up, as obtained by undue influence by a servant over her master, and an account. The evidence of direct influence considerably subsequent to the deeds. The defendant a married woman; her only separate property, stock; and not liable, therefore, without a lien. An issue being de-clined, bill was dismissed. Nautes v. Carrock, 9-Ves. 182; 7 R. R. 156.

Burden of Proof - Pressure - Undue Influence. |-An action was brought by a married woman to set aside a mortgage of her property to the defendants, who were the trustees of a land society, to secure moneys which had been misappropriated by her husband, who was the secretary of the society, on the ground that the security was given under threats of a criminal prosecution against her husband :- Held, that the burden was on the plaintiff to prove pressure or undue influence, neither of which had been substantiated; and that consequently her action could not be maintained. Me Clatchie v. Haslam, 65 L. T. 691; 17 Cox, C. C. 402-C. A.

Illegality—Illegality must clearly Appear.]

- A court of equity will not at the instance of a settlor or his legal personal representative, Void Deeds-Jurisdiction. A bill for the adversely set aside a settlement by which the settlor confers on a stranger the absolute benederivery up on a vota mease may more the control portion control on a stanger the theoretic period of the paper from the state-ficial interest in property legally vested in ments in the bill that the lease is void on the trustees, although such settlement may have

A widower, two days before going through the ceremony of marriage with his deceased wife's sister (which ceremony was known to both parties to be invalid), executed a deed by which it was recited that he was desirous of making a settlement and provision for the lady, and had transferred certain shares into the names of trustees upon the trusts thereinafter declared, being for the separate and inalienable use of the lady during her life, and after her death as she should by deed or will appoint; and they afterwards lived together as man and wife until the widower's death. Ten years after such death, and some time after the lady had married, the legal personal representative of the settlor instituted a suit to set aside the settlement, as being founded on a bad and illegal consideration: -Held, that the suit could not be maintained. Ib.

In order to deprive a plaintiff of his right to relief in equity on the ground of illegality in the transaction in respect of which such relief is sought there must be such a degree of illegality as is free from all donbt. Barton v. Mair, 44 L. J., P. C. 19; L. R. 6 P. C. 134; 31 L. T. 593; 23 W. R. 427.

The court will not refuse relief to an injured party to a deed on the ground that he has executed it with an illegal purpose, if that purpose has not taken effect. Symes v. Hughes, 39 L. J., Ch. 304; L. R. 9 Eq. 475; 22 L. T. 462.

- Nature of Illegality. ]-An action having been brought against the defendant for illegally pledging quantities of tobacco, and he having pleaded a release given to him by one of the parties interested in the tobacco, the court refused to set aside the plea, the releasor having an immediate interest in the money sought to be recovered, and no fraud being shewn. Phillips v. Clagett, 11 M. & W. 84; 2 D. (N.S.) 1004; 12 L. J., Ex. 275.

A court of law has no jurisdiction to set aside a release which is good in law; but, in the exercise of its equitable jurisdiction, it may interfere to prevent a defendant from pleading a release where it would be a manifest fraud on a third party seeking to enforce a demand against the defendant, and a party to the fraud. Ih

A bond given to persons to whom the obligor had lost bets on horse-races, which he was mable to pay, in order to prevent them from taking the steps which, under the conventional code established among betting men, they were entitled to take, and which would have been followed by consequences involving the obligor in considerable pecuniary loss, is valid, and provable against the obligor's estate. Bubb v. Yelverton, 39 L. J., Ch. 428; L. R. 9 Eq. 471; 22 L. T. 258; 18 W. R. 512.

To an action on a bond against an excentor, he pleaded that the plaintiff had seduced and committed adultery with the wife of his testator, between whom and the plaintiff it was agreed that in consideration that the testator would not expose and make public the conduct of the expose and make plante the conduct of the plaintiff, he would not sue on the bond: —Held, that there was no valid consideration for the agreement, and that the plea was bad. Brewn v. Brine, 45 L. J., Ex. 129; 1 Ex. D. 5; 33 L. T. 703; 24 W. R. 177.

appearing on the face of the instrument. Ayerst | if he omits to state the condition, it may be v. Jenkins, 42 L. J., Ch. 690; L. R. 16 Eq. 275 | shewn by the defendant in his plea, and the 29 L. T. 126; 21 W. R. 878. court will equally take notice of the illegality in either case. Durergier v. Fellowes, 1 Cl. & F. 39.

A bond conditioned to take possession of the effects of persons dying intestate in a settlement on the coast of Africa, and sell the same, and remit the produce to the African Company in Europe, to be by them delivered to the lawful administrator, was a legal bond. African Co. v. Torrane, 6 Term Rep. 588.

Fraud. ]-To a defence in an action for personal injuries of a release by deed, it was replied that the execution of the deed by the plaintiff was procured by the company fraudulently representing for that purpose that his injuries were of a trivial and temporary nature, and that if they should afterwards two out to be more serious than he then anticipated he would still even though he had executed the deed, be in a position to obtain and would obtain further compensation from the company:-Held, that there was a fraudulent misrepresentation of fact alleged sufficient to avoid the deed as against the plaintiff, who had been thereby induced to execute it, Hirschfield v. L. B. & S. C. Ry., 46 L. J., Q. B. 94; 2 Q. B. D. 1; 35 L. T. 473.

Semble, that the deed would equally have been avoided by the second allegation that the fraudulent misrepresentation had been as to the legal effect of the deed which the plaintiff was thereby

induced to sign. Ib.

A passenger who was injured by a railway accident, sent in a claim for 691*l*, compensation. The traffic manager of the company called upon him, and after some discussion the passenger accepted 400L, and gave a receipt acknowledging it to be in full discharge of his claims. About a year afterwards he commenced an action against the company for further compensation, to which the company pleaded that he had accepted 4001. in full satisfaction and discharge of the causes of action. The plaintiff then filed a bill to restrain them from relying on the plea, and from setting up the acceptance of the 400L or the receipt, as a satisfaction or discharge of the damages, except to the extent of 400l. The bill did not allege fraud, but that the plaintiff had signed the receipt on the express condition that he should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time :- Held, that as the statement in the receipt could be rebutted by evidence that the plaintiff did not receive the money in full satisfaction of all demands, the whole case could be tried at law better than in equity; and that the bill ought to be dismissed. Lee v. Lancashire and Yorkshire Ry., L. R. 6 Ch. 527; 25 L. T. 77; 19 W. R. 729.

Action to set aside Marriage Settlement-Fraud. |- In an action to set aside a marriage settlement, the plaintiff alleged as the grounds of his action that, previous to the execution of the settlement made upon the marriage between himself and J. S., the latter stated to him that her first husband had been divorced from her, at her suit, by reason of his cruelty and adultery; that such statements were made to induce him to execute the settlement and contract the marriage; that, in reliance on the representations, The illegality of the condition of the bond may he executed the settlement, and married J. S.; be shewn by the plaintiff in stating the bond that he subsequently discovered that the repre-itself, with the condition in his declaration; or, sentations were false to the knowledge of J. S. and that she had been divorced from her husband at his suit, and by reason of her adultery : -Held, on motion by the defendant, that the plaintiff's statement of claim must be struck out under Ord. XXV. r. 4, as disclosing no reasonable ground of action. Johnston v. Johnston, 52 L. T. 76; 33 W.R. 239—C. A. Affirming 53 L. J., Ch. 1014.

Setting Aside-Family Settlement-Influence of Father - Independent Advice - Benefit to Father. - In regarding claims to upset resettlements of family estates, the court gives weight to considerations which in other cases would not be allowed in the scale. For the validity of such a resettlement, the son being tenant in tail in re-mainder, it is not essential that the son should have independent advice, and the court will not inquire whether the influence of the father was exerted with more or less force. Where the father obtains a benefit, the jealousy of the court is necessarily aroused; but such a transaction is not necessarily unfair, nor if unfair is it fatal to the validity of the entire arrangement; and the objectionable provisions may be expunged with-out affecting the rest of the deed. Where in such a case the father abandons the benefit which he has obtained, the rest of the settlement may stand good. Hoblyn v. Hoblyn, 41 Ch. D. 200; 60 L. T. 499; 38 W. R. 12,

- To evade Payment of Costs. ]-A remainderman who failed in a suit instituted by him against the tenant for life in respect of alleged waste, and who was ordered to pay the costs of the suit; sold his remainder, and executed a convevance of it to the purchaser before the costs could be taxed, and he paid his solicitor's bill out of the proceeds of the sale without leaving sufficient to pay the defendant's costs of the snit, and without having any means of paying them :-Held, that the defendant was not entitled to have the conveyance set aside or declared fraudulent, or to recover from the remainderman's solicitor the portion which the solicitor had received of the proceeds of the sale in payment of his costs, and that the fact of the purchaser having or not having notice of the circumstances attending the sale, or the purpose of it, was immaterial. Norteliffe v. Warburton, 4 De G., F. & J. 449.

Obtained by Fraud of Sheriff's Officer. ]-A sheriff cannot recover on an indemnity bond which has been procured by the fraud of his own officer. Raphael v. Goodman, 3 N. & P. 547; 8 A. & E. 565; 1 W. W. & H. 363; 7 L. J., Q. B.

A plea to an action on such a bond that it was obtained by the sheriff and others in collusion with him by fraud and covin, is a good plea. Ib.

To escape Forfeiture for Felony. ]—A person being in prison on a charge of felony, in order to avoid a forfeiture of his property in the event of a conviction, executed a voluntary deed, assigning his personal estate to his brother absolutely. He was tried, found not guilty, on the ground of insanity, and ordered to be imprisoned as a lunatic during her majesty's pleasure :- Held, that the deed, being without consideration, and executed by an insane person under a total misapprehension, was inoperative, and that the representatives of the brother took no interest under it. Munning v. Gill, 41 L. J., Ch. 736; L. R. 13 Eq. 485; 26 L. T. 14; 20 W. R. 357; 12 Cox, C. C. 274.

Duress.]—The moment that a person who in-fluences another does so by the threat of taking away from that other something he then possesses, or of preventing him from obtaining an advantage he would otherwise have obtained. then the act of the person exercising the influence becomes coercion, and ceases to be persuasion or consideration. Ellisv. Burker, 40 L. J., Ch. 603; 25 L. T. 7; 19 W. R. 963. Affirmed on appeal, 41 L. J., Ch. 64; L. B. 7 Ch. 104; 25 L. T. 680; 20 W. R. 160-L.J.

A plaintiff, while lodging at an hotel, and seriously ill, executed a bond to the landlord for 10001., payable at six months' date, to secure moneys paid and advanced for the plaintiff for hotel charges, the landlord undertaking to rectify all errors in the accounts; a court of equity restrained an action on the bond, the plaintiff giving judgment for the amount of the claim. Edwards- Wood v. Baldwin, 4 Giff, 613.

Arrangement not Complete. ]—A voluntary deed, by which a father purported to convey his property to his son absolutely, but which did not carry into effect the whole arrangement between them, was set aside at the instance of the father after the son's death. Hughes v. Seanor, 18 W. R. 1122,

A mortgage effected by the son upon the property, the father, though in possession, allowing the son to act as if absolute owner, upheld,

Cancellation-Inchoate Marriage Settlement. In contemplation of marriage, an intended wife and her father executed the engrossment of a settlement of, inter alia, funds to be provided by the father, and the present and after-acquired property of the intended wife. The engrossment was given into the custody of the solicitors of the intended husband: it was not executed by him or the trustees. The engagement was broken off by agreement. After the lapse of three and a half years the court declared the engrossment void as a settlement, and directed it to be given up. Bond v. Walford; 55 L. J., Ch. 667; 32 Ch. D. 238; 54 L. T. 672.

By a settlement executed in 1877, in consideration of a then intended marriage, it was declared that a sum of stock, the property of the intended wife, which had been transferred by her to two trustees, should be held by them on trust for the benefit of the intended wife, the intended hus-band, and the issue of the intended marriage. The marriage was not solemnized, but the parties cohabited without marriage, and three children were born. In 1883 an action was brought by the father and mother against the trustees of the settlement, to obtain a transfer of the fund to the mother :—Held, that the contract to marry had been absolutely put an end to, and that the court could order the stock to be transferred to the lady. Essery v. Cowlard, 53 L. J., Ch. 661; 26 Ch. D. 191; 51 L. T. 60; 32 W. R.

On the Ground of Mistake.]-Where a man executes a several bond, intending it to be joint, he may by bill have it delivered up. Underhill v. Horwood, 10 Ves. 225. Affirmed, 14 Ves. 28.

This will also be done in bankruptey. Id. 227. Circumstances under which a deed executed under a mistake will be set aside considered. Spicer v. Dawson, 5 W. R. 431.

A., supposing that he was entitled, as eldest

517

son and heir-at-law of his father, B., to shares in | hold the same for his wife and children, if any, a company, executed a deed of indemnity in favour of the directors of the company. A. afterwards ascertained that the shares were personal property, and that he was not entitled to them. Prior to the execution of the deed by A., a call on the shares had been paid by B.'s executors, and such payment was entered in the company's books as having been made by the executors of B. :-Held, that A, was entitled to have the deed set aside as against himself, as having been obtained under a mistake of fact and law. Broughton v. Hutt, 3 De G. & J. 501; 28 L. J., Ch. 167; 5 Jur. (N.S.) 231; 7 W. R. 166.

On the Ground of Surprise, - Agreement decreed to be delivered up on the ground not of frand but surprise, neither party understanding the effect of it, viz. a lease with covenant for perpetual renewal at a fixed rent of premises, held under a church lease renewable upon fines continually increasing. Willan v. Willan, 16

Voluntary Settlement - Power of Revocation.]—The absence of a power of revocation, and the fact that the attention of the settlor was not called to that absence, do not make a voluutary settlement invalid; they are merely circumstances to be considered in deciding on the validity of a voluntary settlement. A widow instructed a solicitor to prepare a deed settling certain houses and buildings on herself for her life, and after her death for the benefit of her children. The deed, as prepared, did not exactly correspond with the instructions, but was read over to and executed by her. There was no suggestion made to her that the deed ought to contain a power of revocation. Some years afterwards she burnt it, and expressed satisfaction at having got rid of it. She executed a mortgage of part of the settled property, after asking the or part of the settled property, arter asking the consent of a son who was both beneficially in-terested and a trustee of the settlement, and made a will purporting to dispose of the whole property:—Held, that, under the circumstances, the deed of settlement was valid, and not affected by the want of a power of revocation or by the divergence from the instructions. Hall by the divergence from the instructions. Hall
V. Hall, 42 L. J., Ch. 144; L. R. 8 Ch. 480, 28
L. T. 883; 21 W. R. 373, 8 F. P. Phillips V.
Mullings, 44 L. J., Ch. 211; L. R. 7 Ch. 244;
20 W. R. 129; Henry V. Armstrong, 18 Ch. D.
688; 44 L. T. 918; 30 W. R. 472. Contra,
Mountford V. Keene, 24 L. T. 925; 19 W. R.
708; Welman V. Welman, 49 L. J., Ch. 736;
15 Ch. D. 570; 43 L. T. 145.

- Explanation of Terms. - In order to support a voluntary settlement, it must be shewn that all the provisions are proper and usual; or if there are any unusual provisions, that they were brought to the notice of and understood by the settlor. Phillips v. Mullinys, 41 L. J., Ch. 211; L. R. 7 Ch. 244; 20 W. R. 129.

No general rule can be laid down as to the proper and usual provisions in such a settlement,

but a power of revocation is not essential. Ib.

A young man of improvident habits, being entitled to a sum of money, was induced by the trustee of the money, and by a solicitor, to execute a settlement by which he assigned a part of

and subject thereto for certain cousins of his He had no power of appointment in default of issue, and no power of revocation, and no power to appoint new trustees. The deed was explained to him, and the particular clauses were brought to his notice:—Held, that the deed could not be set aside by the settlor. Ib. And see Hall v. Hall, supra.

- Costs. ]-A decree being made for setting aside a voluntary settlement, on the ground of the omission of a power of revocation :-Held, that the solicitor who had prepared the deed, and who was one of the trustees named in it, must pay his own costs as a penalty for not having called the settlor's attention to the absence of the power. Henshall v. Fereday, 27 L. T. 743; 21 W. R. 240.

Circumstances under which a voluntary deed will be set aside. Ib., 29 L. T. 46; 21 W. R. 570

—— Onus of Proof.]—When a voluntary deed is impeached, the onus of supporting it does not necessarily rest upon those who set it up. Nor is a voluntary deed of settlement voidable by the is a country decay of settlement would be yet settler merely because it does not contain a power of revocation. *Henry* v. *Armstrong*, 18 Ch. D. 668; 44 L. T. 918; 30 W. R. 472.

When a grantce, under a deed purporting to be a conveyance for valuable consideration, attempts to support the grant as a gift, the onus of proving that such a gift was intended and made is thrown upon the grattee, and clear evidence in support of the gift will be required. Coultmos v. Secan, 19 W. R. 485—L. C. Aftirming 22 L. T. 539; 18 W. R. 746.

Voluntary Settlement of Lands - Power of Attorney. ]—B. excented a voluntary settlement of land in favour of his wife and children, which contained a power of sale. Subsequently, B., being about to leave England, executed a power of attorney to E., authorising him to sell all or any of his lands, but in general terms. E., as B.'s attorney, agreed to sell a portion of the land comprised in the settlement to the defendant; and the defendant contracted the next day, the 4th May, 1876, to sell the same piece of land to the plaintiffs. On the execution of this contract a deposit of 2001, was paid, and the purchase was a depise of 2000, was plain, and the pircanse wis to be completed on the 1st January, 1877. The title was objected to by the plaintiffs on the ground that the power of attorney did not authorise the sale to the defendant, and an action was commenced in the Exchequer Division in August, 1877, for the return of their deposit, and for damages for breach of the contract : the defendant asserted that the contract was binding and the title good, and by his counter-claim asked for specific performance. An order had been obtained by consent in another action to administer the trusts of the settlement, confirming the proposed sale by E. to the defendant, and it had also been decided in the action that an order might be made directing a person to convey for B. The defendant subsequently offered a conveyance direct from B. or from the trustees of the settlement, which was declined: -Held, by Bacon, V.-C., that the power of attorney did not authorise E. to sell to the dethe money to trustees to invest and to pay him fendant any portion of the land comprised in the during his life the income on such part as they settlement; and that such a sale was not suffishould think fit, and after his death on trust to climate to call into operation the statute 2T Eliz. c. 4; that the plaintiffs could not be affected by the order of the administration action; and that, the title being defective, the plaintiffs were entitled to recover the deposit, with the costs of the action; the damages, to be ascertained, to be limited to the conveyancing costs, General Meat Supply Association v. Bouffler, 41 L. T. 719-C. A.

Decision of Bacon, V.-C., affirmed on appeal, on the ground that the trustees' suit, being a suit for the execution of the trusts of the settlement, there was no jurisdiction in it to make an order to confirm a sale in derogation of those trusts. Ih.

Reconveyance on. ]-Decree, on setting aside an annuity for want of a memorial registered, for an account of the consideration with interest and costs, and of all the annual payments, the balance on either side to be paid, the securities

mannee on either side to be paid, the securifies to be delivered up, and a re-conveyance. Halbrook v. Skarpey, 19 Ves. 131.

Where a decal is declared void in equity and cancelled, a re-conveyance is not necessary, semble. Hoghton v. Hughton, 15 Beav. 278; 21 L.J., Ch. 482; 17 Jun. 19.

As to the necessity of a re-conveyance on setting aside a deed in equity. Att.-Gen. v. Magdalen College, Oxford, 18 Beav. 223; 23 L. J., Ch. 844; 18 Jur. 363; 2 W. R. 349.

Deed set aside upon the ground of ignorance and mistake as to its purport and effect, no fraud or undue influence in obtaining its execution being alleged, and the deed itself being inconsistent with the offect contended for by the grantee under it as against the plaintiff. The plaintiff intending to assist the defendant, his illegitimate son, in raising money upon mortgage, and to give scenrity for him, had executed a deed which recited a contract for sale, and in consideration of 501, conveyed the equity of redemption in the property, which had been mortgaged to the defendant. No consideration was ever paid, and the defendant, who insisted that the deed was a voluntary conveyance to himself from the plaintiff, had not questioned a subsequent sale of a portion of the property by the plaintiff. Deed set aside, and re-conveyance ordered. Cov. v. Bruton, 5 W. R. 544.

When a suit is instituted to set aside a voluntary settlement of real and personal estate, and the right to the relief asked is not contested, the court will order a re-conveyance of the property the subject of the settlement, and direct payment of the costs out of the property so settled. Thompson v. Milligan, 18 L. T. 809.

Application must be by Action.] — A deed prima facie valid at law will be acted on in equity until it has been set aside, the court never giving a defendant active relief without a cross-bill. Jacobs v. Richards, 18 Beav. 300; 23 L. J., Ch. 557; 18 Jur. 527; 2 W. R. 174. S. P., Moore v. Mc. Namara, 2 Ball & B. 186; 12 B. R. 73; Holderness v. Rankin, 6 Jur. (N.S.) 904. Deeds not delivered up upon petition in bank-ruptcy. Poole, Ex parte, 1 Ves. J. 160.

Court cannot, on motion, order delivery up of annuity deed, void for omission in memorial, but can only set aside judgment and warrant of attorney. Appleby v. Swith, 3 Anstr. S65. S. P., Jeffrey v. Athol (Duke), Id. n.

Parties.]-A person partially interested in an

him, without making the other persons interested in the estate parties. Henley v. Stone, 3 Beav. 355.

Delay. ]-The court will refuse to set aside a bond if there has been unreasonable delay in taking proceedings for that purpose. Richards v. Witham, 66 L. T. 695-C. A.

Other Matters.]-Where a bill is filed to set aside an indenture of settlement of real and personal estate, the court will not exert its authority to set aside the indenture partially, or as to the real estate only. Turnley v. Hooper, 2 Jur. (N.S.) 1081. S. P., Hortopp v. Hortopp, 21 Beav. 259.

The plaintiff, in 1833, gave a post obit security on his expectancy in a certain fund, payable on the death of his father, to W., in consideration of certain gaming debts. He subsequently won a large sum of W. by bets on horse-racing, and both parties having submitted to the arbitration of the Jockey Club, in 1837, the steward decided that one debt should be set off against the other, and the security given up. W. refused to give up the security, and in 1842 assigned it to C. for valuable consideration, who gave notice to the trustees of the fund. The plaintiff having filed his bill to have the security delivered up to be caucelled :-Held, first, that after the lapse of time the deed must be considered to have been for good consideration. Secondly, that the submission to the arbitration of the Jockey Club amounted to an agreement, which could not be impeached under the acts against gaming, if any part of the account between the parties was legal. Thirdly, that although the trust fund was directed to be laid out in land, it must be treated as a mere chose in action, and C. took it subject to all the equities of W. Hawker v. Wood, I W. R. 316,

Upon the dissolution of partnership and the settlement of all accounts between the partners. A. B. (the continuing partner) took some of the debts as good debts. One turned out to be had, the securities for it having been fraudulently abstracted by a clerk:—Held, that A. B. could not sustain a bill to rectify or set aside the Laing v. Campbell. settlement of accounts.

36 Beav. 3.

#### b. In other Cases.

By Broker - Authority. ] - The plaintiffs' broker, by their directions, agreed with a marine broker, by their directions, agreed with a marine insurance company for the insurance of the plaintiffs' ship on certain terms; a policy of insurance under the seal of the company was duly executed in the absence of the broker; and according to the usual practice, the deed was retained in the company's office to await the broker's application for it, and the broker debited with the premium; when the premium became payable according to the debiting, and was demanded, the broker (who had charged to and been paid by the plaintiffs the amount thereof) declared the insurance was a mistake, and without the plaintiffs' authority had the deed cancelled. The plaintiffs brought an action. on the deed :-Held, that, although retained in the office of the company, under the above eircumstances the deed was fully perfected, and constituted a complete contract of insurance between the parties; and as the broker had no Parties, —A person partially interested in an authority to cancel it the action was maintain-state may maintain a suit to set aside a convey-ance of such interest fraudulently obtained from L. R. 2. H. L. 296; 16 L. T. 800; 16 W. B. 38. As against One Obligor, ]—A. and B. entered into a joint and several bond to C. D. and E. C. delivered the bond to A. A. who was her son, for safe custody, and, after for some time receiving the intensi from A. she and D. mother of the obligers, also died, B. one of the obligors, also died, when his executors and A. made an arrangement together, without the privity of E., the surviving obligee, and erased the name and seal of B. from the bond — Held, that this did not invalidate the bond against A. Smith, Ex purte, 3 Mont., D. X. D. 378.

Evidence, 1—The production of a bond out of the hands of the assigness of a bankrupt who was the principal obligor to the defendant in a cancelled state is prima fance evidence that it was cancelled with the consent of the obliges. Mosger v. Close, 10 M. & W. 576; 12 L. J., Ex. 50.

Deed of gift, found cancelled among papers of grantor after death (in absence of evidence of its being satisfied), will be enforced against grantor's representative on presumption that it was cancelled improperly. Singshen v. Hunter,

1 Mer. 40.

Marriage settlement of personal property, in general terms, all moneys, bonds, bills, debts, notes, etc.:—Hold, there is no inference of fraud from cancelling a note, the only instrument of that description, during the treaty, on a fair, mond consideration, the marriage not taking place on representation of particulars, or amount of such personal property. De Monneville v. Crampton, 1 Ves. & B. 354; 12 R. R. 233.

Intention.]—A. having advanced to B. two sums of money, received as a security two bils of sale of goods by way of mortgage. The sams advanced having afterwards been incorporate with a debt of 1,100% due from B. to A., and secured by an assignment of a policy of assurace on B.'s life, the bills of sale were thereupon cancelled. The goods had always remained in the possession of B, the nortgager:—Held, that the effect of the cancellation was not to release the debt and to revest the interest of the goods in B.; that it was for the jury to say with what intent the cancellation was made; and that the plaintiff ought not to be nonsulted. Gummer v. Adonns, 18 L. J., Ex. 40.

Time of. -In an action against a mutual assurance society by one of the members assured, in which it appeared from the rules that the members were mutual insurers, the policy being for a term of years, the premium to be paid by half-yearly instalments, and that if a premium should not be paid within a certain time after it became due, the directors might cancel and de-clare void the policy. Plea, that a premium clare void the policy. having remained unpaid for the time specified the directors then cancelled and declared void the policy : on demurrer, on the ground that the plea did not show that the cancellation was not after the liability for the loss declared on :- Held, that the caucellation, even assuming that it was after the liability arose, had the effect of avoiding the policy ab initio, and destroyed any right of action that might previously have accrued to the assured under it. Bumberger v. Commercial Credit Mutual Assurance Society, 3 C. L. R. 568: 15 C. B. 681; 24 L. J., C. P. 115; 1 Jur., (N.S.) 500.

#### 2. RECTIFICATION.

Burden of Proof. ]—The omes lies on those who seek to alter an instrument to shew why it should be altered, not on those who support it to shew why it should not be altered. A settlement on marriage will not be rectified or altered, unless it is shewn that at the time when the deed was executed there was sone definite arrangement in accordance with which it ought to have been prepared as it is desired to rectify or alter it. As to nersons not within the consideration, such a settlement cannot be regarded as ou the same footing as a voluntary settlement. Tucker v. Bennett, 37 L. J., Ch. 507; 38 Ch. D. 1; 58 L. T. 650—C. A.

On an application to reform a deed, the burden of proof lies on the plaintiff; the court examines the evidence very jealously, and must be convinced that there has been a mistake on the part of all parties to the deed before it will reform it. Wright v. Hoff. 22 Beav. 207; 25 L. J., Ch. 803;

2 Jnr. (N.S.) 481; 4 W. R. 522.

Sufficiency of Evidence.]—The court has jurishiction to rectify a columbry deed; but in a case in which the alleged real intention of the parties to the deed is evidenced by their statements alone, uncorroborated by any further evidence, such as written instructions, and notwithstanding that the proposed rectification would bring the deed more into harmony with recognised precedent, the court will act warily in the exercise of such jurisdiction. In such a case the court is reductant to proceed on affidavit evidence, it being in general musefa and numbes to dispense with oral evidence. Bonhate v. Henderson, 64 L. J., Ch. 56; [1895] D (h. 742; 18 L. 523; 7; T. L. 7.55; 48 W. R. 569. Affirmed, [1895] 2 Chi. 202; 13 R. 529; n.; 72 L. R. 514; 43 W. R. 589.—C. A.

The court will rectify an instrument upon parol testimony only, on being satisfied of the non-existence of any written instructions. Lackersteen v. Lackersteen, 30 L. J., Ch. 5; 6

Jur. (N.S.) 1111; 3 L. T. 581.

In suits for rectification of deeds, where no written instructions were given by the parties preparatory to the preparation of the deeds, parol evidence will be received as to the intention of the parties. *Ib*:

On a bill to set aside a written instrument on the ground of mistake or surprise, parol evidence is admissible to shew that such instrument is contrary to the real terms of the contract, and that it ought to be set aside. Price v. Levy, 4 (fiff. 235.

The court will order rectification of a deed on the ground of mistake upon the evidence of the plaintiff alone, where no further evidence can be obtained. Hanley v. Peurson, 13 Ch. D. 545; 41 L. T. 637.

In reforming a deed it is essential that the extent of the proposed alteration should be clearly defined and ascertained by evidence contemporaneous with or anterior to the deed. Bradford (Eurl) v. Ronney (Eurl), 30 Beav. 431; 6 L. T. 208; 10 W. R. 414.

Voluntary Deed—Rectification after Death of Settlor:]—The court will rectify a voluntary deed after the death of the donor where it is clearly shewn that, through mistake, the deed falled to carry out the proved intention of the donor. M. Mechan v. Warburton, [1896] 1 fr. R. 435—C. A.

Suing on Unrectified Deed.]—Where a plaintiff to cases of mutual mistake. Williamson v. tes on a written contract, and the defendant Moriarry, 19 W. R. 818. S. P., Bradford (Earl) sues on a written contract, and the defeudant pleads as a defence matter which he is in equity precluded from setting up by a term of the con-tract not stated in the written instrument, a court of law may give equitable relief without the instrument being first reformed. Wood v. Dwarris, 11 Ex. 498; 25 L.J., Ex. 129; 4 W.R. 262.

In an action by a wife against her husband and others, to have the trusts of her settlement declared and carried out, so far as the same related to an annuity thereby created for her, it plainly appeared on the face of the settlement that the annuity was intended to be payable during the joint lives of the husband and wife, and to be secured by an immediate term, but that, by mistake, it was secured by a term not to arise until after the husband's death. The plendings did not state the mistake, or pray relief in respect thereof by rectification :- Held, that the court could declare the annuity well charged on the lands, without rectifying the settlement. Annesley v. Annesley, 31 L. R., Ir. 457.

Where a boud was in form only a joint bond, but it was suggested to have been the intention of the parties to make it joint and several, and such intention appears on the face of the bond, the court will treat it as a joint and several bond, although it is only a joint bond in form. Symonds.

Er parte, 1 Cox, 200.

A deed was executed, by which it was intended to pass the whole of certain reversionary interests in an estate, but by mistake one share was omitted: -Held, that the intention was so clear that the whole estate must be considered to have passed. Knapping v. Tomlinson, 18 W. R. 684.

Since the Judienture Act, 1873, the court has jurisdiction (in any case in which the Statute of Frauds is not a bar), in one and the same action to rectify a written agreement, upon parol evidence of mistake, and to order the agreement as rectified to be specifically performed. Olley v. Fisher, 56 L. J., Ch. 208; 34 Ch. D. 367; 55 L. T. 807 : 35 W. R. 301.

Rectification-Nothing left to be performed under Agreement. ]-After money has been paid nuder a indement founded on the construction of an agreement, an action to rectify the agreement on the ground that such construction was contrary to the intention of all parties is barred. Cuird v. Moss, 55 L. J., Ch. 854; 33 Ch. D. 22; 55 L. T. 453; 35 W. R. 52; 5 Asp. M. C. 565—

Variation of Settlements on Divorce. ]-See HUSBAND AND WIFE (DIVORCE).

On the Ground of Mistake.]—By a mistake in pencil directions given to a clerk or a stationer, a clause of a sentence was inserted in a marriage settlement, which, on the face of the deed, was repagnant to the sense, and which led to a highly improbable result. The fact of the mistake was not admitted by all parties. The court did not order the settlement to be rectified ; but, prefacing the order with a declaration that it appeared that the words in question were inserted by mistake, made an order for distribution of the fund, as if the clause had not been inserted. De La Touche's Settlement, In re, 40 L. J., Ch. 85; L. R. 10 Eq. 599. See also Welman v. Welman, ante, col. 517.

v. Ronney (Lord), 30 Beav. 431; 6 L. T. 208; 10 W. R. 414; Bentley v. Mackay, 31 Beav. 143.

A misapprehension of rights under a deed, not arising from the misconstruction of the deed, is a mistake in fact, and consequently relievable in equity. Denys v. Shuchburgh,

4 Y. & Coll. 42.

Although in general, in order to induce the court to rectify an instrument on the ground of mistake, it must be shewn that the mistake was the current mistake of all the parties, yet, semble, this rule ought not to be applied where the object of the rectification is to set aside the deed pro tanto as against the party alleging the mistake. Bentley v. Mackay, 4 De G., F. & J. 279; 10 W. R. 873.

Principles upon which courts of equity proceed in reforming deeds and written instruments. Mortimer v. Shortall, 2 Dr. & War. 363;

1 Con. & L. 417.

In such cases the mistake must be mutual. A mistake on one side may be a ground for the reseinding, but not for correcting, a contract. Ib. An instrument which agrees with the intention of one of the parties, although under a mistake as to the other, cannot be reformed. Fallon v. Robins, 16 Ir. Ch. B. 422.

Contra, Simpson v. Vaughan, 2 Atk. 31. The plaintiff lent the defendant a sum of money on his bond and an equitable deposit. The bond, on the face of it, was usurious, and, an action having been brought on it, the plaintiff failed. The plaintiff afterwards came into equity, shewing that the bond had been erroneously prepared; and that, in fact, the contract was not usurious, and praying that the instrument might be reformed, and effect given to his equitable deposit. The court, being to his equitable deposit. The court, being satisfied of the error:—Held, that the plaintiff was entitled to the relief he asked. Hodgkinson v. Wyatt, 9 Beav. 566.

Bond given for a certain sum which was calculated to be the amount of a residue of a personal estate; it turns out the sum is miscalculated; bill to have the bond considered as security only for the real sum dismissed.

Burt v. Barlow, 3 Bro. C. C. 451.

Equity cannot relieve against a mistake, unless compensation can be made for the injury sustained by it. M. Alpine v. Swift, 1 Ball & B.

— Disentailing Deed.]—The court is not prohibited by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), s. 47, from exercising its ordinary jurisdiction to rectify, on the ground of mistake, a deed of re-settlement which has been enrolled as a disentailing assurance under the act. Hull-Dure v. Hull-Dure, 55 L. J., Ch. 154; 31 Ch. D. 251; 54 L. T. 120; 34 W. R. 82-C. A.

\_\_\_ Mistake as to Parcels.]—Where there has been a mistake in the parcels contained in an executed lease, although it may be a mistake by the plaintiff only, the court will order the annulment, or, at the option of the defendant, the rectification of the lease. Paget v. Marshall, 54 L. J., Ch. 575; 28 Ch. D. 255; 51 L. T. 351; 33 W. R. 608; 49 J. P. 85.

Welman, ante, col. 517. Right of Way.]—Where two closes in one The principle of reforming a deed is confined ownership adjoin, and a formed way leads

over one to the other, and is used therewith. and the owner grants the latter close "with all ways now used therewith," a right of way over the way passes to the grantee, whether the way was constructed before the unity of possession or not. The defendant, the owner of two pieces of land, P. and B., made an agreement with the plaintiff to convey so that P. should belong to the defendant and B, to the plaintiff. The only access to B, was by a defined gravelled path crossing P., which path it was assumed in this action had not existed before the unity of possession. By a conveyance executed in pursuance of the agreement, P. and B., "with all ways with the same now enjoyed," were conveyed to a trustee as to half thereof to the use of the defendant, and as to half to the use of the plaintiff. P. was then occupied by the defendant, B. by the plaintiff. The defendant stopped up the path, and the plaintiff was compelled to buy a right of way over adjoining land. The plaintiff brought this action, asking that the conveyance might be rectified by vesting B. in her with a right of way over the path, and vesting P, in the defendant, subject to the right of way :-Held, that a conveyance executed in pursuance of the agreement ought to have contained an express grant of the right of way; that such right would have passed by a convevance containing the common general words; that it was immaterial whether the way was constructed before the unity of possession or not; that the plaintiff had not abandoned her right; and that she was entitled to rectification as claimed. Barkshire v. Grubb, 50 L. J., Ch. 731; 18 Ch. D. 616; 45 L. T. 383; 29 W. R. 929.

See also VENDOR AND PURCHASER.

Where Lapse of Time. |-The conveyance on a sale of land contained a reservation of the minerals lying thereunder to the vendor, which the evidence showed was not intended by either the vendor or the purchaser. Five years after-wards the purchaser discovered the mistake, and filed a bill to have the conveyance rectified. The vendor after putting in an answer, by which he denied that there had been any mistake on his part, died before he could be cross-examined, and the suit was revived against his legal representative :- Held, having regard to the lapse of time and other circumstances, that if the defendant did not consent to have the conveyance rectified, the whole transaction must be set aside, in which event the plaintiff would be fixed with an occupation rent, while the defendant would have to repay the purchase-money, with interest, and also all sums expended by the plaintiff in permanent improvements. Bloomer v. Spittle, 41 L. J., Ch. 369; L. R. 13 Eq. 427; 26 L. T. 272; 20 W. R. 485.

Doubtful Instrument.]—A deed may be reformed so as to be plainly confined to the object intended, where its operation, as it stands, is doubtful. Walker v. Armstrony, 8 De G., M. & G. 53l; 25 L. J., Ch. 738; 2 Jur. (N.S.) 959; 4 W. R. 770.

Power of Disposition on Failure of Issue mitted.]—By a voluntary settlement property refused to trustees in trust for the settlor for life, virth remainder for any wife he might marry those detection life, remainder for any wife he might marry those detection for life, with remainders to his issue, and in default or failure of issue in trust for his paternal the deed we next of kin :—Held, that though a settlement L. T. 681, L. T. 681,

was proper to be made, and though the settlor understood the terms of this settlement, yet a fast attention was not drawn to the fact that he might have had a power of disposition over the property in default or failure of issue, such a power ought to be given, and the settlement must be rectified accordingly. James v. Ouchman, 34 L. J., Ch. 838; 29 Ch. D. 212; 52 L. T. 341; 33 W. R. 452.

Lease.]—Upon parol evidence explaining a term used in an agreement for a lease in regard to which there was a latent ambiguity, the lease was rectified in accordance with what was thus shown to be the intention. Murray v. Parker, 19 Beav. 305.

Striking out Words—"In or near."]—Where the right was granted to hold a market "in sive juxta" a certain place:—Held, that it was contrary to a canon of construction of a grant or other document, which confers a right to strike out words unless it is absolutely necessary to do so; and that the grant must be taken to be of a right to hold the market in or near the place in question, that is, of a narket without metes and bounds. Att.-Gen. v. Harner, 34 L. J., Q. B. 227; 14 Q. B. D. 254; S3 W. R. 93; 49 J. P. 326—C. A.

Rectification—Mutual Mistake—No Claim for in Pleadings.]—A lense for twenty-one years, from 29th September, 1807, at a rent of 80%, payable half-yearly, was granted in consideration of 40%, paid by the lessee, and contained a chause that the sum of 40% should be taken as a discharge of the half-year's rent accruing due on the 29th September, 1888, the defendant pleaded that the date 1898 was inserted by mutual mistake for 1888. The reply in the alternative admitted that the lease expired on 20th September, 1888. The lessor at the trial admitted, and the jury found, that the figures 1888 were inserted by mutual mistake for 1888:—Held, that although these was no counter-claim to rectify the lesse, the court was not counter-claim to rectify the lesse, the court was entitled upon the pleadings and civilence to treat it as

Want of Independent Advice—Father Agent for Wife.]—On the marriage of a daughter, who is living on affectionate terms with her father, he is the proper person to recommend and advise her, and her natural guandian in matters relating to the preparation of her marriage settlement, and there is no occasion for any independent legal adviser beyond the family solicitor. Saith. v. Ilife (L. R. 20 Eq. 608) dissented from. Tucker v. Bennett, 57 L. J., Ch. 507; 38 Ch. D. 1; 53 L. T. 650—C. A.

— General Knowledge.]—Where in an action to obtain the cancellation or modification of a voluntary deed on the ground of undue influence and want of independent advice, the plantiff admits that he had an accurate general knowledge of what he was doing, and only refused to receive a detailed explanation of the deed because he trusted his solicitor to look into those details on his behalf, he is as much boand as if he were himself a lawyer and had drawn the deed with his own hand. Larell v. Wallis, 50 L. T. 681.

Mistake of fact is not the less a ground for relief because the person who has made the mistake had the means of knowledge. Willmatt v. Barber, 15 Ch. D. 96; 43 L. T. 95; 28 W. R. 911.

A party who, before executing, has had properly communicated to him the real purport of a deed, which he deliberately executes, will not be allowed to set it aside merely on his own statement that he did not understand what was sufficiently explained. Jenner v. Jenner, 2 Giff. 232; 6 Jur. (N.S.) 668; 8 W. R. 537.

- Solicitor taking indirect Benefit under Deed, ]-A man of full mental capacity, seised of property which, according to the opinion of one counsel, was limited to the use of himself for life, with remainder to his first and other sons in tail male, with remainder to himself in fee; and according to another opinion, was limited to the use of himself in tail male; instructed a solicitor who hadacted generally for him, to prepare a voluntary cleed for the benefit of his three nephews-young men in the prime of life, brothers of the halfblood of the solicitor, their father being then alive. The solicitor sent instructions to counsel to prepare a deed barring the entail, and settling the lands in equal shares among the nephews. The deed was drafted by counsel, limiting the lands to the settlor for life; remainder to his wife for life; remainder to the three nephews as tenants in common in fee, with onerous covenants on the part of the settlor, and without any power of revocation. It was duly executed in 1852, but was not registered. The last survivor of the three nephews died in 1864, leaving the solicitor his heir at law. The settlor in 1868, after being further advised by counsel as to the effect of the deed of 1852, and his position with respect to it, executed another voluntary deed, duly registered, to the trustees of the deeds of 1852, limiting the property in favour of the plaintiff, his adopted child, but took no proceedings to set aside the deed of 1852, and died in 1874. In an action brought by the plaintiff in 1882, to have the so icitor declared a trustee for the plaintiff and others entitled under the deed of 1868, there being no exidence of fraud or midne influence in the preparation and execution of the deed of 1852: -Held, that although there was no evidence of fraud or undue influence, it was the duty of the solicitor under the circumstances to have distinctly called the attention of the settlor to the advisability of inserting a clause of revocation in the deed of 1852, and to have pointed out the results that might ensue from its omission; and that therefore the solicitor could not hold a title depending on the absence of a clause of revocation in the deed. Horan v. Marmahon, 17 L. R., Ir. 641-C. A.

— Infant Parties.]—A deed was excented purporting, by mistake, to convey a moisty only of real estate, the intention of the parties having been to pass the whole. Infants were interested. Upon a bill for rectification:—Held, that a conveyance of the other molecy by another deed was not necessary, and order made declaring that the deed was, in the particulars after specified, executed by mistake, that it was intended to pass the entirety, and that the deed ought to be rectified, ordering rectification by words and figures, accordingly, and directing a copy of the order to be indorsed on the deed. White v. White, 42 L. J., Ch. 288; L. R. 15 Eq. 247; 27 L. 7. 752.

— Form of Judgment Order.]—A lady being, under four several instruments, the done of powers of appointment amongst her three daughters, by four several deeds-poll appointed one-third of the several properties, subject to the powers, to one daughter, and died without otherwise having exercised any of the powers. One only of the instruments creating the powers contained a hotchpot clause —Held, upon the evidence, that there was shewn on the part of the appointor a clear and manifest intention to produce an equality between the three daughters, and that the three deeds-poll must be rectified by the insertion of clauses in the harture of hotchpot clauses. Killick v. Grag, 46 L. T.

By a post-nuptial settlement, real estate belonging to the wife was conveyed unto A. and his heirs "to the use of" A., his executors and administrators, during the life of the wife, "upon trust" to pay the rents and profits to her for her separate use; and from and after her decease, in ease of the death of her husband in her lifetime, "to the use of the heirs and assigns" of the wife for ever; but in case of the wife predeceasing the linsband, then to the use of the husband, his heirs and assigns for ever. The wife having survived her husband, she brought an action against A.'s legal personal representative to have the settlement rectified on the ground that by a technical mistake in the form of the settlement her equitable life estate and the legal estate in remainder did not coalesce within the rule in Shelley's Case, so as to give her, as was intended in the events that had happened, an absolute estate in fee:-Held, that a conveyance of the outstanding legal estate was unnecessary. Hanley v. Pearson, 13 Ch. D. 545; 41 L. T.

Form of order for rectification. Ib. And see White v. White, supra.

Blank.]—Covenant that if A. should at any time become entitled to any property exceeding in value the sum of —, he would assign the same to trustees upon certain trusts declared in a deed carrying out a family arrangement. A. became entitled in reversion, subject to his mother's interest during wildowhood, to property which had been bequeathed to his sister by their father's will. Upon bill filed by A. to have the covenant struck out, and for a declaration that he was absolutely cutified, the Lord Chancellor (affirming decision of Stuart, V.-Ch.) refused to strike out the covenant or to make the declaration on the grounds that there was no cridence of nistake, and that the application was premature. Fifter v. Arbuthout, 3 Jur. (N.S.) 651; 5 W. R. 793.

Other Matters.]—Defect in a legal conveyance not supplied in favour of a natural child. Blake v. Blake, Beat, 575.

The defendant, being jointly interested with and G. in a foreign mine, agreed to sell his share to them, upon certain terms not to be fulfilled immediately. Under an arrangement negotiated between M. and the plaintiff, the whole property was conveyed to the plaintiff upon trust to secure him an anunity. The defendant concurred in this conveyance under the impression that the plaintiff was, at the same time, to execute a mortgage scentring the fulfilment of the terms upon which the defendant sold. The plaintiff, in fact, executed this mort-

of the terms upon which he had sold :- Held, that the defendant ought to have communicated directly with the plaintiff, and that the court was justified in setting aside the second instrament alone, in a suit to which M. and G. were

not parties. Leader v. M. Econ, 1 N. R. 251.
W. H. was entitled for life to the interest of certain residuary estate, to the principal of which the wife of A. J. was entitled absolutely. W. H. being largely indebted to A. J., executed an indenture, assigning to A. J. all his, W. H.'s, interest in the said residuary estate. It was subsequently discovered that the residuary estate consisted partly of a fund, the existence of which was unknown to either of the parties at the time of the execution of the indenture. W. H. thereupon filed a bill which, not complaining that the indenture had been executed by frand, sought to exclude from its operation the additional fund by treating the indenture merely as a scenrity for the amount then due from W. H. The bill dismissed on the ground that the words of the indenture were sufficient to pass the interest of W. H. in the fund in question, and that no case was made on the pleadings for reforming the instrument. Howkins v. Jackson, 2 Mac. & G. 372; 2 H. & Tw. 301; 19 L. J., Ch. 451.

#### K, REVOCATION AND CONFIRMATION.

Revocation—When Effectual.]—By a deed made between a corporation and the defendants. P. covenanted with the corporation that he would, on execution of the deed, commence and forthwith build and finish a gas-holder tank, the same to be finished within three months from the date of the deed; and in the event of P. neglecting to finish the work within the time specified, the corporation was empowered to determine the contract; and the corporation covenanted with P, as to the mode of payment for the work. By the deed it was further agreed that the whole of the work should be fully completed on or before the 30th June, 1853, or, in default thereof, P. should forfeit to the corporation 50l., and 20s. for every day the completion should be delayed beyond that time; and the defendants, as sureties for P., covenanted with the corporation that P. should perform the covenants and agreements on his part "which should be subsisting, and not annulled or avoided"; and in default thereof that the defendants would pay to the corporation such sum as E., or other the engineer for the time being of the corporation, should adjudge to be proper to be paid for such default. In an action by the corporation for not finishing the work on the 30th June, 1853, and for not paying the corporation 3001. which E. had adjudged proper to be paid to the corporation for the default of P. in performing the covenants:—Held, that the adjudication of E. was not in the nature of an award by an arbitrator, and that therefore his power to adjudicate could not be revoked by any of the parties to the deed. Northampton Guslight Co. v. Parnell, 15 C. B. 630; 3 C. L. R. 409; 24 L. J., C. P. 60; 1 Jur. (N.S.) 211; 3 W. R. 179.

A lady having actually married with the con-sent of guardians named by her deceased sup-posed putative father, and confirmed by the Court of Chancery, she suffered a recovery; and declared the uses to the joint appointment of herself and her husband, with remainder in strict

gage, but without knowing what it was, and settlement. It being discovered that her sup-without having been informed by the defendant posed marriage was void, because at the time posed marriage was void, because at the time her legal father was alive, and did not consent to the marriage, the parties conceived that the settlement and recovery were void, and executed a deed of revocation, and suffered another recovery, after which the lady made a new settlement :- Held, that the recovery and first settle-ment were valid, although made under a mistake of the situation in which the parties stood. Broughton v. Sandilands, 3 Taunt. 342.

A termor assigned his estate to A. and B. in trust for certain purposes; and, by another indenture, executed the next day, he enfeoffed C. and D. of the same lands upon certain other trusts :- Held, that the term assigned to A, and B. was not destroyed by the enfeoffment, there being no proof that they had assented to it. Doe d. Maddock v. Lynes, 3 B. & C. 388; 5 D. & R. 160 ; 3 L. J. (o.s.) K. B. 77.

An assignment of goods to a circlitor, beneficially interested in them, for the benefit of himself and the other creditors, and communicated to him, is not afterwards revocable, as in the case of a mere power. Siggers v. Ecans, 3 C. L. R. 1209; 5 El. & Bl. 367; 24 L. J., Q. B. 305; 1 Jur. (N.S.) 851.

Where, by a marriage settlement, a power of revocation was given on certain conditions, and the conditions were not performed, the deed of revocation was held a nullity. *Doe* d. *Willis* v. Martin, 4 Term Rep. 89; 2 R. R. 324.

Confirmation.]—A confirmation of part is a confirmation of the whole. Goodwright d. Carter v. Strapham, Cowp. 210: 1 Dougl. 53, n.

Re-delivery by feme, after death of baron, of a deed delivered by her whilst covert, is a sufficient confirmation of such deed, so as to bind her without its being re-executed or re-attested.

Family Arrangement-Lapse of Time. ]-C., a doniciled Englishman, in 1834 married M., an Italian lady. On the 11th January, 1834, prior to the marriage, a contract in Italian was executed in the terms of the Sicilian law, the father of the bride having been domiciled in Sicily at the time of his death. On the 17th July, 1847, C. and his wife, to avoid certain doubts as to the true construction of the deed of 1834, resettled the real estate in England belonging to C., and released it from the contract of 1834. On the 9th June, 1886. C. and his wife executed a deed confirming the contract of 1834, and declaring the deed of 1847, so far as it purported to vary that contract, void. C. died in 1887, and by his will confirmed the marriage contract of 1834 and the deed of 1886. An action was then commenced by C.'s grandson, the tenant-in-tail in possession under the deed of 1847, asking the court to declare the deed of 1886 void, and to have the trusts of the deed of 1847 carried into effect. M., the widow of C., commenced a crossaction to enforce the marriage contract of 1834, and for a declaration that the deed of 1847, so far as it purported to vary that contract, was void :- Held, that there was a reasonable doubt in 1847 as to the true construction of the deed of 1834 :- Held, therefore, that the deed of 1847 was a family arrangement made for the purpose of settling that doubt, with which the court would not interfere. Cuse v. Cuse, 61 L. T. 789; 38 W. R. 183,

# DEFAMATION.

## [BY JOSEPH SMITH.]

- A. WHAT IS AND IS NOT ACTIONABLE.
  - 1. In general, 532.
  - 2. Imputations of Crime and Fraud, 537.
  - 3. Imputations of Untitness for Society, and Immorality, 546.
  - 4. Causing Ridicule or Contempt, 548.
  - 5. In Respect of Trade.
    - a. Generally, 549. b. Of Clergymen, 556.

    - c. Of Solicitors, 558.
      d. Of Medical Practitioners, 559. e. Of Others, 562.
- 6. Comment on Matters of Public Interest,

#### B. PRIVILEGE.

- 1. Absolute.
  - a. Debates in Parliament, 571.
  - b. Judicial Proceedings, 571.
  - c. Other Matters, 575.
- 2. Qualified.
  - a. Communications as to which the Person making them has an Interest or Duty.

    - i. Generally, 577. ii. Public and Official Communications, 581.
    - Ecclesiastical and Religious Matters, 587
    - iv. Solicitor and Client, 587.
    - v. Persons in Fiduciary Positions, 589.
    - vi. Landlord and Tenant, 591. vii. Other Cases, 592.
  - b, Characters of Servants, 595.
  - c. As to Tradesmen and their Dealings, 598.
  - d. Matters of Public Interest.
    - Reports of Judicial Proceed-ings, 599. ii. Of Other Public Proceedings. 608.
  - e. Rebuttal of Privilege by Evidence of Malice, 611.
- C. PRACTICE AND PROCEDURE.
  - 1. Parties.
    - a. To Sue, 611.
    - b. To be Sued, 613.
  - 2. Ploudings.
    - a, Claim.
      - i. Defamatory Matter, 613.
      - Publication, 615.
      - iii. Immendoes, 616.
      - iv. Matter in Aggravation Damages, 620.
    - b. Defence.
    - i. Generally, 620. ii, Justification, 621.
      - iii, Payment into Court and

      - Apology, 630.
  - 3, Particulars, 631.
  - 4. Discovery and Interrogatories, 632.

  - 5. Restraining Libel by Interlocutory Injunction, 636.

- 6. Other Proceedings before Trial, 636.
- 7. Trial.
  - u. Evidence.
    - i. Generally, 637.
    - ii. Publication, 638. iii. Defamatory Words and Innuen-
    - does, 643, iv. Justification, 645.

    - v. Privilege, 647. vi. Malice, 648.
  - vii. Damages, 653. viii, Other matters, 653.
  - b. Functions of Judge and Jury. 655. 8. Practice after Verdict, 659.
- 9. Restraining Libel by Injunction, 663.
- D DAMAGES
  - 1. Generally, 667.
  - 2. Special, 669.
  - 3. Circumstances in Aggravation of, 675. 4. Circumstances in Mitigation of, 675.
- E. SLANDER OF TITLE See SLANDER OF
- TITLE.
- A. WHAT IS AND IS NOT ACTIONABLE.

#### I IN GENERAL

When Written or Published. ]-An action may be maintained for words written, for which an action could not be maintained if they were merely spoken. Thorley v. Kerry (Lord), 4
Taunt, 355; 13 R. R. 626. S. P., Leicester (Earl) v. Wolter, 3 Camp, 214, n.; 2 Camp, 231.

A publication may be a libel on a private

person, which would not be any libel on a person in a public capacity; but any inputation of unjust or corrupt motives is equally libelions in either case. Parmiter v. Compland, 6 M. & W. 105; 9 L. J., Ex. 202; 4 Jur. 701.

The rule with respect to libels on public

characters and persons in anthority is, that every person has a right to comment openly and strongly on their conduct, provided it is done bond fide, and without imputing to them any corrupt or dishonest motives, Ib.

To constitute a libel, it is necessary not only that the words should be susceptible of a libellous meaning, but that in the mind of a reasonable man they should constitute an imputation upon Had they should constitute in imputation upon the person complaining. Movill v. Fine Arts and General Insurance Co., 66 L. J., Q. B. 195; [1897] A. C. 68; 75 L. T. 606; 61 J. P. 500— H. L. (E.)

- Asterisks instead of Name. ]—If asterisks are put instead of the name of the party libelled, to make it actionable it is sufficient that the party should be so designated that those who know the plaintiff may understand that he is the person meant; and it is not necessary that all the world should understand it. Bourke v. Warren, 2 Car. & P. 307.
- —— Initial Letters.]—Printing initial letters will not protect a libeller. Anon., 2 Atk. 469.
- Heading of Paragraph. ]-The heading prefixed to a paragraph will be read with the rest of it, and the whole taken in the ordinary meaning of the words. Harrey v. French, 2 Tyr. 585; 1 C. & M. 11; 2 M. & Scott, 591; 1 L. J., Ex. 231.

— Mistake,]—In a periodical publication v. Cole, 44 L. J., Q. B. 153; L. R. 10 Q. B. 549; circulating amongst booksellers and stationers, the 33 L. T. 12. proprietor, by a mistake in the arrangement of the "London Gazette" announcements, inserted the names of the plaintiff's firm (who were stationers) under the head " First Meetings under the Bankruptcy Act," instead of under "Dissolutions of Partnerships," In a count for libel, the innuendo was, "meaning thereby that the plaintiff had been bankrupt or had taken proceedings in liqui-dation or for composition." The jury having found the publication libellous, and having assessed the damages at 501., the court refused to arrest the judgment or to interfere with the finding. Shepheard v. Whitaker, L. R. 10 C. P. 502; 32 L. T. 402.

A railway company published a notice to the public, that the plaintiff had been convicted of an offence against its by-laws, and fined a certain sum for penalty and costs, with the alternative of three weeks' imprisonment in case of nonpayment. The period of alternative imprisonment fixed was, in fact, not three weeks, but a fortnight only :- Held, that the inaccuracy of the statement did not necessarily render it libellous, and that it was a question for the jury whether the statement was substantially true. Alexander v. North Eastern Ry., 6 B. & S. 240: 34 L. J., Q. B. 152; 11 Jur. (N.S.) 619; 13 W. R. 651.

- Statement capable of Libellous and Harmless Meaning. ]-Where an alleged libel is capable both of a harmless and an injurious meaning, it is a question for the jury to decide which meaning the readers on the occasion in question would have reasonably given to it. Churchill v. Gedney, 53 J. P. 471.

Though one part of a statement taken alone is injurious to a man's character, if the jury thinks that the effect of that part is removed by the other part of the statement, it is not a libel. Chalmers v. Payne, 2 C. M. & R. 156; 1 Gale, 69; 5 Tyr. 766; 4 L. J., Ex. 151.

A plaintiff declared upon a letter written by the defendant in which it was alleged that the former had for many years, without cause, systematically done everything to amoy the latter, and had nunecessarily dragged him into the Court of Chancery, and put him to great expense: -Held, on demurrer, that the court could not so clearly see that the letter could not be libellous as to justify the court in withdrawing the case from a jury. Fray v. Fray, 17 C. B. (N.S.) 603; 34 L. J., C. P. 45; 10 Jur. (N.S.) 1153.

In an action for a libel, imputing to the plain-

tiff that he was a truckmaster, there being no innucudo to explain the meaning of the word : Held, that although the word was not to be found in any English dictiouary, yet, as it was composed of two well-known English words, the plaintiff was not bound to give evidence of its meaning, nor the judge to explain it to the jury; but that it was properly left to them to say whether, under all the circumstances it was used in a defamatory sense. *Homer* v. *Taunton*, 5 H. & N. 661; 29 L. J., Ex. 318; 2 L. T. 512; 8 W. R. 499.

Statement not Libellous per se-Capability of Defamatory Meaning.]-An action will not lie in respect of words published, if an ordinary reader would not understand them in a defamatory sense, and they cannot be made actionable by being alleged to bear a meaning banks. The defendants informed him that if he which the evidence does not warrant. Mulligun would not do so they should issue an order to

Declaration for a libel published in a Walsall newspaper: "Walsall Science and Art Institute. The public are informed that Mr. M.'s" (the plaintiff) "connection with the institute has ceased, and that he is not authorised to receive subscriptions on its behalf." Signed by the defendant as an officer of the institute. Immendo, that the plaintiff falsely pretended to be authorised to receive subscriptions on behalf of the institute. At the trial it appeared that the plaintiff was a certificated art master, and had been master at the institute. His engagement with the defendant ceased in June, 1874, and he got up and became master of another school, which was called "The Walsall Government School of Art," and was opened in Angust : in September the advertisement complained of appeared. The judge directed a nonsuit, on the ground that the advertisement was not capable of the defamatory meaning attributed by the innuendo :- Held, that the nonsuit was right; for that the advertisement was not capable of a defamatory meaning. Ib.

A dispute having arisen between a Scotch firm of manufacturers and their Dublin agent as to an item of the accounts between them, of trifling amount, the former sent to the latter a postcard as follows :- " Settlement. If you do not remit by return the matter will be handed to our Dublin solicitors," In an action by the agentfor libel, it appeared that the posteard was deposited in the ordinary course of post in the plaintiff's letter-box, from which it was taken by the plaintiff's porter, and placed upon a desk, to which his manager, bookkeeper, and junior clerk had access. It was read by the bookkeeper, who was aware of the state of the accounts, and the existence of the dispute, and also by the manager, who was not conversant with these matters. The card was not shewn to have been read by any other person:—Held, that a verilet was rightly directed for the defendants. Methan v. Edinburgh Roperic Co., 28 L. R., Ir. 24— C. A.

The defendant hoard of gnardians, being desirous of effecting a change in the management of their legal business, published advertisements to the effect following :- "Cork Union. To Solicitors. The Cark Board of Guardians will at their (next) meeting appoint a solicitor, other than the late solicitors, to do all the legal business of the union, &c." In an action for libel by one of such late solicitors :--Held, that the words were not per se libellous. O'Hea v. Cork Union, 32 L. R., Ir. 629.

The plaintiffs were the "Capital and Counties Bank," which had a branch at Chichester and other branches in Sassex and Hampshire, defendants were brewers at Chichester, and had many customers and tenants occupying publichonses in different parts of the same counties, These enstomers and tenants were accustomed to eash cheques for persons who visited their houses, and afterwards to hand the cheques, which were drawn on various banks, to the defendants' collector in payment of accounts. The collector used to pay the cheques into the plaintiff's necount at the Chichester branch bank, where the cheques were received as of course. But a new manager of that branch bank objected to eash such cheques as were drawn on other branch their tenants not to cash cheques of the plaintiffs' discovery. Delany v. Jones, 4 Esp. 191. And bank, at least with the intention of paying the see Maloncy v. Bartley, 3 Camp. 210. collector with them. The manager replied that he must certainly decline to cash cheques on the other branches of the bank when presented by parties unknown to him, though as a matter of grace he was quite willing to eash cheques to the defendants' representatives if properly introduced to him, with proof that they had power to sign for the defendants' firm, and that he was quite indifferent as to their sending out orders to their tenants not to eash the plaintiffs' cheques. Thereupon the defendants caused to be printed and sent to 137 of their customers and tenants aforesaid the following circular:—"Messrs. Henty and Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." -This publication of the circular caused a run on the bank and loss to the plaintiffs. They brought an action for libel. The statement of claim set out the circular as the libel, and alleged by an innuendo the meaning to be that the plaintiffs were not to be relied upon to meet the cheques drawn upon them, and that their position was such that they were not to be trusted to cash the cheenes of their customers. At the trial the question of libel or no libel was left to the jury, with a direction that the circular, if, under the circumstances, libellous, was published on a privileged occasion, unless there was express malice. The jury failed to agree, and were discharged. On motion to enter judgment for the defendants :- Held, by the Common Pleas Division that the circular was capable of the meaning alleged, and there was evidence to support the immendo and also of express malice, and the case must go again to a jury .- On appeal:—Held, reversing the decision of the court below (Thesiger, L.J., dissenting), that there was no evidence that the circular was defanatory in either a primary or a secondary sense, and that, even if there was any such evidence, the circular was issued on a privileged occasion, and there was no evidence of expressed Tables, Tapital and Counties Bank v, Heaty, 52 L. J., Q. B. 232; 7 App. Cas. 741; 47 L. T. 662; 31 W. R. 157; 47 J. P. 214—H. L. (E.)

Statements in Newspapers. ] -If a libel is sent to a newspaper, and the editor strikes out the most libellous portions, and publishes the remainder, the writer is liable for the part which is published. Durhy v. Ousley, 1 H. & N. 1; 25 L. J., Ex. 227; 2 Jur. (N.S.) 497.

Advertisement in Newspaper.] - An advertisement in a public newspaper strongly reflecting upon the character of an individual who has been declared bankrupt, is libellons; although published with the avowed intention of convening a meeting of the creditors for the purpose of consulting upon the measures proper to be adopted for their own security, if the legal object might have been obtained by means less injurious. Brown v. Crowne, 2 Stark. 297; 19 R. R. 727.

An advertisement published in a newspaper concerning any person, though conveying with it an imputation injurious to the character of the party about whom it is published, is not a libel if done bona fide, and with a view of obtaining information on the subject alluded to in the adver-

Letter in Newspaper applying to Plaintiff remarks made by Another upon Privileged Occasion.]-The defendant published a letter in a newspaper in which she referred all readers to a certain speech made in the House of Lords That speech contained a passage which, if it referred to the plaintiff, would have constituted a libel upon him if the occasion had not been privileged:—Held, that it was for a jury to say whether the defendant meant that the passage in the speech referred to the plaintiff, and whether by referring to it she intended to apply it to the plaintiff. Lawrence v. Newberry, 64 L. T. 797; 39 W. B. 605.

- Publication of Book in Mutilated Form. —A book was originally published in its com-plete form in 1886; in 1892 the publisher issued an edition of the book omitting the preface, table of contents, introduction, bibliographical notice and index; the author applied to restrain the publishing or selling of the book in its mutilated form on the ground that his reputation would suffer thereby: Held, that the plaintiff's remedy in law was libel. Lee v. Gibbings, 67 L. T. 263.

Words Spoken. ]-Slanderous words must be understood by the court in the same sense as the rest of mankind would ordinarily understand Woodnoth v. Mendows, 5 East, 463; 2 Smith, 28; 7 R. R. 742.

The question in an action for words is, not what the party using them considered their meaning by any secret reservation in his own mind, but what he meant to have understood as their meaning by the party to whom he rittered them. Read v. Ambridge, 6 Car. & P. 308,

In an action of slander for words, some of which, if spoken and understood in their ordinary sense, would certainly be actionable, the jmy may consider whether, taking the whole of the conversation together, the particular words are so qualified by the other parts of the conversation, as to shew that they were not intended to convey the idea which their primary and ordinary meaning would give. Shipley v. Tod-hunter, 7 Car. & P. 680.

- Words not Defamatory per se. ]-Where words not defamatory in their nature, even though productive of special damage, are spoken, the action is not maintainable. Kelly v. Partington, 3 N. & M. 117: 5 B. & Ad. 645; 3 L. J., K. B. 104. S. P., Sheahan v. Ahoarne, Ir. R. 9 C. L. 412.

- Imputation of Evil Inclinations. ] -Semble, that words imputing evil inclinations to a man which were never brought into action are not actionable. Harrison v. Stratton, 4 Esp. 218.

But an action for words which charge men with evil inclinations and principles will lie, Prince v. Have, 1 Bro. P. C. 64.

- Words of Suspicion.] - Words merely conveying suspicion will not sustain an action for slander. Simmons v. Mitchell, 50 L. J., P. C. 11; 6 App. Cas. 156; 43 L. T. 710; 29 W. R. 401; 45 J. P. 237—P. C.

- Repetition of Slander. ]-The repetition tisement by a person really interested in the of a rumour injurious to another is actionable

It is no justification that the rumour existed.

The general rule that the remedy of a slaudered person, in cases where the words are uttered by the original slanderer to another, who communicates them to a third person, whereby special damage arises, is against the intermediate person and not the original slanderer, does not apply where the words are spoken to a person who is under a moral obligation to communicate them to a third. Derry v. Handley, 16 L. T. 263,

In such case the communication is privileged, and the original utterer of the slander is

responsible. Ib.

Where slanderous words are not actionable per se, no action will lie against the original utterer of the slander for damage resulting from Purking a repetition of it unauthorised by him. v. Scott, 1 H. & C. 153: 31 L. J., Ex. 331; 8 Jur. (N.s.) 593; 6 L. T. 394; 10 W. R. 562.

The defendant uttered a slander consisting of a false imputation upon the chastity of the plaintiff, an numarried woman, in the presence of the plaintiff's mother. The mother repeated it to the plaintiff, who repeated it to the man to whom she was engaged to be married, and he broke off the engagement. There being no evidence that the defendant authorised or intended the repetition of the slander, or that he knew of the plaintiff's engagement :- Held, that an action of slander could not be maintained against him. Speight v. Gosnay, 60 L. J., Q. B. 231; 55 J. P. 501—C. A.

Where special damage arises from the repetition of a slander, an action may be maintained against the person uttering the slander if he authorised or intended the repetition; or if the repetition was the natural consequence of his act : or, semble, if there was a moral obligation on the person in whose presence the slander was uttered to repeat it. Ib.

- Communication of Libel to Person Libelled.]—No claim can be maintained by the publishers of a libellous work against a person informing the individuals libelled of the publication who bring actions against the publishers resulting in the recovery of damages. Sannders v. Seyd and Kelly's Credit Index Co., 75 L. T. 193—C. A.

# 2. IMPUTATIONS OF CRIME OR FRAUD.

Generally. ] - Words are not actionable as imputing crime, unless they convey to the hearer an express imputation of some crime liable to punishment. Holt v. Scholefield, 6 Term Rep. 691; 3 R. R. 318.

Words imputing that the plaintiff has been guilty of a criminal offence will support an action for slander, without special damage ; and it is not necessary to allege in the statement of claim that they impute an indictable offence. Webb v. Bevan, 52 L. J., Q. B. 544; 11 Q. B. D. 609; 49 L. T. 201; 47 J. P. 488.

Words imputing a crime are actionable, though they describe it in vulgar language, and not in technical terms. Colman v. Godwin, 3 Dougl, 90;

2 B, & C, 285, n.

unless the occasion rendered it privileged. If words which, by themselves expressly Watkin v. Hall, 9 B, & 8, 279; 37 L, J, Q, B, charge a felony, are accompanied by an express 125; L, L, 3 Q, B, 396; 18 L, T, 551; 16 W, R, allusion to a transaction which merely amounts to a breach of trust, no action will lie. Thompson v. Bernard, 1 Camp. 48.

So, if the transaction was a mere breach of contract. Christie v. Cowell, Peake, 4; 3 R. R. 642. A declaration stating that the plaintiff was clerk to a mining company; that the defendant, intending to cause it to be believed that he had

been guilty in the course of his employment of grave crimes and felouies, in a discourse of and concerning the plaintiff, spoke these words: "You have done things with the company for which you ought to be hanged, and I will have you hanged before the 1st of August"; (thereby meaning that the plaintiff had been guilty of felonies punishable by law with death by hanging) is good, on motion, in arrest of judgment. Francis v. Rosse, 3 M. & W. 191; 1 H. & H. 36; 7 L. J., Ex. 66.

The words "You have done an act for which I can transport you," are actionable without colloquium or innuendo. Curtis v. Cretis, 4 M. & Scott, 337; 10 Bing. 447; 3 L. J., C. P. 158. An action will lie for saying of the plaintiff, "he is a returned convict"; though the words

import that the punishment has been suffered. Fowler v. Dowdney, 2 M. & Rob. 119.

The use of words imputing an indictable offence is actionable or not, according to the sense in which they may fairly be understood by bystanders not acquainted with the matters to which they relate, or which may render them a privileged communication; and the secret intent of the speaker in uttering them in the presence of such bystanders is immaterial. Hankinson v. Bilby, 16 M. & W. 442. See Daines v. Hartley, 3 Ex. 200; 18 L. J., Ex. 81.

Charge of Murder.]—The words, "You are guilty (innuendo of the murder of D.)," are, after the verdict, a sufficient charge of murder, though the colloquium was only of the death. Peuke v. Oldhum, Cowp. 275; 2 W. Bl. 960.

The words "I am thoroughly convinced that you are guilty (innuendo of the death of D.), and rather than you should go without a hangman, I will hang you," are actionable. Ib.

The words, "I think the present business

ought to have the most rigid inquiry, for he, the plaintiff, murdered his first wife; that is he administered improper medicines to her for a certain complaint, which was the cause of her death," are actionable. Ford v. Primrose, 5. D. & R. 287; 3 L. J. (o.s.) K. B. 40.

Bigamy.]-A declaration for slandering thewife of the plaintiff alleged, that the wife of the plaintiff and A. B. were brother and sister, and that the defendant spoke the slanderons words of and concerning the plaintiffs, their intermarriage, and A. B., to the effect that it had been ascertained beyond doubt that the wife of the plaintiff and A. B. were not only brother and sister, but man and wife; meaning to impute bigany to the wife of the plaintiff. The defendant having pleaded the general issue :-Held, first, that it was not essential for the plaintiff to prove the introductory averment that the wife of the plaintiff and A. B. were brother and sister; and secondly, that the declaration was good, the words spoken sufficiently shewing an intention to impute felony. Heming v. Power, 10 M. & W. 564; 6 Jur. 858.

Charge of Theft or Robbery. ]-If one calls another thief, together with many other names of general abuse not imputing crime, and, on no other evidence being given to explain the sense in which the word thief was used, the jury finds for the plaintiff, the court will not set the verdict aside, for the action may be maintained for the word thief. Penfold v. Westevte, 3 B. & P. (N.R.) 335,

The words, "He is a thief and robbed me of my bricks," are actionable without any introductory averment. Sloman v. Dutton, '10 Bing. 402; 4 M. & Scott, 174; 3 L. J., C. P. 109,

The following words, alleged to have been spoken by the defendant of the plaintiff:—"You robbed me, for I found the thing you have done it with," are actionable, per se, without any colloquium or inunendo to explain the sense in which they were used. Roweliffe v. Edmonds, 7 M. & W. 12: 9 L. J., Ex. 278: 4 Jur. 684.

The words, "He robbed J. W.," are actionable, as imputing an offence punishable by law. Tomlinson v. Brittlebunh, 4 B. & Ad, 630 ; 1 N. & M. 455; 2 L. J., K. B. 105.

If they were said in any other sense the defendant must shew it. Ib.

The words, "He was put in the roundhouse for stealing ducks at Crowland," are actionable, if laid to have been spoken falsely and maliciously. Beaver v. Hides, 2 Wils, 300,

In slander the words were, "You are a thief; you robbed Mr. L. of 30!." The words were spoken in the hearing of B, and of several strangers. B. knew that the words did not mean to impute felony, but meant to impute that the plaintiff had improperly obtained 30%, from Mr. , to compromise an action for a distress :-Held, that, under these circumstances, the ques-tion to be left to the jury was, not what the defendant meant by the words he spoke, but what reasonable men, heaving the words, would under-stand by them. Hankinson v. Bilbu. 2 Car. & K.

Semble, also, that if all the persons present when the words were spoken had known that the words did not impute felony, that would have

been an answer to the action. Ib.

At the trial of an action by A. against B. for slander, A. proved the words used to be "You're a thief and robbed J. C. of his money," while B. proved the words to be "You've got J. C.'s brass." The fact was J. C. had lost money, and it was thought A, had found it :- Held, that the judge rightfully told the jury that they were to consider whether A,'s version or B,'s version of the words used was correct, and, if they believed A, they were to find a verdict for him; and that he was not bound to tell them that the finding of J. C.'s money was no felony in itself, and that if they were of opinion that B, intended not to impute a felony but merely the circumstances of J. C.'s money being found, then they were to find for. the defendant. Atkinson v. Newton, 3 W. R. 14.

An allegation that the defendant said of the plaintiff, "She secreted 1s. 6d. under the till," stating, "These are not times to be robbed":— Held, to import that the plaintiff, when secreting the 1s. 6d., had used the latter words, and that therefore the allegation did not contain that which was actionable per se. Kelly v. Partington, 2 N. & M. 460; 4 B. & Ad. 700; 3 L. J., K. B. 104.

A plaintiff brought an action for the words, "Who stole the parish bell-ropes?" Innuendo, that the plaintiff whilst churchwarden had stolen the parish bell-ropes :- Held, that the church- 298.

warden had the possession of the bell-ropes belonging to the church, and that he could not be guilty of stealing them; and, therefore, no action would lie for the words spoken, as they did not impute an indictable offence. Jackson v. Adams, 2 Scott, 599; 2 Bing. (N.C.) 402; 1 Hodges, 339; 5 L. J., C. P. 79.

\_\_\_\_ Larceny by Husband of Wife's Property. ]—It is no offence for a husband to take his wife's money while they are living together; sed aliter while they are living apart. Therefore, words spoken amounting in substance to an allegation that a husband has robbed his wife, and nothing more, will not support an action for slander by the husband against the speaker, since they do not in themselves impute an indictable offence. Lemon v. Simmons, 57 L. J., Q. B. 260; 36 W. R. 351.

Sect, 12 of the Married Women's Property Act, 1882, which alone creates any such offence on the part of the husband, contains a proviso that "no criminal proceeding shall be taken by any wife against her husband while they are living together as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the linsband while they were living together concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife." Accordingly, nuless the words complained of allege that, besides robbing his wife, the husband was living apart from, or or deserting, or about to desert her, they contain no imputation of an indictable offence, and consequently impute no actionable slander. Ib.

Suspicion of. ] - A declaration, after stating by way of inducement that the defendant used the words, "I have a suspicion that you robbed my house," for the purpose of expressing, and that the words were understood as expressing, that the plaintiff had feloniously stolen goods of the defendant's, set out the slanderous words as follows: "I (meaning the defendant) have a suspicion that you (meaning the plaintiff) and B. have robbed my house (meaning that the plaintiff had feloniously stolen and carried away goods and chattels of the defendant), and there-fore I take you into custody":—Held, that the plaintiff was not entitled to a verdict, unless the jury found that the words spoken by the defendant imputed to the plaintiff a direct charge of felony.

Toxer v. Mashford. 6 Ex. 539; 20 L. J. Ex. 225.

A libel was headed "Horse Stealer," and then

alleged that the plaintiff was taken up on suspicion of having stolen a horse, by a constable who was informed that "such a character" was at a certain public-house; it then went on to state circumstances of suspicion against the plaintiff, and ultimately that, having obtained permission to go out of the constable's sight, he made his escape, but was retaken, and confined in goal for examination. The defendant pleaded a justification as to all of the libel except the word "horse-stealer," setting out the several circumstances related in the libel :- Held, that as the declaration alleged that the libel was intended to convey a charge of felony, and this intent was not denied by the plea, the statement of circumstances of suspicion to excuse part of the libel was no sufficient justification. Mountney v. Watson, 2 B. & Ad. 673; 9 L. J. (O.S.) K. B.

Charge of Buying Goods, knowing them to have been Stolen. —A declaration alleged that the defendant in a discourse, spoke and published of the plaintiff, and of his trade, the words following :- "I have been robbed of three dozen of winches; you have bought two, one at 3s, and one at 2s, ; you knew well when you bought them that they cost me three times as much making as you gave for them, and that they could not have been come honestly by": whereupon the plaintiff said to the defendant. " I have bought half-a-dozen winches from a new maker the week before"; and then produced and shewed some of such last-mentioned winches to the defendant, who thereupon replied to the plaintiff, "Oh, no! those are not my winehes, you know that well enough; these (the defendant meaning and pointing to certain other winches) are mine. I am sorry to say anything against any tradesman, but will bring the man who stole my winches and let you see him, for he is in my custody"; thereby meaning that the plaintiff had been guilty of buying the winches, knowing them to have been stolen :-Held, in arrest of judgment, that the declaration contained one count only; that the former words were actionable; that, all the words appearing to have been spoken by the defendant in one continued discourse, it was sufficient that some of them were actionable, though damages were given upon the whole declaration. Alfred v. Far-low, 8 Q. B. 854; 15 L. J., Q. B. 258; 10 Jur. 714.

Charge of Forgery.]—No action lies for these words: "I will take him to Bow-street on a charge of forgery," without inmendo, because they do not directly charge the person of whom they are spoken with felony. Hurrison v. King, 4 Price, 46; 7 Taunt. 431; 18 R. R. 524.

The words, "You are a rogue, and I will prove you a rogue, for you forged my name, actionable. Jones v. Herne, 2 Wils. 87.

Advertisement in a newspaper as follows: To bill-brokers and others, Caution. Reward. Whereas information has been given to me, that attempts have been made to obtain the discount of a bill of exchange bearing date, London, May 26, 1825, and purporting to be drawn by one John Stockley upon and to be accepted by the Dowager Lady P. Turner for 6,000l. with interest, payable twelve months after date to the order of the said J. Stockley; I hereby give notice on behalf of the Downger Lady P. T. that she has not accepted such bill, and that if her name should appear on any such instrument the same has been forged; or her handwriting to the acceptance of the bill, if genuine, has been obtained by fraud, in total ignorance on her part of the intended effect of the signature. Any person who will give positive information to me of the party in possession of the instrument shall be handsomely rewarded. Thomas Binns":—is not a libel on Stockley, at least without innuendo and proof that he was the person designed to be charged with having forged Lady Turner's name. Stockley v. Clement, 4 Bing, 162; 12 Moore, 376; 5 L. J. (o.s.) C. P. 139.

Charge of Perjury. - Saying of the plaintiff that he had forsworn himself, and that the defendant had three evidences that would prove it, is not actionable, without shewing that the words

Secus, saving that he was perjured, because perjury can only be committed in a judicial or an authorised proceeding. Ib.

The words, "His oath ought not to be taken.

for he has been a forsworn man, and I can bring people to prove it; and that they who know him will not sit in the jury-box with him," are not actionable per se. *Hall v. Weeden*, 8 D. & R. 140: 4 L. J. (o.s.) K. B. 204.

The defendant saying of the plaintiff, that "he was under a charge of a prosecution for perjury, and that G. W. (an attorney of that name) had the attorney-general's directions to prosecute the plaintiff for perjury," is actionable. Roberts v. Camden, 9 East, 93; 9 R. R. 513.

Charge of Embezzlement. ]-Slander for accusing the plaintiff of felonious embezzlement. The plaintiff had been ehosen and sworn in at a courtleet held by a corporation, as chamberlain of certain commonable lands. The duties of the chamberlain (who received no remuneration) were to collect moneys from the commoners and other persons using the commonable lands; to employ the moneys so received in keeping the lands in order : to account at the end of the year to two aldermen of the corporation, and to pay over any balance in his hands to his successors in office :- Held, that the plaintiff was not a servant, or person employed in the capacity of a servant, within 7 & 8 Geo. 4, c. 29, s. 47, as to embezzlement, Williams v. Stott, 1 C. & M. 675; 3 Tyr. 688; 2 L. J., Ex. 303; 3 L. J., Ex. 110.

Words Imputing Fraud or Dishonesty -Swindler.] — Saying to another "You are a swindler," without other words, is not actionable. Saville v. Jardine, 2 H. Bl. 531; 3 R. R. 502.

The speaking and publishing of a person that he is a swindler is not actionable, in the absence of an allegation that the word was spoken in relation to an office, trade, profession or business. Bluck v. Hunt, 2 L. R., Ir. 10.

To say of one who carries on the business of a corn vendor, "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats worse by 6d. a bushel than I bargained for," is worse by the a busher than I beginned to, is actionable without proof of special damage, Thomas v. Jackson, 3 Bing, 104; 10 Moore, 425; 3 L. J. (o.s.) C. P. 182; 28 R. R. 605.

To print of any person that he is a "swindler," is a libel, and actionable. I Anson v. Stuart, 1 Term Rep. 748; 1 R. R. 392.

A declaration, after reciting that divers persons had been associated together, under the name of "The Society of Guardians for the Pro-

tection of Trade against Swindlers and Sharpers"; and that the defendant, under colour of being the secretary of the society, had from time to time published printed reports for the purpose of denoting to the members of the society the names of such persons as were deemed swindlers and sharpers, and improper persons to be proposed to be balloted for as members of the society, set out the following libel of and concerning the plaintiff :- "Society of Guardians for the Protection of Trade against Swindlers and Sharpers: I (meaning the defendant) am directed to inform you, that G. (meaning the plaintiff) and C. are reported to this society as improper to be proposed to be balloted for as members. (Meaning that the plaintiff was a swindler and sharper, were spoken with reference to some judicial pro-ceeding in which the plaintiff had been sworn.

Society)." After verdict for the plaintiff, and been sworn.

After verdict for the plaintiff, and the property of the plaintiff, and the property of the plaintiff, and the x-bichelpfald, 6 Term Rep. 691; 3 K. 8.38. [with a few for error brought:—Held, that the innuendo was not warranted by the libel; and that the an averment that illegal gambling and play were words of the libel, unexplained by introductory intended. Forbes v. King, 1 D. P. C. 672 matter, were not actionable. Goldstein v. Foss (in error), 1 M. & P. 402 : 6 B. & C. 154 ; 2 Y. & J. 146; 9 D. & R. 197; 4 Bing, 489; 2 Car. & P. 252; 29 R. R. 610.

- Welcher. - A declaration alleged that the defendant called the plaintiff "a welcher" (meaning a person who dishonestly appropriates and embezzles money deposited with him). The evidence was that a welcher is a person who receives money which has been deposited to abide the event of a race, and who has a predetermined any intention to keep the money, and not to part with it in any event:—Held, that as the term does not necessarily impute the offence of embezzlement, it does not imply an indictable offence, and so is not actionable. Blackman v. Briant, 27 L. T. 491.

- Charge of Withdrawing Horses in order to Win Bets.]—A declaration shewed that the plaintiff was a member of the Jockey Club, and subscriber to the Derby Stakes at Epsom, and had withdrawn a horse which he intended to run. It set out words which imputed to the plaintiff that he had entered the horse to run for those stakes, and had afterwards withdrawn him for the purpose of getting an unfair advantage over parties with whom he had heavy wagers on the result of the race :- Held, that the action would lie, and this whether or not the transactions in which the declaration shewed the plaintiff to be engaged were legal. Grerille v. Chapman, D. & M. 553; 5 Q. B. 731; 13 L. J., Q. B. 172; 8 Jur. 189.

- Blackleg. - A declaration alleged that the defendant asserted of the plaintiff, "I am surprised that Mr. R. should allow a blackley" (meaning the plaintiff) "in this room" (meaning that the plaintiff obtained his living by dishonest gambling, and was a professed gamester). A witness having deposed that the defendant used the language with reference to the plaintiff, was asked, "What did you understand by the word 'blackleg?' "who replied, "A person who cheats at eards" :—Held, per Pollock, C.B., and Watson, B. (dissentiente—Martin and Bramwell, BB.) first, that the word "blackleg" is not actionable without special damage. Barnett v. Allen, 3 H. & N. 376; 1 F. & F. 125; 27 L. J., Ex. 412; 4 Jur. (N.S.) 488.

Held, secondly, that the above evidence of its meaning was improperly received. Ib.

Held, thirdly, that even if the evidence was receivable, it did not prove the immendo as laid in the declaration. Ib.

The saying of a man that he is a blackleg is actionable without special damage, because it imputes conduct for which he is liable to be indicted under 8 & 9 Vict. c. 109, s. 17. Ib.—per Martin and Bramwell, BB,

· Villain.]-A letter written to a third person, calling a person a villain, is actionable, without proof of special damage. Bell v. Stone, 1 Bos. & P. 331; 4 R. R. 820.

— Gambler.]—To write of a man that he best earned an appear and control of a dispute at play, is not libelious without latting that the plaintiff was an out of a dispute at play, is not libelious without

A writing in which a party is spoken of in language usually applied to the keeper of a gaming-house, is libellous, whether the words are capable of being applied by an immendo to specific charges of unfair practices or not. Digby v. Thompson, 1 N. & M. 485: 4 B. & Ad. 821: 2 L. J., K. B. 140.

\_\_\_\_Affidavit-man.]—Calling a person an affidavit-man is libellous, for it means a man who is ready to swear on all occasions, without any connsance of the fact. Anon., 2 Atk.

- Convicted Felon-Punishment for Felony endured.]—An action will lie for saying of the plaintiff, "He is a returned convict"; though the words import that the punishment has been suffered. Fowler v. Dowdney, 2 M. & Rob. 119.

In an action by the editor of a newspaper for libel by printing and publishing of him in another newspaper that he was "a convicted felon," and also a "felon editor," the defendant justified, alleging that the plaintiff had been convicted of felony and sentenced to twelve months' hard labour. The plain-tiff replied that the conviction had taken place many years previously, that he had endured the punishment, and had thereby become in the same situation as if a pardon under the great seal had been granted to him. At the trial thejudge held that the alleged libels merely meant that the plaintiff had been convicted of felouy, and that this being true, the plaintiff could not recover :- Held, that upon demurrers to the justification and to the reply the plaintiff was entitled to judgment, and also that there must be a new trial. Per Branwell, L.J., that the words "felon editor" implied that the plaintiff had been guilty of felony, and the justification did not allege that he had actually committed felony; and therefore, although the plaintiff might be "a convicted felon," yet the justifica-tion being pleaded to the whole cause of action. was too wide and formed no defence. Per Brett, L.J., and Cotton, L.J., that the question as tothe meaning of the alleged libels ought to have been submitted to a jury : that by 9 Geo, 4, e. 32, s. 3. a person convicted of felony, after enduring the punishment is in law no longer a felon, and that the justification was bad for not alleging: that the plaintiff was then enduring the punishment. Leyman v. Latimer, 3 Ex. D. 352; 47 L. J., Ex. 470; 37 L. T. 819; 26 W. R. 305; 14 Cox, C. C. 51—C. A.

Other Imputations of Dishonesty. ] - The words, "He has defrauded a mealman of a roan horse," are not actionable without special damage. Richardson v. Allen, 2 Chit, 657.

An action for saying of a merchant, "He has brought a false bill of lading for half the cargo (meaning the lading of a particular ship) already," whereby he was injured as such merchant, and lost the confidence of several persons, was held not maintainable, and judgment accordingly arrested, because the words did not of themselves impute any crime. Feise v. Linder, 3

had employed him as an appraiser to value 3. IMPUTATIONS OF UNFITNESS FOR SOCIETY certain goods, and that he spoke of him and of AND IMMORALITY, his valuation—"He is a dammed rascal; he has cheated me out of 109%, on the valuation," sufficient after verdict. Bryant v. Loxton, 11 Moore, 344.

To say of a commission agent that he is an unprincipled man, and borrowed money without repaying it, is not actionable without special Storey v. Challands, 8 Car. & P. 234

The following publication is not libellous:-"Notice, any person giving information where any property may be found belonging to H. G., prisoner in the King's Bench prison, but residing within the rules thereof, at 3, 4 and 5, Portland-place, Borough-road, shall receive 5 per cent, upon the goods recovered, for their trouble, by applying to Mr. Levy, Fetter-lane, Fleet-A. & E. 282; 1 W. W. & H. 728; 8 L. J.,

The plaintiff alleged in his statement of claim that the defendant falsely and maliciously spoke and published of the plaintiff the words, "His shop is in the market," meaning thereby that the plaintiff was going away, and was guilty of fraudulent conduct in his business, inasmuch as he had received subscriptions from members of a certain club, well knowing that they would be unable to obtain any benefit therefrom :- Held, that the words, not being in themselves defamatory, and there being no evidence to wholly support the innuendo, the defendant was entitled to judgment. In an action of slander, where the plaintiff, in his statement of claim, annexes a meaning to the words complained of, and fails to sustain such meaning, he cannot diseard that and adopt another. Where words, which are not slanderous in their primary sense, are taken in a secondary sense distinct from their primary sense, there must be evidence of facts which would reasonably make them defamatory their secondary sense. Ruel v. Tatnell, 43 L. T. 507; 29 W. R. 172.

The words, "You are a regular prover under bankruptcies," as they convey no imputation upon the plaintiff in the way of his trade, are not in themselves actionable. An ander, 7 Bing. 119; 4 M. & P. 870. Angle v. Alex-

The publication of a placard, stating that the prosecutor is indebted in a large sum, and offering it for sale, is not necessarily libellous. Reg. v. Coghlan, 4 F. & F. 316.

In an action on a libel for publishing a handbill, offering a reward for the recovery of certain bills of exchange, and stating that A. is suspected of having embezzled them, it is a good defence on the general issue that the handbill was solely with a view to the protection of persons liable on the bills, or to the conviction of the offender. Finden v. Westlake, M. & M. 461; 31 R. R. 748.

A defendant published a placard of the plaintiff, who had formerly served some parochial offices, "That when out of office he had advocated low rates, but when he came into office he had advocated high ones, and raised a large sum of money not to be paid to the poor; and that he was a person in whose hands the defendant would not intrust 51. of his private property":-Held, that these words were actionable, per se, without any innuendo. Cheese v. Scales, 10 M. & W. 488; 12 L. J., Ex. 13; 6 Jur. 958.

Generally. ]-In general, any charge of immoral conduct, although in matters not punishable by law, is libellous. Tuam (Archbishop) v. Robeson. 5 Bing. 17; 2 M. & P. 32; 6 L. J. (O.S.) C. P. 199; 30 R. R. 530.

An action lies for writing in a letter that the plaintiff stunk of brimstone and has the itch. Villiers v. Mousley, 2 Wils. 403.

But not for representing to the committee for managing a volunteer corps that one of its members was an unfit and improper person to continue a member. Barband v. Hookham, 5 Esp. 109.

These words :- "The Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room," published by posting a paper on which they were written, purporting to be a regulation of a particular society, are not libellons. Robinson v. Jermyn, 1 Price, 11.

It is libellous and actionable to publish of a man that he has been guilty of gross misconduct, and insulted females in a barefaced manner. Clement v. Chivis, 9 B. & C. 172; 4 M. & R. 127; 7 L. J. (o.s.) K. B. 189.

Action for libel consisting of the following sentence in a newspaper: "Mr. Richards (the plaintiff) is an old man, being, as we hear, upwards of sixty years of age. He also exercises great power, necessarily delegated to him by Lord Gage, and ought, therefore, both on account of his years and of his influential station, to be the man to protect the wives and daughters of his neighbours from the ruffian's insult, rather than to violate in their persons not only the decencies of society but the modesty of nature. We should be sorry to hear that any man, who had lived to Mr. Richards' years had been pronounced guilty of such an offence as is alleged against him; yet the respect we bear our neighbours, and the feeble protection which it is our duty to throw over the modest and virtuous of the gentler sex, compel us to express a hope that Lord Gage will see the propriety of instituting some inquiry." After verdict for the plaintiff :- Held, on motion in arrest of judgment, that the sentence was libellous on the plaintiff. Richards v. Cohen, 1 L. J., K. B. 210.

As to a Person's Mind being Affected.]statement in writing that a person's mind is affected is primâ facie a libel. Morgan v. Lingen, 8 L. T. 800.

Such a publication is malicious, unless made in discharge of a public or private daty arising out of a matter in which the person making it is concerned, and then made without malice. Ib.

But if fairly wanted by any reasonable exigency, and honestly made, it is privileged. Ib.

Unchastity in Women.]-See 54 and 55 Vict. c. 51.

These words spoken of a woman: "I have kept her common these seven years; she hath given me the bad disorder, and three or four other gentlemen," are not actionable, because they may refer to time past. Carslake v. Mappledorum, 2 Term Rep. 478.

Charging a person with having had a contagious disorder is not actionable, because it is no reason why the company of a person so charged should be avoided. Ib.

Calling a woman a whore is not actionable except in the city of London, by reason of the cantom there to cart whores; but there the words must charge that she was a whore in Loudon, as it is not sufficient if the declaration merely alleges that she resided there. Roberton v. Parcell, 2 Selv. N. P. 1224. See Brand v. Roberts, 4 Burr. 2418. Kryer v. Eustwick, 4 Burr. 2032.

So calling a woman a strampet in the city of Bristol is actionable there, by the custom of the place. Pacer v. Shaw, 1 Wils. 62.

Words imputing to a woman want of chastity are not actionable, unless attended by the loss of some material temporal advantage. \*Hoberts v. Haberts, 5 B, & S, 384; 33 L, J, Q, B, 249; 10 Jur. (X.S.) 1027; 10 L. T. 602; 12 W. R. 909.

The words, "You are living by imposture; you

The words, "to are nying by imposture; you used to walk St. Paul's Ghirrchyard for a living," spoken of a womau with the intention of imputing that she was a swindler and a prostitute, are not actionable without special damage. Wilby v. Elston, S. C. B. 142; 7 D. & L. 143; 18

L. J., C. P. 320; 13 Jur. 706.

An action by husband and wife, for words repeated to him by the wife, imputing to her want of chastity, will not lie against the author of the slander. Parkius v. Scott, 1 H. & C. 153; 31 L. J., Ex. 331; 8 Jur. (x.s.) 593; 6 L. T. 394; 10 W. R. 562.

Immorality in Mon.]—To say of a man that he has the venereal disease is actionable, without proof of special damage; though it is otherwise if the words are spoken in the past tense. Bloodworth v. Gray, 8 Scott (8.K.) 9; 7 Man. & G. 334.

Words spoken of a tradesman, inputing to him criminal intercourse with a female employed in his trade, are not actionable (although hid to be spoken of him in his trade), unless they can be construed as imputing that he keeps a bawdyhouse. Bryne v. Ctopper, 5 M. & W. 249.

## Clergymen.]-See post, col. 556.

Keeping House of Ill-fame.]—A, brought an action for speaking these words: "Your house is a bawdy-house, and no respectable people will live in it." The words proved were addressed to his wife, and were as follows: "You are a nuisance to live beside of; you are a bawd, and your house is no better than a bawdy-house".—Held, that the words were actionable without special damage, and substantially supported the declaration. Heeklo v. Regunds, 7 C. B. (N.S.) 114; I. L. T. 9. See Bryne v. Cooper, 5 M. & W. 249.

In an action for exhibiting an inscription opposite to the plaintiff's house, instanting that it was a house of ill-fame, it was alleged in the declaration that he carried on the business of a retailer of wines there:—Held, that such allegation might be rejected as surplusage, there being no averment that the publication of the inscription was of and concerning the plaintiff as such retailer of wines. Spail v. Massey, 2 Stark, 599.

In an action for suspending a lamp before the plaintiff's house, for a similar purpose, the parish in which the declaration states the house to have stood, and the tort to have been committed, is to be considered as venue merely, and not as local description, and it is immaterial whether there is any such parish in existence. Jefferies v. Duncombe, 2 Camp. 3; 11 East, 226.

— Or Disorderly House.]—A declaration alleging that the plaintift, being proprietor of rooms adapted for a dancing academy, the defendant falsely and maliciously published of the building and rooms, and of the plaintiff as the proprietor, that "the magistrates in quarter sessions having refused to renew a music and dancing licence to the proprietor, all such entertainments there carried on are illegal, and the proprietor needees himself thereby indictable for keeping a disorderly house, and every person found on the premises will be apprehended and dealt with according to law," by means of which premises he was prevented from letting the rooms, discloses a good cause of action. Higued, V. Buzzard, 3 H. & N. 217; 27 L. J., Ex., 355.

# 4. CAUSING RIDICULE OR CONTEMPT.

Generally, ]—On demurer the court will not construct he words complained of mitiori sensu, but will see if there is anything which by reasonable intendment conveys an imputation. Mavee v. Pigutt. Ir. R. 4 C. L. 54.

To make words libellous, the imputation must be one tending to bring the party into latred, ridicule or contempt, with a society whose standard of opinion the court cannot recognise. Ih.

Written slauder tending to bring a justy into public hatred and contempt is actionable. Woudard v. Doursing, 2 M. & Ry, 74. See also Clement v. Chiris, 9 B. & O. 172; 4 M. & R. 127; 7 L. J. (O.S.) K. B. 189.

So is any libel tending to bring a party into ridicule. *Trum* (*Archbishop*) v. *Robeson*, 5 Bing, 17; 2 M. & P. 32; 6 L. J. (o.s.) C. P. 199; 30

R. R. 530.

It is a libel to publish in a newspaper a story of an individual calculated to render him Indicrous, although the may have previously told the same story of himself. Cook v. Ward, 6 Bing. 409; 4 M. & P. 99; 8 L. J. (o.s.) C. P. 126; 31 R. R. 456.

If words charged to be libellous may, in their ordinary acceptation and without the aid of extrinsic circumstances, be reasonably understood as derogatory to the character of the plaintiff, judgment cannot be arrested. Wahleyv. Healey, 7 C. B. 591; 18 L. J., C. P. 241—Ex. Ch.

So where the words used in terms general, and the innuendoes apply them to the plaintiff, and the jnry so finds, the judgment cannot be arrested.

charging Ingratitude.)—To charge a man will ingratitude is libellous, and such a charge may also be libellous notwithstanding that the facts upon which it is founded are stated and they do not support the charge. Cov. V. Lea, 38 L. J., Ex. 219; L. R. 4 Ex. 284; 21 L. T. 178.

— Heartless Conduct.]—An action lies for a libel stating that although the plaintiff was aware of the death of a person occasioned by his improperly driving a carriage against that in which another person was riding he had attended a public ball in the evening of the same day. Charchill (Lora) v. Hunt, I Chit. 480; 2 B. & Ald. 685; 22 R. R. 807.

The plaintiff declared upon a letter published in a newspaper, in which it was alleged that he, being a hotel and job coach proprietor by trade, and a Presbyterian in religion, had, from mere motives of intolerance, refused the use of his

hearse for the funeral of bis own deceased servant, damage. Brown v. Smith, 13 C. B. 596; 1 because the body was about to be interred in C. L. R. +; 22 L. J., C. P. 151; 17 Jun. 807; 1 a Roman Catholic burying-ground;—Held, on W. R. 288. because the body was about to be interred in a Roman Catholic burying-ground:—Held, on demurrer, that the court could not so clearly see that the letter could not be, in any view, libellous as to justify them in withdrawing the case from a jury. Tenen v. M. Kenna, Ir. R. 4 C. L. 374.

- Misconduct. - To write to the members of a charitable institution, calling on them "to reject the unworthy claims of Miss H.," and staring that "she squandered away the money which she did obtain from the benevolent in printing circulars abusive of Commander D.," the secretary of the institution, is libellous. Houre v. Silverlocke, 12 Q. B. 625; 17 L. J., Q. B. 306: 12 Jur. 695.

Other Expressions. -- A count charging that the defendant wrote of the plaintiff that he was a "man Friday" to another, is bad, for want of an averment to shew, that, by the term Friday. as applied to the plaintiff, degradation and subserviency were intended to be imputed to him.

Forbes v. King, 1 D. P. C. 672.

Where one newspaper copied a libellous paragraph from another, adding the word "Fudge" at the close:—Held, in an action by the party libelled against the publisher of the paper in which the word "Fudge" was added, that it was for the jury to say whether the object was to vindicate the character of the party by the addition of the word, or whether it was only introduced for the purpose of creating an argument in case proceedings should be afterwards taken. Hunt v. Algar, 6 Car. & P. 245.

Allegorical terms of a defamatory character or of evil import, such as imputing to a person the qualities of the "frozen snake," in the fable, are libellous per se, without innucudoes to explain their meaning. Houre v. Silverlocke, 12 Q. B. 625 : 17 L. J., Q. B. 306 : 12 Jur. 695.

The respondent, a member of parliament, asked a question in the House of Commons implying that one C. had been guilty of improper conduct. C, wrote to the respondent to complain of the imputation on his character, and subsemently published his letter in a newspaper of which the appellants were proprietors. letter contained the following passage: "Supposing, for example, I sent a question . based on hearsny evidence to the effect that I heard, from a gentleman whom I would not think of doubting, that 'you' were in a state of delirium tremens. . . Or suppose I had added to that further stories I had heard that" you were "afterly intoxicated" in the streets. The respondent brought an action for libel against the proprietors of the newspaper :- Held, that the words were capable of being reasonably understood in a libellous sense, and that, therefore, there was a question to go to the jury. Ritchie v. Sexton, 64 L. T. 210; 55 J. P. 389-H. L. (Sc.)

### 5 IN RESPECT OF TRADE

### a. Generally.

Allegation of Insolvency. |- To say of a tradesman " If he does not come and make terms with me, I will make a bankrupt of him and ruin him," is actionable, without proof of special bank, at least with the intention of paying the

A declaration, after alleging that the plaintiff had been in prison and had applied for money to pay his quarter's rent, stated that he was a "mere man of straw." thereby meaning that he was insolvent and in bad circumstances :- Held, that it was not necessary to explain the meaning of that term by any prefatory averment; and that, as the libellous matter contained but one charge, viz. insolvency, the defendant could not plead or demur to part only, Eaton v. Johns, D. (N.S.) 602.

Saying of an innkeeper, "He is a bankrupt, he is a will be in the "Gazette pauper," is actionable, though he was not liable to the bankrupt laws. Whittaker v. Bradley, 7 D. & R. 649: 5 B. & C. 180: 2 Car, & P. 146:

4 L. J. (o.s.) K. B. 125; 29 R. R. 212.

Where a plaintiff declared that he had been a woolstapler at Circnester, and was a brewer at Oxford, and that the defendant spoke of him as such trader these words:-"Mr. H. (the plaintiff) and B, have both been bankrupts, Mr. H, at Circneester," and gave no evidence of his having been a woolstapler, but only that he was a brewer at Oxford, and proved the words spoken to have been these :- "He was a bankrupt at Circnester" :- Held, that this proof sustained the allegation that the words were spoken of him in his trade of a brewer, for a trader at Oxford may be a bankrupt at Cirencester. Hall v. Smith. 1 M. & S. 287.

So an action will lie for saying of a trader that his cheques are dishonoured. Rolin v. Steward, 14 C. B. 595; 2 C. L. R. 759; 23 L. J.,

C. P. 148; 18 Jur. 536.

Action for speaking of the plaintiff the following words :- "I will bet 51, to 11, that Mr. J. (the plaintiff) was in a sponging-house within the last fortnight, and I can produce the man who locked him up; the man told me so him-And in answer to the following question from a bystander :- "Do you mean to say that Mr. J., brewer, of Roschill, has been to a sponging-house within the last fortnight for debt ? The defendant said: "Yes, I do." The jury found that the words were spoken of the plaintiff in the way of his trade :- Held, that the action was maintainable, and that the verdict was right; as it was plain, from the conversation, that the words were spoken of the plaintiff in his character of a brewer. Jones v. Littler, 7 M. & W. 423.

The plaintiffs were the "Capital and Counties Bank," which had a branch at Chichester, and other branches in Sussex and Hampshire. The defendants were brewers at Chichester, and had many customers and tenants occupying publichouses in different parts of the same counties. The enstomers and tenants were accustomed to eash cheques for persons who visited their houses and afterwards to hand the cheques, which were drawn on various banks, to the defendants' collector in payment of accounts. The collector used to pay the cheques in to the plaintiffs' account at the Chichester branch bank, where new manager of that branch bank objected to cash such cheques as were drawn on other branch banks. The defendants informed him that if he would not do so they should issue an order to their tenants not to cash cheques of the plaintiffs'

collector with them. The manager replied that | Williams v. Smith, 58 L. J., Q. B. 21; 22 hemust certainly decline to each cheques on the | Q. B. D. 134; 59 L. T. 757; 37 W. R. 93; 52 other branches of the bank when presented by J. P. 823. parties unknown to him, though as a matter of grace he was quite willing to cash cheques to the defendants' representatives if properly introduced to him, with proof that they had power to sign for the defendants' firm, and that he was quite indifferent as to their sending out orders to their tenants not to eash the plaintiffs' cheques. Thereupon the defendants caused to be printed and sent to 137 of their customers and tenants aforesaid the following circular :-"Messrs. Henty and Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." The publication of this circular caused a run on the bank and loss to the plaintiffs. They brought an action for libel. The statement of claim set out the circular as the libel, and alleged by an immendo the meaning to be that the plaintiffs were not to be relied upon to meet the cheques drawn upon them, and that their position was such that they were not to be trasted to cash the cheques of their customers. At the trial the question of libel or no libel was left to the jury, with a direction that the circular, if, under the circumstances, libellous, was published on a privileged occasion, unless there was express malice. The jury failed to agree, and were discharged. On motion to enter judgment for the defendants:-Held, by the Common Pleas Division, that the circular was capable of the meaning alleged, and there was evidence to support the inmendo and also of express malice, and the case must go again to a jury. On appeal :-Held, reversing the decision of the court below (Thesiger, L.J., dissenting), that there was no evidence that the circular was defamatory in either a primary or a secondary sense, and that, even if there was any such evidence, the circular was issued on a privileged occasion, and there was no evidence of express malice. Capital and Counties Bank v. Henty, mance. Capital and Commics Dams v. Lieng, 49 L. J., C. P. 880; 5 C. P. D. 514; 48 L. T. 65; 28 W. R. 851; 45 J. P. 188—C. A. Affirmed, 52 L. J., Q. B. 232; 7 App. Cas. 74; 47 L. T. 662; 31 W. R. 157; 47 J. P. 214—H. L. (E.)

· Publication in Trade Newspaper of Extract from Register of Judgments. - The plaintiff was a hatter against whom a judgment had been obtained in the county court. The judgment remained unsatisfied pending an appeal, which appeal the plaintiff subsequently abandoned, and thereupon he satisfied the judgment, but omitted to get the fact of satisfaction entered on the register. The defendants published a trade newspaper, and in a column headed "The Gazette" appeared a list of judgments entered on the county court register, in which the name of the plaintiff with the judgment against him was inserted. The plaintiff brought an action for libel, alleging by innuendo that the insertion of his name in that column implied that the judgment remained unsatisfied, and that he was unworthy of credit. The defendants denied the innuendo. The judge held that the publication was capable of being defamatory, and a jury found a verdict for the plaintiff :-Held, that the meaning of the allegation was properly left for the jury; and that, the jury having found such to be its meaning, together with the fact that the statement was not true, the statement as published was a libel, butcher, and then charged the defendant with,

Publication of Register of Protests for Nonpayment of Bills of Exchange in Scotland.]—
The register of protests for non-acceptance and nonpayment of bills of exchange and promissory notes, established by the Scotch Acts of 1681 and 1696, and the 12 Geo. 3, c. 72, and 23 Geo. 3, c. 18, is a public document, to which everybody has a right of access, and the publication of which in a printed paper does not constitute a libellous publication. A person whose name was upon this register applied to the Court of Session for an interim interdiet to prevent, so far as his own name was concerned, the publication of a copy of the register. The court decreed for the application:—Held, by the lords, reversing that decree, that the interdict ought not to have been granted. Fleming v. Newton, 1 H. L. Cas.

Imputation of Dishonesty in Conduct of Business.]—The plaintiff inquired of the defendant if he had accused her of using false weights that it he had accessed her or using dustweights in her trade. The defendant, in the presence of a third person, answered, "To be sure I did; you have done it for years":—Held, that the latter words were actionable, and not privileged by reason of the plaintiff's inquiry, the evidence shewing that such inquiry was caused by a former statement of the defendant himself. Griffiths v. Lewis, 7 Q. B. 61; 14 L. J., Q. B. 197; 9 Jur. 370.

A defendant published of the plaintiffs, coal merchants, what purported to be a report of an inquiry before a board of guardians respecting the fraudulent conduct of their agent, who, in performance of a contract for best coals, had delivered at the workhouse coals of an inferior description, and (by falsifying the weighingmachine by means of a wedge) deficient in weight. The libel commenced, "The way in which Messus. P. (the plaintiffs) do things at Carilliford Incerting the wedge"; and ended Guildford. Inserting the wedge"; and ended with a recommendation of one of the guardians ; and ended to "have nothing more to do with Messrs, P." innuendo, "the defendant meaning thereby that the plaintiffs were cognisant of and had sanctioned improper and fraudulent conduct by their agent at Guildford, and were accustomed tocarry on their trade there improperly and fraudu-lently." The defendant pleaded a justification, following the innnendo, and saying that the coals delivered, as mentioned in the libel, were inferior in quality, as the plaintiffs well knew, and deficient in weight. The judge ruled that the defendant having by his plea alleged that the fraud of their agent was sanctioned by the plaintiffs, he must prove it; and he told the jury that they must find for the plaintiffs, unless they were satisfied that the defendant had shewn some complicity on their part in the misconduct and fraud imputed to their agent. The jury having found for the plaintiffs:—Held, that there was no misdirection, and that the libel

- Calling Plaintiff a "Thief" without imputing a Felony.]—A declaration stated by way of inducement, that the plaintiff was a pork-

imputed personal misconduct and fraud to the plaintiffs. Prior v. Wilson, 1 C. B. (N.S.)

publishing of the plaintiff, in the presence of maintainable, although the declaration alleges other persons, these words of and concerning the that he has suffered special damage in consendintiff:—"You are a bloody thief! Who stole quence of the publication, and although the F.'s-pigs! You did, you bloody thief, and I can allegation of the superiority of his own goods prove it: you poisoned them with mustard and brimstone." Innuendo, that the plaintiff was guilty of pig-stealing. The jury found that the words were not intended to impute a felony, but were spoken of the plaintiff in relation to his trade:-Held, that the plaintiff was not entitled to recover, as the words used did not show that they were spoken of him in relation to his trade. Sibley v. Tomlins, 4 Tvr. 90,

Imputing Want of Experience.]-To impute to a person actually employed to execute certain work that he has no experience in the work in which he is so employed is a libel upon that person in the way of his profession or calling; and it is no justification to say that such person cannot shew any experience in work of the kind which, in the opinion of the person making the imputation, was requisite. B., an architect, had been employed by a certain committee to superintend and carry out the restoration of T. church; thereupon W., who had no manner of interest in the question of the employment of B, to execute the work, wrote a letter to a member of the committee, saying, "I see that the restoration of T. church has fallen into the hands of an architect who is a Wesleyan, and can have no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" In an action for libel, W., by way of justification, alleged "that the facts contained in the letter are true, and the opinions expressed in it, whether right or wrong, were honestly held and expressed by W.." and "that B. cannot show experience in church works, i.e. of the kind which in the opinion of W. was requisite":—Held, that the letter was a libel on B. in the way of his profession or calling. Botterill v. Whytehead, 41 L. T. 588.

Imputation of Immorality.]—Words spoken of a tradesman, which imputed to him impropriety in moral conduct—the prostitution of a female employed by him in his shop—though alleged to be spoken of him in his trade, are not actionable, unless they can be construed to mean that he keeps an improper house. Brayne v. Cooper, 5 M. & W. 249; 9 L. J., Ex. 80.

— Against Wife of Trader.]—An action by a trader alleging that the defendant falsely and maliciously spoke and published of his wife, who assisted him in his business, and in relation to such business, words accusing her of having committed adultery on the premises where he resided and carried on business, whereby he was injured in his business, and certain specified persons and others who had dealt with him ceased to do so, is maintainable on the ground that the injury to his business is the natural consequence of the words spoken which would prevent persons resorting to his shop. Riding v. Smith. 45 L. J., Ex. 281; 1 Ex. D. 91; 34 L. T. 500; 24 W. R. 487.

Disparagement of Trader's Goods, 1a person, in publishing an account of his own goods, compares them with those of another, describing his own as superior to them, but not making any false representation as to the quality

quence of the publication, and although the allegation of the superiority of his own goods may be false. Young v. Macrae, 3 B. & S. 264; 32 L. J., Q. B. 6; 9 Jur. (N.S.) 538; 7 L. T. 354; 11 W. R. 63.

A declaration stated that the plaintiff carried on the business of an engineer, and was the inventor and registered proprietor of an original design for making impressions on articles manufactured in metal, and sold divers articles on which the design was used; that the plaintiff had sold and had on sale, in the way of his trade, articles and goods called "Self-acting tallow syphons or Inbricators"; and that the defendant published a libel of him in his trade, and of his design, and the plaintiff, as the inventor and manufacturer of the articles with the design thereon, and of the goods which he had sold and had on sale, and the plaintiff as the seller, as follows, viz.: "This is to caution parties employing steam power from a person (meaning the plaintiff) offering what he calls 'Self-acting tallowsyphons or lubricators' (meaning the design, and meaning the goods and articles which the plaintiff had so sold, and had ou sale), stating that he is the sole inventor, manufacturer and patentee, thereby monopolising high prices at the expense of the public. B. H. (the defendant) takes this opportunity of saying that such a patent does not exist, and that he has to offer an improved lubricator." "Those who have already adopted the Inbricators, against which R. H. would cantion, will find that the tallow is wasted, instead of being effectually employed as pro-fessed":—Held, that the words were not a libel on the plaintiff, either generally or in the way of his trade, but were only a reflection upon the goods sold by him, which was not actionable without special damage. Evans v. Harlow, 5 Q. B. 624; D. & M. 507; 13 L. J., Q. B. 120; 8 Jur. 571.

To publish of a tradesman, falsely and withont lawful occasion, that the goods in which he trades are inferior in quality to similar goods in which his rivals trade is actionable if special damage results. Western Counties Manure Co. v. Lawes Chemical Manure Co., 43 L. J., Ex.

171; L. R. 9 Ex. 218; 23 W. R. 5.

A plaintiff alleged that he carried on in an honest and lawful manner the trade of a manufacturer of bitters, and that the defendant libelled him in his trade, by publishing that the bitters were made to adulterate porter, per quod the plaintiff was ruined :-Held, that under the

general issue, the defeudant might give in evidence that the plaintiff's trade was illegal, and that his bitters had been condemned in the Court of Exchequer. Manning v. Clement, 7 Bing. 362; 5 M. & P. 211; 9 L. J. (o.s.) C. P.

Words not per se Defamatory.]-Words not defamatory in their nature are not actionable, even though followed by special damage. Sheahan v. Ahearne, Ir. R. 9 C. L. 412.

A plaintiff complained of defamatory words spoken of him concerning his trade, alleging spoked of him concerning in trace, august special damage; the words proved reflected on him personally, and were not defamatory in their nature:—Held, that he had been rightly nonsuited. Ib.

A declaration alleged that the plaintiffs were and character of the latter, an action is not manufacturers of bags, and manufactured a bag

dant published, concerning the plaintiffs in their business, the words following: "As we have not seen the "Bag of Bags," we cannot say that it is useful, or that it is portable, or that it is elegant. All these it may be, but the only point we can deal with is the title, which we think very silly, very slangy and very vulgar; and which has been forced upon the notice of the public ad nauscam" :- Held, by Mellor and Hannen, JJ., that it was a question for the jury whether the words did not convey an imputation on the plaintiff's conduct in their business, and whether the language went beyond the limits of fair criticism.-By Lush, J., that the words could not be deemed libellous, either upon the plaintiffs or upon their mode of conducting their business, Jenner v. A' Beckett, 41 L. J., Q. B. 14; L. R. 7 Q. B. 11; 25 L. T. 464; 20 W. R. 181.

It is not actionable to say of a stonemason that he is the ringleader of the nine hours' system and that he has rained a town by bringing about the nine hours' system, and that he has stopped several good jobs from being carried out being the ringleader of the nine hours' system; nor is it material that the person alluded to has suffered special damage, if such damage is not intended as a consequence when the words are uttered. Miller v. David, 43 L. J., C. P. 84; L. R. 9 C. P. 118; 30 L. T. 58; 22 W. R.

222

A statement false and malicious, but not in itself defamatory, made by one person in regard to another, whereby that other may probably under some circumstances, and at the hands of some persons, suffer damage, will not, even though damage has resulted in fact, support an action for defamation. 1b.

Action on the Case-Falsehood in Relation to Man's Business - General Loss of Business-Special Damage. ]-In an action brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business-a falsehood which is not actionable as a personal libel, and which is not defamatory in itselfevidence to shew that a general loss of business has been the direct and natural consequence of such falsehood is admissible, and, if uncontradieted, is sufficient to maintain the action. Ratcliffe v. Ecaus, 61 L. J., Q. B. 535; [1892] 2 Q. B. 524; 66 L. T. 794; 40 W. R. 578; 56 J. P. 837-C. A.

Plaintiff of two Trades-Slander Proved as to One. |-A declaration alleged that the plaintiffs was of two trades, and that the defendant, intending to injure him in his several trades, and to prevent persons from employing him in the way of his several trades, in a discourse which he had of and concerning the plaintiff in one of his trades, spoke :- Held, that though the plaintiff failed to prove he was of both trades, yet he might recover upon proof that he was of that trade concerning which the defendant was charged to have spoken the words. Figgins v. Cogswell, 3 M. & S. 369.

Slander as to Former Trade.]-A tradesman brought an action for slander for words spoken of him when he carried on another trade twelve years before. It was submitted that words of this nature are not actionable, unless they are applied to the trade which the plaintiff is carrying on at the time they are spoken :-Held, that

which they called the "Bag of Bags," and the defen- | the action was maintainable. Wadsworth v.

## b. Of Clergymen.

Conduct in Church.]-To say of a clergyman that he came to the performance of Divine service in a towering passion, and thus his conduct was calculated to make infidels of his congregation, is libellous. Walter v. Broyden, 19 C. B. (N.S.) 65; 11 Jur. (N.S.) 671; 12 L. T. 495; 13 W. R. 809.

Comments by a churchwarden upon the couduct of a clergyman, in taking meals in the vestry and in causing books to be sold in the church during service, are matters of public interest, and may lawfully be published, if they do not exceed the boundaries of fair criticism. Kelly v. Tinling, 35 L. J., Q. B. 231; L. B. 1 Q. B. 699; 12 Jur. (N.S.) 940; 13 L. T. 255; 14 W. R. 51.

Imputation of Incontinence — No Action unless Plaintiff holds Office of Profit. ]—No action will lie for a verbal imputation of incontinency in a clergyman, unless he is beneficed, or holds some clerical office or employment of temporal profit. Gallwey v. Marshall, 9 Ex. 295; 2 C. L. R. 399; 23 L. J., Ex. 78; 2 W. R. 106.

Charge of making Converts by offers of Money.]—It is a libel to publish of a Protestant archbishop that he attempts to convert Catholic priests by offers of money and preferment.

Tuam (Archbishop) v. Itobeson, 5 Bing, 17;

M. & P. 32; 6 L. J. (o.s.) C. P. 190; 30 R. R.

Imputation of Dishonesty.]-A first count stated that the plaintiff was a clergyman of the united church of England and Ireland, and a vicar, and that the defendant spoke of the plaintiff, in his profession of a clergyman, and relating to himself, the following words :- "The day I came into residence, Dr. P. sent for me. I went and dined with him, and the wine must have been drugged, for I took but two glasses, and was quite stupified. While in this condition, Dr. P. put a bill into my hands, and requested me to sign it, as a security for the payment of 130l, per annum for reading for me at the new church. The bill, I think, was drawn for 2,500L, but, having been stupified with wine, I do not rightly remember." And the following words:-"You cannot suppose that I can visit a man who so cheated me at my first coming." A second count stated that the defendant spoke of the plaintiff, in his profession, the following words:—"Dr. P. placed before me a bill. I signed. I do not know for what amount it was, whether for 2,000l. or 3,000l., for I was completely pigeoned by Dr. P.":-Held, that the imputation conveyed by the words in the first count reflected on the plaintiff in his professional character, but the imputation conveyed by the words in the second count did not so reflect; and the damages having been taken on the two counts jointly, a venire de novo was awarded. *Pemberton* v. *Colls*, 10 Q. B. 461; 16 L. J., Q. B. 403; 11 Jur. 1011.

Dissenting Minister. ] - A declaration stated as inducement that the plaintiff was a Dissenting minister, and that he had been in a grant in support of a Roman Catholic college, trade in partnership with  $P_n$  that the partnership  $|Ih\rangle$ had been dissolved, and that reports had been circulated of and concerning the plaintiff, and the partnership accounts and money transactions; that the defendant said of the plaintiff, and of him in his ministry, and of and concerning the part-

nership, "Mr. H. is a rogue, and I can prove him to be so by the books at S. Mr. H. pretends to say he has been as good as a father to him, but you see he has been robbing him, he has cheated P. of 2,000l. ; I will so expose Mr. H. that he will not be able to hold his head up in T. pulpit, or any other." A second count was for saying, "Mr. H. has cheated P., his brother-in-law, of upwards of 2,000/,; I wonder how any respectable persons can countenance such a man by their presence; I have been advising some other persons to go to the chapel, as they would there hear plain honest Special damage was alleged, that divers persons discontinued their attendance at the plaintiff's chapel. It was proved that the plaintiff received 30%, per animm, and house rent, but not how that sum was to be raised, or the parties by whom it was to be paid. It was also proved that the attendance at the chapel was diminished, but why, or whether the seccelers were contributors to the funds of the chapel, did not appear. The libels complained of were written by the defendant to A., acting for the plaintiff, in the course of a correspondence arising out of an invitation to the defendant by A., with the plaintiff's concurrence, to investigate certain charges brought against the plaintiff :- Held, first, that the words in the first and second counts were not actionable per se, and could not be deemed to have been spoken of the plaintiff quâ minister in any sense that would subject the defendant to an

action. Hopwood v. Thorn, 8 C. B. 293; 19 L. J., C. P. 94 : 14 Jur. 87. Held, secondly, that there was no evidence of special damage resulting from these words so as to support an action on them. Ib.

Charge of imposing Degrading Penance—Roman Catholic Priest. - A declaration stated that the plaintiff was a Roman Catholic priest, and priest of a chapel named, and that the defendant, intending to injure him in his offices, published of him in those offices a libel, which was set out. The alleged libel contained an account of a Roman Catholic having been seen performing a penance which was suggested to be of a degrading kind, and added that the party performing the penance said that his priest would not administer the sacrament to him till he had performed it, and that his priest was the plaintiff. The libel was not otherwise connected with the plaintiff, nor was there any allegation shewing how the enjoining of such a penance would affect the character of a Roman Catholic priest. The court arrested the judgment, holding that the publication was not, on the face of it, libellous, plaintiff was charged with imposing the penance,

called to petition parliament against making duced, the imputations appeared to be that the

## c. Of Solicitors.

Generally.]-The words, "He is more a lawyer than the devil," are actionable when spoken of an attorney. Day v. Buller, 3 Wils. 59.

So are the words, "He deserves to be struck off the roll." Phillips v. Jansen, 2 Esp. 624.
But the words, "I have taken out a judge's

order to tax his bill; I will bring him to book, and have him struck off the roll," are not. "He has defrauded his creditors, and has been

horsewhipped off the course at Doncaster," spoken of an attorney, are not actionable unless applicable to his conduct in his profession; notwithstanding it may tend to injure him morally and professionally. D'Oyley v. Roberts, 3 Bing. (N.C.) 835; 5 Scott, 40; 3 Hodges, 154; 6 L. J., C. P.

The plaintiff, an attorney, was employed to bring an action; the defendant was commissioned to adjust the accounts, and finding that an action was about to be commenced, wrote a letter to the plaintiff's client, blaming him for allowing the plaintiff to sue, and concluded by saying, "If you will be misled by an attorney, who only considers his own interest, you will have to repent it; you may think when once you have ordered your attorney to write he will not do any more without your further orders, but if you once set him about it he will go to any length without further orders": in an action for libel :- Held, that it was properly left to the jury whether this letter applied to the plaintiff individually, or to the profession at large; and that it was nunecessary to direct them to find whether it was a confidential or a malicious communication. Godson v. Home, 3 Moore, 223; 1 Br. & B. 7.

The words, "How lawyer Bishop treats his clients," heading a report of a case in one of the vice-chancellor's courts, are libellous. Bishop v. Latimer, 4 L. T. 775.

Although prefixed to a particular case, the words, being general, are a charge of treatment, in the manuer asserted, not of that elient only but of all clients, and therefore are not met by proof that the charge was justifiable in the particular instance. Ib.

A declaration that the plaintiff was an attorney, and had been employed by the parishioners of a parish as vestry clerk; that while he was such vestry clerk certain prosecutions were preferred against M. for certain misdemeanours, and that in furtherance of such proceedings, and to bring the same to a successful issue, certain sums of money belonging to the parishioners were appropriated to the discharge of the expenses and law charges incurred on account of the proceedings; yet, the defendant, intending to injure and refusing, even upon the assumption that the plaintiff in his profession of an attorney, and to cause him to be esteemed a fraudulent practiser to intend that the jury had evidence before them in his profession and in his office as vestry clerk, of an injury to the plathiff which the declara-tion did not shew, though some evidence to and to be a person unfit to be trusted therein, that purpose was in fact given. Hearne v. be suspected that he had fraudilently appro-shneed, 12 A. & E. 719; 4 P. & D. 696; 6 Jur. printed money belonging to the parish, falsely and maliciously published of and concerning him, If the publication had been libellous, it and of and concerning his conduct in his office as would not have been justifiable on the ground that it was promulgated at a public meeting, aforesaid, the libel. When the libel was proplaintiff had appropriated money belonging to the parishioners in discharge of the express of the presentions after they had temparated:— Held, that of we had a second temperature of the Held, that of we had a second temperature of the school of the second temperature of the mission of the presentions, and the same, whether the money was so applied before or after the termination of the presentions, and the averment that the libel was published of and concerning the matters aforesaid not making it necessary to prove literally that the libel did relate to all the natters previously stated. May v. Brown, 4 D. & R. 670; 3 B. & C. 118; 2 L. J. (o.s.) K. B.

It is not libellous to write of an attorney that he did not present his bill for fifteen years, and having made his ellent's will, presented it after his death to his representatives. *Revers* v. *Templar*, 2 Jur. 137.

Sharp Practice.]—It is libellons to impute to an attorney "sharp practice" in his profession. Beydell v. Jones, 7 D. P. C. 210; 4 M. & W. 446; 1 H. & H. 408.

Gertificate not taken out.]—It is no objection to maintraining an action for libel on an attorney that it appears that, during the time of the grievances stated to take out his certificate for more than a year, as he may still sue as an attorney for damages in consequence of a libel imputing improper conduct to him in his character as such Junes v. Stevens, 11 Price, 235; 25 R. R. 714.

## d. Medical Practitioners.

Immorality.]—In an action for defamation, for words charging a physician with adultery, it is not sufficient (unless special damage is alleged) to state that the misconduct was imputed to him in his profession. Agrev. Craven, 4 N. & M. 220; 2 A. & E. 2; 4 L. J., K. B. 35.

Breach of Professional Etiquetta, 1—A defendant pleaded truth in justification of a libed, part of which alleged that a physician refusing to act with the plaintiff, also a physician, had "honourably and faithfully discharged his duty to his medical brethren"—Held, that it was not competent to the defendant to offer in cytidence the opinion of medical witnesses on this head. Ramaday v. Ryan, 9 Bing, 333; 2 M. & Sc. 421; 2 L. J., C. P. 2 L. J., C. 2 L.

It is no libel to write of a physician that he is alleged that, in the opinion of the profession, meeting homecopathists in consultation; though it is alleged that, in the opinion of the profession, meeting homecopathists in consultation is improper and is against criquette. Notiner is it a libel, although alleged, in addition to the above, that meeting homecopathists is also disgraceful in the opinion of the profession. Clay v. Roberts, 9 Jun. (28.3, 850; 8 L. T. 397; 11 W. R. 649.

charges of Non-Qualification and Want of Skill.]—In an action for words spaken of the plantist as a physician, importing a denial that the plantist is duly qualified to practise as a physician, the plantist must, under the general issue, prove the inducement in the declaration alleging that the plantist exercised the profession of and was a physician and show not only that he practised as a physician but also that he practised lawfully. Collinar. Charagie, 8 N. & M. 703; 1 A. & E. E52; 8 L. J. K. B. 196

A declaration alleged that the plaintiff was a medical practitioner, and stated the libel to have been published of and concerning him in his practice. No evidence was given of any Heence or authority to practise, nor was the plaintiff mentioned in the libel as a regular medical man, but merely as "physician extraordinary to several ladies of distinction," and "doctor, or rather quack": "-Held, that this did not withdraw the claim of damages in the medical capacity from the consideration of the jury, but that they might give such damages as they thought right, both for that and the libel on the plaintiff's private character. Long v. (Bubb, 5 Car. & P. 55.

In an action for slander the declaration alleged that the plaintiff, an apothecary, having attended a child of the defendant, which was ill with a view to heal and cure such illness, and having, with the consent of the defendant, made up and administered medicines, and amongst others a saline injection, and the child having died of the sickness aforesaid, the defendant published of and concerning the plaintiff the following words:—"He killed my child; it was the saline injection that did it"; innuendo, that the defendant meant that the plaintiff had been guilty of feloniously killing the child. The defendant pleaded a justification, for that the plaintiff did injudiciously, indiscreetly and improperly, and contrary to his duty in that behalf, administer a saline injection to the child; and that the death of the child was caused or occasioned, or greatly accelerated, by the saline injection :-Held, that the plea was bad, for that it confessed the meaning imputed to the words spoken, that the plaintiff had been guilty of manslaughter, and afforded no instification for such an allegation. Edsull v. Russell, 4 Man. & G. 1090; 5 Scott (N.R.) 801; 2 D. (N.S.) 641; 12 L. J., C. P. 4; 6 Jnr. 96,

A second court alleged the words to be, "He made up the medicines wrong, through jealonsy; because I would not allow him his own judgment"; innucedo, that the plaintiff had intentionally, and from jealonsy and improper motives, made up the medicines in a wrong and improper manner, and that such medicines were, to his knowledge, unfit and improper:—Held, that it imputed no criminal offence. Ib.

A third count stated the words to be, "Mr. P. told me that he had given my child too much mercury, and poisoned it, otherwise it would have got well"; immendo, that the plaintiff had, through ignorance or inattention, administered to the child such an excessive quantity of mercury that the mercury had acted as poison and caused the death of the child. A plen that the plaintiff did, wrongfully and improperly, and contrary to his duty, administer to the child an excessive proportion of mercury, having reference to the state and condition of the child, neither confesses nor avoids the charge, and is therefore bad. 1b.

A declaration stated that the plaintiff was a suggeon and an accountent and that he had been employed to attend, and had attended, on R. in her confinement, and that the defendant, in a discourse with R., of and concerning the plaintiff in relation to his profession, spoke and published the following words — "I wonder you had him to attend you. Do you know him? He is not an apothecary; he has not passed any examination; he is a bad character; none of the medical men here will meet him. There have been many imquests had npon persons who have dided because

died that the plaintiff has attended, and there imputing to him misconduct and consequent have been inquests held upon them":—Held, unfitness for the office, unless the imputation that the words as amended were actionable, Southee v. Denny, 1 Ex. 196; 17 L. J., Ex. 151. Semble, that the words "he is a bad character,

none of the medical men here will meet him, were actionable, as importing the want of a necessary qualification for a surgeon in the discharge of his professional duties. Ib.

### e. Of Others.

Candidates and Members of Parliament. ]-Defamatory words, which are actionable in themselves, are not the less so because they are alleged to have been spoken of one as a candidate to serve in parliament. Harwood v. Astley, 1 Bos. & P. (N.R.) 47; 8 R. R. 756.

There is no such privileged relation existing between parliamentary candidates and the electors as will justify any of the latter in publishing statements injurious to the character of the former. Duncombe v. Daniell, 8 Car. & P. 222; 2

Jur. 32; 1 W. W. & H. 101.

Charging a member of parliament with want of sincerity is not actionable. Onslow v. Horne, 2 W. Bl. 750 : 3 Wils, 177.

Military Officer-Publication of Name in Pension List. ]-A military officer may be compulsorily removed by the government to the pension list, although he may originally have entered the service under a regulation that he should continue therein so long as he was physically and mentally efficient, and his removal is not on account of inefficiency in these respects. No action will lie against the Secretary of State in respect of such removal. And the publication in the "Gazette" of the fact that an officer has been placed on the pension list is not a libel in respect of which an action can be maintained against the Secretary of State where there is no allegation that he was personally cognisant thereof, and that the matter was published maliciously and without reasonable and probable cause. Grant v. Secretary of State for India, 46 L. J., C. P. 681; 2 C. P. D. 445; 37 L. T. 188; 25 W. R. 848.

Holders of Offices not of Profit-Magistrate.] —It is actionable without the aid of a prefatory averment to write of a maistrate, that, "as chairman of a finance committee, he audited accounts containing items of upwards of 12,000l. for the nominal purpose of furnishing lodgings, plate, &c., for the judges, but which expenditure was in reality to find accommodation for the magistrates, as the sheriff always found the judges suitable lodgings, without putting the county to any expense. Adams v. Merodew, 3 Y. & J. 219.

- Alderman-Imputation of Dishonesty in Office.]—A verbal imputation of dishonesty or corruption in the exercise of the office of an alderman is actionable without proof of special damage, although the office is not one of profit. Booth v. Arnold, 64 L. J., Q. B. 443; [1895] 1 Q. B. 571; 14 R. 326; 72 L. T. 310; 43 W. R. 360; 59 J. P. 215—C. A.

he had attended them." At the trial the words office of profit, cannot in the absence of special proved, as to the inquests, were "several have damage maintain an action of slander for words relates to his conduct in the office, or unless, if true, it would lead to his removal therefrom. Alexander v. Jenkins, 61 L. J., Q. B. 634; [1892] 1 Q. B. 797; 66 L. T. 391; 40 W. R. 546; 56 J. P. 452—C. A.

The plaintiff was elected town councillor of S. The defendants, after the election, but before the plaintiffs had taken the oaths or acted, spoke words of him imputing that he was an habitual drunkard and unfit for the council :- Held, that the words were not actionable without proof of special damage. Ib.

Treasurer of Relief Committee. ]-The holding of the office of treasurer of a relief committee for the purpose of relieving the poor of a parish is not such a circumstance as to dispense with an averment of special damage where the words do not impute an indictable offence. Currigan v. Ryan, 15 W. R. 61.

Holders of Offices of Profit.]-Where words are spoken of a person in an office of profit which have a natural tendency to occasion the loss of such office, or which impute the want of some necessary qualification for, or some misconduct in it, they are actionable. Lumley v. Allday, 1 Tyr. 217; 1 C. & J. 301; 9 L. J. (0.8.) Ex. 62.

- Clerk of Gas Company. Secus, if a clerk to a gas-light company is charged with immoral conduct with a woman, that imputation having no reference to his office, the words not being laid to have been spoken of him in his office as clerk, nor proved to have occasioned him any special damage. Ib.

— Secretary of Railway Company.]—An article in a magazine expressing the writer's sorrow at seeing the correspondence between the secretary of a railway company and another person published, and observing that had invention been taxed to blast the character and throw a shade over the honour of the company it could have devised nothing more effective than this stupid correspondence and still more stupid publication; and also imputing trickery and deception to the secretary, and, in reference to an answer he was about to put in chancery, reminding him that shuffling and low cunning would not do in that court :- Held, libellous after verdict, in an action by the secretary, where the declaration merely alleged the object and intention of the defendant to be to injure him in his character of secretary to the company, but did not contain any special averments or innucudoes. Robertson v. Wylde, 7 L. J., C. P. 196.

Superintendent of Police.]—Words spoken of a superintendent of police—"I saw a letter re-specting an officer of the Leeds police force who was superior in rank to A. B., and who had been guilty of conduct unfit for publication"-are not actionable without special damage, the conduct imputed to the party not being connected on the face of the declaration with his official character. James v. Brook, 9 Q. B. 7; 16 L. J., Q. B. 17; 10 Jur. 541.

— Town Councillor—Imputation of Mis-conduct.]—The holder of an office, not being an be maintained by a lessee or a rentor of tolls, for

words spoken of him in his character of contractspoken. Bellumy v. Burch, 16 M. & W. 590.

Shipowner - Imputation that Ship unseaworthy, -A statement in a newspaper that a ship, of which the plaintiff was owner and master, and which he had advertised for a voyage to the East Indies, was not a seaworthy ship, and that Jews had bought her to take out convicts, is a libel on the plaintiff in his trade and business, for which he may recover damages without proof of malice on an allegation of special damage. Ingram v. Lawson, 6 Bing. (N.C.) 212; 8 Scott, 471; 9 L. J., C. P. 145; 4 Jur. 151.

And, in an action brought for such a libel, the ordinary profits of a voyage are the proper measure of damages. Ib.

Master Mariner-Charge of Drunkenness. ]-Words imputing to a certificated master mariner drunkenness whilst in command of a vessel at sea, are actionable without special damage. Irwin v, Brandwood, 2 H. & C. 960; 33 L. J., Ex. 257; 10 Jur. (N.S.) 370; 9 L. T. 772; 12

Stock Broker, ]—A declaration affecting the damage. It. plaintiffs in their business as sharebrokers, after stating that they had bought, as sharebrokers, on account of the defendant, shares in a railway company, set out the libel, as published in a newspaper, which, after commencing with the word "wanning," proceeded to inform the plaintiffs that the shares so bought, under a false representation of the market, at 8L per share, and sanctioned by the defendant, were being sent to the committee of the railway company with instructions to return the deposited balance to the defendant; and that, unless the plaintiffs arranged to return such deposit-money to the defendant, with certain expenses, the defendant would adopt legal measures. The libel then stated the following :- "The amount will be taken by instalments, on security being deposited with any bankers but those who recommended C. & Co." (meaning the plaintiffs) :-Held, that in the absence of any colloquium or immendo explaining the meaning to be attached to the words the publication was not libellous. Capel v. Jones, 4 C. B. 259; 11 Jur. 396.

In a declaration the plaintiff stated that he was a jobber or dealer in the funds or stocks, and as such had been accustomed lawfully to contract; that the defendant said of him as such jobber or dealer," He is a lame duck," meaning that he had not fulfilled his contracts in respect of the said stocks or funds; in consequence of which divers persons refused to fulfil their contracts with him, and he was prevented from fulfilling his contracts with other persons :- Held, that it did not sufficiently appear either that the words were spoken of lawful contracts, or that the plaintiff was a lawful jobber or dealer in the funds; and that the declaration was therefore bad. Morris v. Langdule, 2 Bos. & P. 284.

Owner of Newspaper-Charge of Vulgarity and Low Circulation. ] - A paragraph in one newspaper charging another with being vulgar or scurrilous, is not actionable ; but, aliter, where it asserts it to be low in circulation, as addressed to persons who are disposed to advertise in it. Heriot, v. Stuart, 1 Esp. 437.

Domestic Servant. |-A delaration alleged that ing for tolls, after he has cassed to contract for the defendant spoke and published of the plain-renting the tolls respecting which the words are spoken. Bellumy v. Burch, 16 M. & W. 590. to her employment: "I was so incensed with that girl for coming to hire with me, after having had a miscarriage at Mrs. B.'s house, and sent away by her in a car; and she afterwards to give the girl a good discharge" :-- Held, that the words were actionable per se, as relating to the plaintiff's employment. Conners v. Justice, 13 Ir. C. L. R. 451.

> Gamekeeper.-Spoken words imputing to a man misconduct in his office or in his trade are actionable, although the office or the trade is not one of which the court can take judicial notice. Finlger v. Newcamb, 36 L. J., Ex. 169; L. B. 2 Ex. 327; 16 L. T. 595; 15 W. R. 1181. notice. A declaration alleging that it was the duty of the plaintiff, as a gamekeeper, not to kill foxes. that he was employed on the terms of his not doing so, and that a person killing foxes would not be employed as gamekeeper; and that the defendant, knowing the premises, falsely and maliciously said of the plaintiff, as such gamekeeper, that he killed foxes is a good declaration, even without an allegation of special

> Persons carrying on Illegal Businesses. ]-A person who pursues an illegal avocation, such as keeping a public room for pugilistic exhibitions, cannot maintain an action for a libel regarding his conduct in such avocation. *Hunt* v. *Bell*, 7 Moore, 212; 1 Bing. 1; 25 R. R. 563.

> An action does not lie for anything written against a party, touching his conduct in an illegal transaction; but for misconduct imputed to him in any matter independently of the illegal transaction, though arising out of it, an action lies. Yrisari v. Clement, 3 Bing. 432; 11 Moore, 308; 2 Car. & P. 223; 4 L. J. (o.s.) C. P. 128.

## 6. COMMENT ON MATTERS OF PUBLIC INTEREST.

Generally.]-Where an action of libel is brought in respect of a comment on a matter of public interest the case is not one of privilege, properly so called, and it is not necessary in order to give a cause of action that actual malice on the part of the defendant should be proved. The question whether the comment is or is not actionable depends upon whether in the opinion of the jury it goes beyond the limits of fair criticism. Campbell v. Spottiswoode (3 B. & S. 769) approved and followed. Henwood v. Harrison (L. R. 7 C. P. 606) dissented from. Mericule v. Carson, 20 Q. B. D. 275; 58 L. T. 331; 86-W. R. 231; 52 J. P. 261—C. A.

The fair and honest discussion of, or comments upon, a matter of public interest is in point of law privileged, and is not the subject of an action unless the plaintiff can establish malice. Henwood v. Harrison, 41 L. J., C. P. 206; L. R. 7 C. P. 606; 26 L. T. 938; 20 W. R. 1000.

A writer, in commenting upon matters of publie interest, is protected and excused if, in writing honestly and with reasonable moderation and self-control, he makes, through mistaken inferences on the matters of fact involved, defamatory statements, the truth of which he cannot substantiate. Hunter v. Sharpe, 4 F. & F. 983; 15 L. T. 421.

by way of advertisement, the effect of which not guilty, may adduce evidence to shew that the is to represent that he is in possession of a specific remedy for a disease hitherto regarded as incurable, are matters of public interest and fair and proper subject for public comment.

If a public writer in the press writes that which turns out to be not founded upon the inference he draws, and is unable to instify the conclusion at which he has arrived, yet if he has acted in good faith in the discharge of his duty, bringing to it the amount of care, reason and judgment which a man who takes upon himself as pertaining to fair description or criticism on a to discuss public questions is bound to bring, so that the jury is of opinion that he has acted reasonably and properly, he will be privileged, although he may turn out to be in error. Risk Allah Bey v. Whitehurst, 18 L. T. 615.

Fair Criticism of Work of Art not actionable -Character of Author not to be attacked. Whatever is fairly written of a work, and can be reasonably said of it, or of its author as connected with it, is not actionable unless it appears that the party, under the pretext of criticising the work, takes an opportunity of attacking the character of its author. Macleud v. Wakeley, 3 Car. & P. 311.

A fair, reasonable and temperate, though an erroneous criticism of works of art, not written for the purpose of hurting the artist in his profession, is not a libel. Soune v. Knight, M. & M. 74; 81 R. R. 714.

It is not libellous to ridicule a literary composition, or the author of it, in as far as he has personal slander, he cannot maintain an action for any damage he may suffer in cousequence of being thus ridiculed. Carr v. Hood, 1 Camp. 355, n.; 10 R. R. 701, u.

If a critic, in criticising a work, goes out of his way to attack the private character of the author this is a libel. Fraser v. Berkeley, 7 Car. & P. 621.

The editor of a public newspaper is not justified in calumnious attacks on the private charae-Stark, 93: 19 R. R. 688.

Work of Art—Tradesman's Advertisement.]— A tradesman's advertisement, placard, or handbill, is open to fair criticism and remark, as a book or as a work of art. Paris v. Lory, 9 C. B. Gree (x.s.) 342; 30 L. J., C. P. 11; 7 Jun. (x.s.) 289; 340, 3 L. T. 323; 9 W. R. 71. S. C., at Nisi Prius, 2 F. x F. 71.

Extent of Fair Criticism. ]-The publication of a critique upon a literary work, conched in terms of condemnation, however strong, and even though imputing profamity or indecency, will be excused unless it appears that it is so unfair and reckless in its character that it may be presumed to have been published, not honestly, but maliciously. Strauss v. Francis, 4 F. & F. 1107; 15 L. T. 674.

It is not libellous fairly and honestly to criticise a painting publicly exhibited, though the terms of censure used may be strong, such as calling the painting a daub. Thomson v. Shackell, M. & M.

187 : 31 R. R. 728.

In an action for a libel upon the plaintiff in being in the habit of publishing immoral and complained of to be no more than a fair comment

Publications issued by a medical practitioner foolish books, the defendant, under the plea of supposed libel is a fair stricture upon the general run of the plaintiff's publications. Tubart v. Tipper, 1 Camp. 350; 10 R. R. 698.

An article in a newspaper describing leaden figures "reported to have been found in the Thunes," and sold as antiquities, as being of recent fabrication and stigmatising the sale as an attempt at deception and extortion, is not actionable, the alleged libel being aimed, not at any particular individual, but at a class, and being privileged, in the absence of evidence of malice, matter of public interest. Eastwood v. Holmes, 1 F. & F. 347.

In an action for a libel in a newspaper, imputing to the plaintiff, the proprietor and editor of Zadkiel's Almanack, that not only was he connected with that foolish publication, but that he gulled the public by means of a magic ball of crystal, by which he pretended to tell what was going on in the other world, and that he took money for those profane acts, and made a good thing of it :- Held, first, that within the scope of fair discussion a public writer is not liable unless the writes unreasonably, recklessly, and malicionsly. Marrison v. Beleher, 3 F. & F. 614.

Held, secondly, that this immunity does not

extend beyond the discussion of the published writings or public or undoubted acts of the plaintiff, and does not extend to the gratuitous assertion of matters of fact for which there is no

foundation. Ih.

Held, thirdly, that the privilege had extended to a denunciation of the almanack and the use of embodied himself with his work; and if he is not the ball as an imposture; but that if the libel followed into domestic life for the purpose of meant that the plaintiff had made money by a conscions and fraudulent imposture, by use of the magic ball, that was beyond the right of fair dis-

enssion, Ib.

It is not within the limits of privileged criticism to print of an exhibitor of flowers, in observations touching the exhibition:—"The name of G. is to be rendered famous in all sorts of dirty work; the tricks by which he, and a few like him, used to secure prizes, seem to have ter of the writer of another. Stuart v. Lorell, 2 been broken in upon by some judges more honest than usual. If G. be the same man who wrote an impudent letter to the Metropolitan Society, he is too worthless to notice: if he be not the same man, it is a pity two such beggarly souls could not be crammed into the same carease, Green v. Chapman, 4 Bing. (N.C.) 92; 5 Scott,

> Comment on Petitioner to Parliament. ]-Quere, whether a petition to parliament on matters of general importance is such a publication as renders the petitioner an object of fair eriticism and comment. *Dunne* v. *Anderson*, 3 Bing, 88; 10 Moore, 407; R. & M. 287; 28 R. R.

The plaintiff, a surgeon and proprietor of a medical institution, having petitioned the House of Commons against quacks and empirics, the defendant, the proprietor of a periodical publication, in commenting upon, and criticising the petition, used expressions charging him with ignorance of his profession generally, and of chemistry in particular. The plaintiff sued the defendant, and declared against him for libelling him in his profession of a surgeon; and the jury his business of a bookseller, accusing him of were directed that if they thought the writing on the petition, it was no libel; and that they were to consider whether the publication imputed to the plaintiff ignorance in his profession of a surgeon, or merely ignorance of chemistry; and that if they thought the latter, their verdict must be for the defendant. The jury having accordingly found a verdict for him, the court granted a new trial. Ib.

Criticism of Scheme submitted to the Admiralty. ]-A navál architect, in 1867, submitted to the Admiralty proposals for the conversion of the old wooden line-of-battle ships of the navy into ironclad turret-ships. His proposals were considered by the Admiralty, and rejected. In September, 1870, the ironclad turret-ship "Captain," whilst on a cruise, capsized and sank with all hands. This disaster caused great excitement and anxiety in the public mind; and, with a view to explain the circumstances under which the "Captain" had been sent to sea, as well as the general course pursued by the board with reference to the placing the navy in a proper condition to meet the exigencies of modern naval warfare, a minute was prepared by the first lord of the Admiralty for presentation to parliament during the approaching session. This minute referred to and criticised the plans of conversion proposed by the plaintiff; and in a note was inserted a letter upon the subject addressed to the board in September, 1867, by the controller of the navy, which letter contained this passage: "These plans would have no weight whatever from the known antecedents of their author, but they derived weight from the approval of Mr. Watts, the late chief constructor of the Navy, and concluded by recommending their rejection. The minute was, by order of the lords of the Admiralty, printed by the Queen's printer; and copies of it were publicly sold by him before the meeting of parliament. At the trial of an action for this alleged libel, the judge—assuming the letter to be prima facie libelions, and it being conceded that the publication was without malice -nonsuited the plaintiff, on the ground that it was a fair criticism upon a matter of public and national importance, and therefore privileged :-Held, by Willes, Byles and Brett, JJ., that the nonsuit was right; but by Grove, J., that the publication was not privileged as being of public and national importance or interest, within the limits marked by previous decisions, and that it was not in the nature of a fair criticism of matter before the public, or, at all events, that it was not so clearly within the limits of such privilege as to be removed from the consideration of a jury. Henwood v. Harrison, 41 L. J., C. P. 206; L. R., 7 C. P. 606; 26 L. T. 938; 20 W. R.

Comment on Public Characters, ]—A welllatown public character in addressing meetings held to protest against a bill recently introduced into parliament, had burnt the bill and predicted much popular irritation in event of its being passed. Thereupon the defendant published or him that he was a political cheap jack, half booby and half humbug, and had defect the government and threatened civil discord, and that he was only seeking by agitation to obtain a government appointment :—Held, a question for the jury, whether this was fair comment or not, and a rule to set aside, as against evidence, a verdict for the defendant, was refused. Odger v. Mortimer, 28 L. T. 472.

In an action for a libel it is only on the very strongest grounds that the court will set aside, as against evidence, a verdict for the defendant on the question of fair comment upon the conduct of public men. 1b.

À barrister, who, after becoming a member of parliament, was made a Queen's counsel, and also a recorder, having been partly acquitted and partly censured by the benchers of his fun, after an inquiry into his conduct, private as well as professional; and having afterwards, on a public platform, alluded to their sentence as one of acquittal; upon which they published their sentence, and he published a protest and a letter, in which he impugned their proceedings and decision as unjust. A person, in a legal review, published an article fairly setting forth these documents, with comments, and also a narrative of the plaintiff's career, mixed up with some general reflections on his character, and particular observations, suggesting that he had obtained his appointments by parliamentary influence or services:—Held, first, that the matter of those appointments was a legitimate subject of public comment. Segment vs. Butterworth, 3 F. & E. 372.

Held, secondly, that even the private conduct of the plaintiff might, as tending to shew whether he was a man of honour and integrity, be also legitimate subject of such comment. *Ib*.

Held, thirdly, that as he had in a public speech alluded to all these matters, they were all legitimate subjects for such comments as were fair, and not, in substance, going beyond the matters which were the subject of comment. 1b.

The right to comment upon the public acts of public men is a right of every citizen, and is not the peculiar privilege of the press. Kune v. Mulcains, Ir. R. 2 C. L 402.

— On Conduct of Magistrates.]—A commentary in a newspaper upon the conduct of magistrates in dismissing a charge is privileged. Hibbins v. Lee, 4 F. & F. 243; 11 L. T. 541.

— On Conduct of Clergymen.]—The conduct of public worship by a clergyman, and the uses to which he puts his church and vestry, are lawful subjects of public comment, so as to excuse, under the plea of not guilty, the publication of matter otherwise libellous. Kelly v. Tinlings, 35 L. J., Q. B. 281; L. R. 1 Q. B. 699; 12 Jur. (N.S.) 940; 13 L. T. 255; 14 W. R. 73.

The conduct and management by the clergyman of a parish of a charitable society in a parish, from the benofits of which dissenters are, by his sanction, excluded, is not lawful subject of public comment, so as to excuse, under the plea of not guilty, the publication of untrue and injurious matter respecting the clergyman in relation to the charity. Guthercole v. Midll, 15 M. & W. 319, 15 L. J. Ex. 179; 10 Jun. 387.

— On a Waywarden.]—No criticism on a person holding a public office, as that of a waywavden, is libellous nuless malice is shewn. Harle v. Catherall, 14 L. T. 801.

On Public Officer removable by Privy Council. —An action of libel may be maintained for statements in a letter addressed to the privy council injurious to the character of the plaintiff, a public officer removable by the privy council, upon proof of express malice in the defendant. Proctor v. Webster, 55 L. J., Q. B. 150; 16 Q. B. D. 112; 33 L. T. 753.

paper of a report of an inspector of charities under the Charitable Trusts Act, containing a letter, written some years before, reflecting on the plaintiff in his management of a college :-Held, that as the matter was one of public interest, the defendant was not liable, provided he published it fairly, from an honest desire to afford the public information, and that comments upon it were only material as evidence of malice. Cow v. Freney, 4 F. & F. 13.

—— On a Landlord. ]—A plea to an action of libel averring that plaintiff's dealings with his tenantry were a matter of public notoriety, and had formed the subject of a letter written on behalf of the tenantry by the parish priest to the plaintiff, and that the whole subject of laws of landlord and tenant was now a matter of public interest and discussion, discloses no grounds of justification, and was not permitted by the court, on an application to plead several defences under s. 57 of the Common Law Procedure Act (Ireland) Hogan v. Sutton, 16 W. R. 127.

- On Employers of Labour. ]-An article in a newspaper purporting to give account of the homes provided by the plaintiffs for their workmen, and representing them as in an insanitary condition and searcely fit for habitation, relates to a matter of public interest, and is, therefore, not libellous if it does not exceed fair comment. South Hetton Coal Co. v. North Eastern News Association, 63 L. J., Q. B. 293; [1894] I. Q. B. 133; 9 R. 240; 69 L. T. 844; 42 W. R. 322; 58 J. P. 196.

Comment on Circulation of Newspaper. |-The circulation and position of a newspaper are not matters of general public interest, and a discussion on the subject is not protected if libellous. Latimer v. Western Morning News Co., 25 L. T.

On Evidence in Court. ]-The right of free discussion on a subject of public interest excuses the publication of defamatory matter, provided it appears to have been published not in that unfair or improper spirit, that is, in the spirit of intemperate and inconsiderate imputations which implies malice, in a legal sense, but in the spirit of fair discussion. And the right of free discussion extends to comments in a journal upon sworn evidence given on a subject of public interest, even to the extent of imputing that such evidence is unfounded, or even ineautious or careless; but if it is imputed, apparently without any fair foundation, that it is wilfully, muliciously, or recklessly false, then there is an excess, which is evidence of what the law deems malice, and which takes away the protection or excuse arising from the exercise of the right of free discussion. Hedley v. Barlow, 4 F. & F.

A writer in a newspaper may comment upon proceedings in a court of justice, if he does so fairly and honestly, upon the facts in evidence; but if he departs from, or misrepresents or perverts the facts, or gives a one-sided and a partial view of them, so as to convey false and calumnious reflections upon personal or professional character, or uses epithets of contumely or ob-

— On Manager of College.]—In an action evidence of unfairness which will take away for libel, consisting of a publication in a news-the privilege and render him liable to an action. Woodgate v. Ridout, 4 F. & F. 202.

The evidence of a witness given upon oath in a public court of justice is a matter of public interest and importance, and a legitimate subject for fair and bonâ fide comment. Kane v. Mulrains, Ir. R. 2 C. L. 402.

On Place of Public Entertainment. ]-Theeditor of a newspaper may fairly comment on any place of public entertainment, and a paragraph in which he does so is not libellous. *Dibdin* v. Swan, 1 Esp. 28; 5 R. R. 717.

But if it is proved that the comment is unjust, is malevolent, and exceeds the bounds of fair opinion, it is a libel and therefore actionable. Ib,

Comment involving Criticism of Conduct of Individuals. ]-Newspaper criticisms on the conduct or motives of an individual will be held privileged if the criticism has been made with an honest belief in their justice, and the writer has brought to the task a reasonable degree of judgment and moderation, so that the result may be what a jury shall doem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of criticism. Wason v. Walter, 8 B. & S. 671; 38 L. J., Q. B. 34; L. R. 4 Q. B. 73; 19; L. T. 409; 17 W. R. 169.

In an action by a musical critic for a libel imputing to him that he used his influence as a critic to extort the gratuitous services of eminent artists at his concerts, it appeared that he did obtain their services gratuitously, they of course knowing that he was a critic :-Held, that although the defendant might have been excused in commenting upon the system in severe terms, as likely to bias the criticism and have an unfair influence, yet that the imputation in the libel went far beyond the limits of fair discussion, and that a justification of it not proved was an aggravation. Ryan v. Wood,. 4 F. & F. 735.

The publication by a reform committee of a report imputing to the plaintiff that he had been guilty of bribery is not privileged within the rule of law allowing discussion of matters of public interest, the privilege not extending to imputations upon personal character, going, in the opinion of the jury, beyond the necessity for-discussion of the public question. Wilson v. Reed, 2 F. & F. 149.

- Belief in Truth of Imputations.]-When a writer in a newspaper or elsewhere, in commenting on public matters, makes imputations on the character of the individuals concerned in them which are false and libellous, as being beyond the limits of fair comment, it is no defence that he bona fide believed in the truth of these imputations. Campbell v. Spottiswoode, 3. B. & S. 769; 32 L. J., Q. B. 185; 9 Jur. (N.S.) 1069; 8 L. T. 201; 11 W. R. 569. S. C., at Nisi Prius, 3 F. & F. 421.

A Roman Catholic having been appointed calendarer of foreign state papers, the defendant, in the course of a newspaper controversy on the subject of the propriety of the appointment, published loquy, even although they have already been letters, in which he argued that the papers might used by counsel in the action, there will be not be fairly epitomised by the plaintiff, and also threw out that such papers might not be in tice, in a man's own defence, against a charge upon safe custody while in the hands of persons of the plaintiff's views, and that such persons might Burr. 807; 2 Ld. Ken. 536. possibly, through religious prejudices, be induced to mutilate, alter, or abstract them :-Held, that if the defendant really believed it, the publica-tions were privileged, provided there was no wilful misstatement. *Turnbull* v. *Bird*, 2 F. & F.

# B. PRIVILEGE.

### I. ABSOLUTE.

## a. Debates in Parliament.

Words spoken by a member of parliament in parliament are absolutely privileged : the court has no jurisdiction to entertain an action in respeet of them, and will upon motion set aside the writ of summons and statement of claim in such netion. Dillon v. Balfour, 20 L. R., Ir. 600.

## h. Indicial Proceedings.

Statements made by Judges. -No action is maintainable against a county court judge for words spoken by him in his judicial capacity while sitting in his court trying a cause, even though the words are spoken falsely and maliciously, and without reasonable, probable or justifiable cause, and without any foundation whatever, and not bona fide in the discharge of his duty as judge, and though they are wholly irrelevant to the matter in issue before him. Scott v. Stansfield, 37 L. J., Ex. 155; L. R. 3 Ex. 220; 18 L. T. 572; 16 W. R. 911.

By Coroner. ]-Semble, that no action is maintainable against a coroner for anything said by him while he is acting as coroner, and addressing a jury impanelled before him, although he uses defaulatory language towards a person, and does so falsely and maliciously. *Thomas* v. *Chirton*, 2 B. & S. 475; 31 L. J., Q. B. 139; 8 Jur. (N.S.) 795 : 6 L. T. 320.

- By Court-Martial. - If a court-martial, after stating in their sentence the acquittal of an officer against whom a charge has been preferred, subjoins thereto a declaration of their opinion that the charge is malicions and groundless, and that the conduct of the prosecutor in falsely calumniating the accused, is highly injurious to the service, the president of the court-martial is not liable to an action for a libel for having delivered such sentence and declaration to the judge-advocate. Jekyll v. Moore, 2 Bos. & P. (N.R.) 341; 6 Esp. 63.

- By Director of Military Inquiry. ]--- Where the commander-in-chief directed a military inquiry to be held, to investigate the conduct of a commissioned officer in the army, who afterwards sued the president of such court of inquiry for a libel stated to be contained in his report, and transmitted by him to the commander-in-chief :-Held, that such a report was a privileged communication, and properly rejected as evidence at the trial. \*Lone v. \*Restruch (Lond). \* Moore, 563; 2 Br. & B. 130; 8 Price, 225; 22 R. R. 748.

him in a court will not lie. Astley v. Younge, 2

No action lies against a man for a statement made by him whether by affidavit or viva voce. in the course of a judicial proceeding, even though it is alleged to have been made falsely and maliciously, and without any reasonable or probable cause. Revis v. Smith. 18 C. B. 126; 25 L. J., C. P. 195; 2 Jur. (N.S.) 614; 4 W. B. 506.

Or although the statement was irrelevant, and was expanged from the affidavit as being prolix, impertinent, and scandalous, by an order of the court. Kennedy v. Hilliard, 10 Ir. C. L. R. 195; 1 L. T. 578.

And the party scandalised was not a party to the cause. *Henderson* v. *Broomhead*, 4 H, & N, 569: 28 L. J., Ex. 360; 5 Jur. (N.S.) 1175: 7 W. R. 492-Ex. Ch.

If a servant summonses his master before a court of conscience for wages, and the latter in his necessary defence utters words imputing felony to the former, no action will lie. Trotman

v. Dunn, 4 Camp. 211.

The defendant having obtained judgment against the plaintiff, entered the judgment in the register of judgments by handing in a minute thereof to the officer of the court; the judgment was afterwards set aside :- Held, that handing in the minute would not sustain an action for libel against the defendant. McLaughlin v. Doey, 32 L. R., Ir. 518.

Letter and Affidavit of Complaint against Solicitor to Incorporated Law Society. ]-A letter of complaint against a solicitor in respect of his professional conduct, with affidavit of alleged charges attached, forwarded to the Registrar of the Incorporated Law Society, in accordance with Form I, in the schedule of the Rules under the Solicitors Act, 1888, is so essentially a step in a judicial proceeding that statements in such letter or affidavit will be absolutely privileged. Lilley v. Roncy, 61 L. J., Q. B. 727.

Letter from Creditor to Chief Commissioner of Debtors' Court. ]-A letter written by an opposing creditor to the chief commissioner of the Insolvent Debtors' Court, previously to the hearing of an insolvent's case, is not a privileged communication. Gould v. Hulme, 3 Car. & P. 625.

Statements made by Witnesses. ]-A witness in a court of justice is absolutely privileged as to auything he may say as a witness having reference to the inquiry on which he is called as a witness. Scaman v. Netherclift, 46 L. J., C. P. 128; 2 C. P. D. 53; 35 L. T. 784; 25 W. R. 159— C. A.

A statement as to another matter, made to justify the witness in consequence of a question going to the witness's credit, has reference to the

inquiry within this rule. Ib.

The defendant, an expert in handwriting, gave evidence in a trial of D. v. M. that, in his opinion, the signature to the will in question was a forgery. The jury found in favour of the will, and the judge made some very disparaging remarks on defendant's evidence. Soon afterwards the defendant was called as a witness in favour of the genuineness of a document, on a charge of forgery before a magistrate. In crossexamination he was asked whether he had given Statements made by Parties.]—An action for evidence in the suit of D. v. M., and whether he libellous words spoken or sworn in a court of jusHe answered "Yes." Counsel asked no more questions, and the defendant insisted on adding, though told by the magistrate not to make any further statement as to D. v. M.: "I believe that will to be a rank forgery, and shall believe so to the day of my leath." An action of slander for these words having been brought by one of the attesting witnesses to the will:—Held, that the words were spoken by the defendant as a witness, and had reference to the inquiry before the magistrate, as they tended to justify the defendant, whose credit as a witness had been impagned; and that the defendant was, therefore, absolutely privileged.

— Affidavit.]—No action lies against a party who, in the course of a cause, makes an affidavit in support of a summons taken out in such cause, which is scandalous, false, and malicious, though the person scandalised, and who complains, is not a party to the cause. Hendown v. Bromathevit, 4. H. & N. 569; 28. L. J. Ex. 369; 5 Jur. (8.8.) 1175; 7 W. R. 492—Ex. Ch. S. P., Konnedy v. Hilliard, 10 Ir. C. L. R. 195; 1 L. T. 578.

A. obtained a rule uisi for a criminal information against B. for sending him a challenge, and A.'s affidavits contained untries of high consure against B. The affidavit of B. in showing cause against the rule was recriminatory, and would, under other circumstances, have been libellons. In an action by A. against B., for the libel contained in B.'s affidavit:—Held, that B. was justified in setting forth any such nattors respecting A.'s past conduct as hemight think would dishadine the court to entertain the application for A.'s rule. Doyle v. O'Doberty, Car. & M. 418.

— Affidavit in Interlocutory Matter.]—An affidavit in an interlocutory proceeding is privilegal, and, therefore, where an action for libel was commenced, founded on the contents of such an affidavit:—Held, that the defendant was not liable, Gompate v. Wide, 54 J. P. 2.

Court.]—A military man giving evidence before a military court of military, which has no power to administer an oath, is entitled to the same protection as that enjoyed by a witness on oath in an ordinary judicial proceeding. Dauchius v. Rokeby, 45 L. J., Q.B. 8; L. R. 7 H. L. 744; 33 L. 7, 194; 23 W. R. 931.

No evidence, whether written or oral, given by him in the course of the inquiry and relative to the inquiry can be made the foundation of an action, however strong the presumption may be that such evidence was not only mirne but was also known to be untrue by him who gave it, or even that it was dictated by malice. For the correctness of this presumption must always be a question until resolved by a Jury, and public policy requires that witnesses should give their evidence freely and openly, and without fear of being haussead by a civil action on an allegation, whether true or false, that they have spoken from malice. Ib.

When a witness before such a court handed in a written statement voluntarily and masked, after his examination was concluded:—Held, that evidence that the statements contained in such paper were untrue and were made maliciously was inadmissible. *Ib*.

— Witness before Select Committee of Commons.]—To an action of slander the defendents pleaded that the statements complained of were part of the evidence given by him in the character of a witness before a select committee of the House of Commons:—Held, that the statements so made were privileged, and that the action would not lie. Goffin v. Donnelly, 50 L. J., Q. B. 393; 6 Q. B. D. 307; 44 L. T. 141; 20 W. R. 440; 45 J. P. 433.

— Communication to Inquest not on Oath.]—
If a person has a communication to make to an inquest for its information, not on eath, he is bound to do it in such a way as to satisfy a jury, if he is afterwards charged with slander, that he was only staring the fact for the information of the inquest, and that he did it in a proper manner. Without v. Culting, 5 Car, & P. 373.

Statements by Counsel or Advocates.]—An action will not lie against a barrister for words spoken by him as counsel in a cause, pertinent to the matter in issue. Hodgsm v. Szarlett, 1 B. & Ald. 232; 19 R. B. 301.

A party in a matter before the court had kept a sum of money, which, by his contract, he ought not to have kept; counsel, in reference to this matter, used the language, "This gentleman has defrauded us," and was interrupted by the court before he had finished his sentence:—Held, first, that the words were not actionable. Newthern Y, Donvling, 15 L. J., C. P. 15.

Held, secondly, that they were not irrelevant to the matter before the court. Ib.

By an arrangement between A, and B., A, was to enter the service of B, as his clerk, and sell wine for him upou commission, B, to allow him the use of certain premises for that purpose, the contract to be determinable by either party on giving twelve months' notice. B. having made an assignment for the benefit of his creditors, the assignces sold the premises to C., who sent D. and E. to take possession of the premises for him; and A, having refused to give them up. D. and E. put him out by force, not using excessive force for the purpose. A. having preferred a charge of assault against them before a bench of magistrates, F., an attorney, appeared as advocate for the defendants, and addressed the court as follows:—"I am going to take an objection in this case. This is a case in which I apprehend the bench has no jurisdiction whatever. Mr. A. claims certain rights and privileges under this agreement. I think there is sufficient eause for determining the connection between Mr. B. and Mr. A. Mr. B. has been plundared by this man to a frightful extent":—Held, that these words were privileged. Muckey v. Ford. 5 H. & N. 792: 29 L. J., Ex. 404; 6 Jur. (N.S.) 587; 2 L. T. 514; 8 W. R. 586.

An attorney acting as an advocate has the same privilege as counsel. Ib.

No action will lie against an advocate for defamatory words spoken with reference to and in the course of an inquiry before a judicial tribunal, although they are uttered by an advocate maliciously and not with the object of supporting the case of his client, and are uttered without any justification or even excuse, and from personal ill-will, or anger towards the person defamed arising out of a previously-existing cause, and are irrelevant to every issue of fact which is contested before the tribunal, Musster v. Lamb, 52 L. J., O. B. 726: 11

H. was charged before a court of petty sessions with administering drugs to the inmates of M.'s house in order to facilitate the commission of a burglary at it. M. was the prosecutor, and L., who was a solicitor, appeared for the defence of H. There was some evidence, although of a very slight character, that a narcotic drug had been administered to the inmates of M.'s house upon the evening before the burglary, and H. had been at M.'s house on that evening. During the proceedings before the court of petty sessions, L., acting as advocate for H., suggested that M. might be keeping drugs at his house for immoral or criminal There was no evidence that M. kept purposes. any drugs for those purposes :- Held, that no action by M. for defamation would lie against Kendillon v. Multby (C. & M. 402; 2 M. & Rob. 438), dissented from. Ib.

- Publication by Counsel subsequent to Case. ]-Semble, that although it may be lawful for a counsel in the discharge of his duty to utter matter injurious to individuals, yet the subsequent publication of such slanderous matter is not justifiable, unless it is shewn that it was published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the evidence. Flint v. Pike, 6 D. & R. 528; 4 B. & C. 473; 3 L. J. (o.s.) K. B. 272; 28 R. R. 335.

Objections by Solicitor to Bill of Costs.] -No action will lie against a solicitor for defamatory words contained in written objections lodged by him upon taxation of another solicitor's bill of eosts. Pedley v. Morris, 61 L. J., Q. B. 21; 65 L, T. 526; 40 W. R. 42,

### c. Other Matters.

Parliamentary Papers and Proceedings.]-An action will not lie for printing a report of the House of Commons, though it reflects on the character of an individual. Rev v. Wright, 8 Term Rep. 293; 4 R. R. 649.

However injurious such publication may be to Walter, 1 Bos. & P. 525; 8 Term Rep. 298; 1 Esp. 457; 4 R. R. 717; 5 R. R. 743.
The House of Country

The House of Commons, in 1835 and 1836, made resolutions that parliamentary papers and reports printed for the use of the house should be publicly sold by the printer; and afterwards a report from the inspectors of prisons was ordered by the house to be printed: Held, that if this report contained a libel on an individual. the printer of the House of Commons who sold it was liable to an action, and that the resolutions of the house did not render this a privileged publication. Stochdale v. Hansard, 7 Car. & P. 731; M. & Rob. 9. Ruling upheld by the court.
 A. & E. 1;
 P. & D. 1;
 S. L. J., Q. B. 294; Jur. 905.

Therenpon, by 3 & 4 Vict. c. 81, it was enacted. that proceedings, criminal or civil, against persons for the publication of papers printed by the order of parliament are to be stayed upon the delivery of a certificate of the Speaker or of the Lord Chancellor, and affidavit to the effect that the publication is by order of either house of parliament.

Q. B. D. 588; 49 L. T. 252; 32 W. R. 248; 47 of bills of exchange and promissory notes, J. P. 805—C. A. established by the Scotch Acts of 1681 and 1696, and 12 Geo. 3, c. 72, and 23 Geo. 3, c. 18, is a public document to which everybody has a right of access, and the publication of which in a printed paper does not constitute a libellous publication. Fleming v. Newton, 1 H. L. Cas.

> Communication in Writing on State Business by one Minister to another. ]-A communication relating to affairs of state made in writing by one minister to another is absolutely privileged. and is therefore not actionable, although it contains false defamatory matter and express malice India alleged. Chatterton v. Secretury of State for India, 64 L. J., Q. B. 676; [1895] 2 Q. B. 189; 14 R. 504; 72 L. T. 858; 59 J. P. 596—C. A.

> Report by Military Officer in course of Duty.] -To a declaration for libel, a plea that the defendant was the superior military officer of the plaintiff, and the plaintiff was under his command, and it was his duty as such superior officer to forward to the adjutant-general of the army letters written and sent to him as such superior officer, in relation to their military conduct, duties, and qualifications by the officers under his command, and to make, for the information of the commander-in-chief, reports in writing to the adjutant-general on the subject of such letters; that the defendant had received from the plaintiff letters in relation to his military duties and to certain orders received by him as such officer, and which the plaintiff requested might be forwarded by the defendant to the adjutant-general; and the defendant in the course of military duty, and as an act of military duty, forwarded the letters to the adjutantgeneral; and for the information of the commander-in-chief, when forwarding such letters, the defendant made certain reports in writing in relation to the letters of the plaintiff, which was the libel complained of. Replication, that the libel was written by the defendant of actual malice, and without any reasonable, probable, or justifiable cause, and not bonâ fide, or in the bonâ fide discharge of the defendant's duty as such superior officer:—Held, by Mellor and Lush, JJ., that the replication was bad: for that no action would lie against a military officer for an act done in the ordinary course of his duty as such officer, even if done maliciously and without reasonable or probable cause. Cockburn, C.J., dissenting, and holding, that an action would lie if the reports, though made under the circumstances alleged in the plea, were made of actual malice and without reasonable or probable cause. Dawkins v. Paulet (Lord), 9 B. & S. 768; 39 L. J., Q. B. 53; L. R. 5 Q. B. 94; 21 L. T. 584; 18 W. R. 336.

> Charges made to Officers of Justice. -An action will not lie for words spoken on giving a party in charge to a constable, or in preferring a complaint to a magistrate. Johnson v. Evans. 3 Esp. 32; 6 R. R. 809,

Nor where a man upon reasonable grounds of suspicion charges an innocent person with a theft, Fowler v. Homer, 3 Camp. 294; 13 R. R. 807 And see Wood v. Brown, 1 Marsh. 522; 6 Taunt. 169; 16 R. R. 597.

A. obtains a warrant to search the house of B. Public Records or Documents.]—The register for goods suspected to be stolen, and in accom-of protests for non-acceptance and non-payment (panying the officer to execute the warrant, tells

The defendant being robbed of 50l. in a crowd gave a description of the thief to a police constable, who apprehended the plaintiff. defendant met the constable while on his way to the magistrate with the plaintiff, and said "That is the man," and accompanied them to the magistrate. After remand the plaintiff was discharged :-Held, that the defendant was not liable for falsely saying to the constable that the plaintiff was the thief, as the occasion was privileged. Shufflebottom v. Allday, 5 W. R. 315.

#### 2. QUALIFIED.

a. Communications as to which the Person making them has an Interest or Duty.

### i. Generally.

Meaning of Privileged Occasion and Communication. - The meaning in law of a privileged communication is a communication made on such an occasion as rebuts the prima facie inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the onns of proving malice in fact, but not of proving it by extrinsic evidence only: he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it. Wright v. Woodgate, 2 C. M. & R. 573; 1 Tyr. & G. 12; I Gale, 329.

To create a privileged occasion there must be not only an interest in making a communication, but also a legitimate interest in the matter communicated. Simmonds v. Dunne, Ir. R. 5 C. L.

A communication made bonâ fide upou any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or daty, although it contains criminatory matter which, without the privilege, would be slanderous and actionable; and this, though the duty is not a legal one, but only a moral or a social duty of imperfect obliga-tion. Harrison v. Bush, 5 El. & Bl. 344; 25 L. J., Q. B. 25; 1 Jnr. (N.S.) 846; 3 W. R. 474. z. d., & D. 20; 1 JHP, (N.S.) 846; 3 W. R. 474. S. P., Whiteley v. Adams, 15 C. B. (N.S.) 392; 33 L. J., C. P. 89; 10 JHP, (N.S.) 470; 9 L. T. 483; 12 W. R. 153.

Semble, that this rule applies also when the communication is made to a person not in fact having such interest or duty, but who might reasonably be, and is, supposed by the party making the communication to have such interest

or duty. Ib.

Privileged communications comprehend all statements made bona fide in performance of a duty, or with a fair and reasonable purpose of protecting the interests of the person making them, and the onns of proving malice lies on the plaintiff. Somerrill v. Hawkins, 10 C. B. 583; 20 L. J., C. P. 131 ; 15 Jur. 450.

When once a confidential relation is established between two persons with regard to an inquiry of a private nature, whatever takes place between them relevant to the same subject, though at a the confidential relation began, may be entitled his conduct while master of a ship of which the

him that B. has robbed him :- Held, not a privi- to protection, as well as what passed at the legred communication. Demonster v. H. revessus, 2 Man. & Ry. 176; 6 L. J. (0.8) K. B. 311. same subject, though apparently casual and voluntary, did not take place under the influence of the confidential relation already established between them, and was therefore entitled to the same protection. Beatson v. Shene, 5 H. & N. 838; 29 L. J., Ex. 430; 6 Jur. (N.s.) 780; 2 L. T. 378; 8 W. R. 544.

A man has a right to communicate to any other any information he is possessed of in a matter in which they have a mutual interest; and it is a perfectly legal and justifiable object for one to induce another to become a party to a suit, as to a subject-matter in which both have an interest; and it is not because strong or angry language is used in such a communication that it will be a libel; but the jury must go further, and see, not merely whether expressions are angry, but whether they are malicious. Shipley v. Todhunter, 7 Car. & P. 680.

Every wilful unauthorised publication jurious to the character of another is a libel; but where the writer is acting on any duty, legal or moral, towards the person to whom he writes, or where he has, by his situation, to protect the interests of that person, that which he writes under such circumstances is a privileged communication, and no action will lie for what is thus written, unless the writer is actuated by malice. Cochayne v. Hodykisson, 5 Car. & P.

Malice implied where Libel untrue.] -However honestly the party who publishes a libel believes it to be true, if it is untrue in fact the law implies malice, unless the occasion justifies the act; and whether the occasion justifies the act is a question of law. Durby v. Ouseley, 1 H. & N. 1; 25 L. J., Ex. 227; 2 Jur. (N.S.)

Information honestly communicated without Personal Interest. |- A person having information materially affecting the interests of another, and honestly communicating it privately to such other party, in the full belief, and with reasonable grounds for the belief, that it is true, is justified in so publishing it, although the publisher has no personal interest in the subject-matter of the libel, and although no inquiry has been made of him, and although the damage to the other party, or to his property, is not imminent. Per Tindal, C.J., and Erle, J. But per Coltman, J., and Cresswell, J., that such a communication is not privileged. Coxhead v. Richards, 2 C. B. 569; 15 L. J., C. P. 278; 10 Jur. 984.

Slander in Answer to Question by Slandered Person. - Where a person courts the alleged slander by a question, the occasion is privileged. Palmer v. Hummerston, 1 Cab. & E. 36.

Where a person originates a slander and afterwards repeats it in answer to a question by the person slandered, in the presence of a third person brought by him for the purpose of hearing the answer, such a statement is not a privileged communication. Griffiths v. Lewis, 7 Q. B. 61; 14 L. J., Q. B. 197; 9 Jur. 370.

Statement to Partner.]—A letter written by a defendant to a late partner, T., containing a time and a place different from those at which charge against the plaintiff, with reference to defendant and T. had been joint owners, is a privileged communication. Wilson v. Robinson, 7 Q. B. 68; 14 L. J., Q. B. 196; 9 Jur. 726.

Transmission of Privileged Matter by Telegram, —The transmission nunecessarily by a post-office telegram of libellous matter, which would have been privileged if sent in a scaled letter, avoids the privilege. Williamson v. Ferer. 43 L. J., C. P. 161; L. R. 9 C. P. 393; 30 L. T. 332; 22 W. R. 878.

Publication by Mistake—To Wrong Person.]—A person who has a duty or whose interest it is to publish defanatory statements of another, does not publish them upon a privileged occasion if he sents them to a person who has no duty to take any action and who has no particular interest with regard to them. The fact that he honestly believes that the person to whom he sends the statements has such duty or interest will not make the occasion privilegel. Tompson v. Dushvenod (11 Q. B. D. 43) overuled. Hebditch v. Maalkenie, 63 L. J. Q. B. S57 : [1842] 2 Q. B. 54; 9 R. 452; 70 L. T. 826; 42 W. R. 422; 58 J. P. 620—C. A.

The defendant wrote defanatory statements of the plaintiff in a letter to W under circumstances which made the publication of the letter to W, privileged, but by mistake the defendant placed it in an envelope directed to another person who received and read the letter. In an action for libel:—Held, that the letter having been written to W, under circumstances which caused the legal implication of malice to be rebutted, the publication to the other person, though made through the negligence of the defendant, was privileged in the absence of malice in fact on his part, Tompson v. Dushwood, 52 L. J., Q. B. 425; 11 Q. B. D. 43; 48 L. 7. 943.

A timekeeper, employed on behalf of a public department, having written a letter to the scoretary of the department a letter reflecting on the conduct of the contractor:—Held, that if the letter was written in good faith, and for the information of his employers, it was privileged, although to the wrong person. Searl v. Dixon, 4 F. & F. 300.

- Publication in Course of Duty as to Wrong Person.]-W. was surveyor to the owner of an estate, to which estate he, W., also acted as steward. The owner directed W. to make inquiries as to the existence on the estate of a house of bad character. W., in the course of his inquiries, was referred to the house of B., but doubting the accuracy of his information, made further inquiries, and in the course of doing so mentioned what he had heard of the character of B.'s house. He then ascertained that the address of B.'s house had been given him erroneously, and that, by a mistake in the number in the street, a reference had been made to B.'s house which was intended for another residence. In an action by B. against W. for the statements made by W., while following up the inquiries directed by his employer, and the further pursuit of which inquiries had been suggested by the erroneous information he, W., had received as to

whether such inquiries were in excess of his duty, and beyond the directions he had received from his employer or not, but did not direct the jury that if the statements relied upon as slanderous were only made in the necessary course of pursning the inquiries he had been directed by his employer to make, he would have been within his duty, and they, the jury, should then consider whether there was any proof of express malice or not :- Held, that this direction was wrong, and that, in the absence of evidence of actual malice, the judge ought to have pointed out to the jury all the evidence bearing upon the character of the defendant's employment and the course of duty in which the statements charged as slanderous were made, in order that the jury might have expressly found whether such statements were or were not made in pursuance of his duties under his employment, and the court have been enabled to decide upon such finding whether there was or was not existing such malice as would be implied by law, and which might be rebutted by the character of privileged communication attaching to such statements. Brett v. Watson. 20 W. R.

- Record of Judgment Erroneously Registered.]-A judgment was obtained in England against A., as executor of his deceased father. and a certificate of the judgment was duly and correctly registered in the Queen's Bench Division in Ireland, under the Judgments Extension Act, 1868. In registering the judgment in the Registry of Judgments Office, under 7 & 8 Vict. c. 90, owing to a mistake in the minute certified by the officer of the Queen's Bench Division, the judgment was described as recovered againt A. personally, and the particulars of the judgment personary, and the partenance in the judgment so registered were published in the publication known as "Stubbs' Gazette," which is issued weekly, for the assistance of bankers, merchants, traders and others, against risk and fraud. In an action for libel brought by A. against the proprietors of the Gazette, there being no evidence that the defendants had notice of the error, or acted with malice :- Held (dubitante Barry, L.J.), that the publication was privileged, and that the defendants were entitled to a verdiet. Annaly v. Trade Auxiliary Co., 26 L. R., Ir. 394—C. A.

Other Parties present at time of Publication. The defendant wrote down at the instance of W. T. a statement to the effect that he, W. T., had robbed W., whose manager the defendant was, with the connivance of the plaintiff, and that he, W. T., thereby promised to repay the moneys so stolen by weekly instalments. W., the defendant's wife, and D., who was also in the employ of W., were present at the time. Afterwards the defendant obtained the signature of D, as witness to the statement he had written down :-Held, that the communication, being made and written down in the interests of the employer, was protected, and that that protection was not taken away by reason of the presence of those other parties at the time of the publication. Jones v. Thomas, 53 L. T. 678; 34 W. R. 104: 50 J. P. 149.

of which inquiries had been suggested by the errous information he, W., had received as to B.'s house, the judge directed the jury to consider whether the statements made by W. had been made in the course of the inquiries which he had been directed by his employer to make, and the learning to the limit of the latter.—

582

4 Jur. 458.

Presence of Reporters-Meeting of Board of Guardians. ] - At a meeting of a board of guardians at which reporters were present, the defendant, who was a member of the board, made defamatory statements in a speech, bona fide believing them to be true, about the conthe board, the question being whether a sum of money should be given to the plaintiff in respect of his past services :- Held, that the presence of the reporters, which was not due to

— Meeting of Railway Shareholders.]—A shareholder of a railway company having summoned a meeting of shareholders, at which he invited others, and especially the reporters for the public press, to attend, and at this meeting made defanatory comments on the conduct of one of the directors, relating to the affairs of the company :- Held, that though a discussion of the matter before a meeting of shareholders would have been excased, there was no excuse for a publication to others than shareholders. Parsons v. Surgey, 4 F. & F. 247.

Publication to one of two Persons Slandered-Privileged as to Other. ]-When words imputing misconduct, of which two persons are alleged to have been jointly guilty, are spoken to one of them under circumstances which make the communication privileged as to him, the slanderous statement is privileged as to the other, and the latter cannot maintain an action for defamation. Davies v. Sucad, 39 L. J., Q. B. 202; L. R. 5 Q. B. 608; 23 L. T. 126.

The defendant mentioned to the rector of her parish a rumour that she had heard publicly uttered, impugning his conduct and the conduct of his solicitor, the plaintiff, in the administration of a trust. The plaintiff having brought an action for slander against the defendant, the jury found that the words complained of were spoken bona fide and without malice, under the belief that it was important for the rector to know the rumour, in order that he might clear his character :- Held that the communication was privileged; and that the privilege extended to the alleged slander of the plaintiff, as the communication could not be made without mentioning him. Ib.

## ii. Public and Official Communications.

Report to Foreign Government.]—In an action brought in Her Majesty's Supreme Court for China and Japan, for false representations made by the defendant, occupying an official post in the service of the Emperor of China, to the Tsung-li-Yamén, the head of the Foreign Board at Pekin, respecting the conduct of the plaintiff

Held, that the charge was privileged, if the alleged misrepresentations being, that he had defendant believed in its truth, acted bona fide, asked to be relieved from his duties, and declined and did not make the charge before more persons to perform them, and that he had absented himthan was necessary. Padmore v. Laurence, 11 self from Pekin at a time when his active services A. & E. 380; 3 P. & D. 209; 9 L. J., Q. B. 137; might be required at the college; the defendant, in reply, denied that he had made any false representations, and asserted that such representations as he had made were contained in a report made by him in the course of his duty as an officer of the Chinese Government. The judge in his summing-up directed the jury that, whether the defendant had made false representations, and the Chinese government had disduct of the plaintiff, who had been a servant of missed the plaintiff in consequence, was a thing specially for the jury to consider, and whether the representations were warranted by facts. The jury found for the plaintiff, and gave large damages. A rule nisi was afterwards obtained presence or the reporters which was not use to damages. A role as it was determine solutioned the action of the defendant, did not destroy the formula of a moustir, or for a new trial, on the ground privilege of the occasion. Pittural v. Oliver, of misdirection, and that the verifiet was against 0. L. J. Q. B. 219; [1801] 1 Q. B. 474; 64 L. T. (1) that the indge did not direct the jury that the representations were privileged; (2) not leaving to the jury the question, whether the representations were wilfully false; and (3) that there was no evidence to go to the jury that the representations were wilfully false. The Supreme Court discharged the rule. On appeal :—Held, that the summing-up was erroneous, that the representations complained of were privileged communications, that the judge ought to have explained to the jury the relation and position of the parties and have told them that the action would not lie if the statements were made honestly and in a belief of their truth, without proof of express malice, and not whether they were warranted in fact, and that the burden was on the plaintiff to prove that they were not so made. *Hart* v. *Gumpach*, 9 Moore, P. C. 241; 42 L. J., P. C. 25; L. R. 4 P. C. 439; 21 W. R.

> County Council — Administrative Duties — Words Spoken by Member—Meeting for Granting Music and Dancing Licences.]—At a meeting of the London County Council held for the purpose of hearing applications for music and dancing licences, upon the plaintiffs applying for a renewal of such a licence for a place of entertainment belonging to them, the defendant, a member of the council, stated that he had been to the place in question, and had witnessed a most indecent performance there, and gave that as his reason for voting against the renewal. In an action of slander brought by the plaintiffs in respect of such statement, the jury found a verdiet for the plaintiffs :-Held, that the defendant was not entitled to absolute immunity from liability for the words spoken, the duties of the county council in dealing with music and dancing licences being administrative and not jndicial. Royal Aquarium v. Parkinson, 61
>  L. J., Q. B. 409; [1892] 1 Q. B. 431; 66 L. T.
>  513; 40 W. R. 450; 56 J. P. 404—C. A.

Communication of Town Councillor as to Public Contract Work-Letter to Newspaper.] —The plaintiffs were contractors for the erection of a gaol in a borough. The defendants were members of the town council, and from their business competent judges of the work. They published in a local newspaper a letter, in which they charged the plaintiffs with serious omissions as a professor in the college established there, and deviations from their contract:—Held, that which led to his dismissal by that board, the although the charges in the libel would have town council in their characters as conneillors, they were not privileged in the form of a letter in a public newspaper. Simpson v. Downs, 16 L. T. 391.

Meeting of Poor-law Guardians-Defamatory Statements by Member-Words spoken in Honest Discharge of Duty, without Malice, but "Care--At a meeting of a board of poor-law guardians certain defamatory statements were made by a member of the board, concerning the clerk of the board, he being accused of improperly retaining in his hands moneys belonging to the board. In an action for slander, the jury found "that the words were spoken honestly in the discharge of a public duty, without malice, but carclessly." The jury found a verdict for the plaintiff for 40s, :-Held, on further consideration, that the occasion was a privileged one, and that the privilege was not taken away by the word "carelessly" at the end of the find-ing of the jury, and that, therefore, the judgment ought to be entered for the defendant. v. Olirer, 63 L. T. 247.

Report of Directors of Company to Shareholders.]—The plaintiff was manager of a limited company. The auditors in making up the year's accounts issued a report to the shareholders, and at the foot of the accounts they remarked, "The shareholders will observe that there is a charge of 1,306*l*. 1s. 7d. for deficiency of stock, for which the manager is responsible. His accounts have been badly kept, and have been rendered to us very irregularly." The directors presented this report to the shareholders at the annual meeting, at which it was resolved that the report should be printed and sent to all the shareholders :- Held, first, that the report of the directors was a privileged communication, and the mode of publishing it was reasonable and proper. Lawless v. Anglo-Egyptian Cotton and *Oil Co.*, 10 B. & S. 226; 38 L. J., Q. B. 129; L. R. 4 Q. B. 262; 17 W. R. 498.

Held, secondly, that there being no intrinsic nor extrinsic evidence of malice, there was no question to be left to the jury. Ib.

Letter of Individual to Public Official. ]-The memorial of a tradesman addressed to the secretary at war, complaining of the conduct of a half-pay officer in the army, for not having paid a debt due to him, and stating the facts of his case fairly and honestly, according to his opinion and understanding of such facts, is not the sub-ject of an action for a malicions libel, although the statement of those facts is derogatory to the character of the officer. Fairman v. Ices, 1 D. & R. 252; 5 B. & Ald, 642; 1 Chit, 85; 24 R. R. 514.

A letter written to the postmaster-general, or to the secretary to the general post-office, com-plaining of misconduct in a postmaster is not a libel, if it was written as a bona fide complaint to obtain redress for a grievance, that the party really believed he had suffered; and particular expressions are not to be strictly scrutinised, if the intention of the writer was good. Woodward v. Lander, 6 Car. & P. 548.

A letter written by a private individual to a public officer, complaining of the misconduct of a person under him, is not privileged from disclosure as an official communication; but, if

been privileged if made by the defendants to the | munication is not actionable as libellous, though the charges may not be true. Blake v. Pilfold, 1 M. & Rob. 198.

> Letter by Inhabitant of Borough to Home Secretary—As to Conduct of Magistrate. ]—The plaintiff was a justice of the peace for a county and in the habit of acting at petty sessions held The defendant, an elector and in a borough. inhabitant of the borough, signed a memorial addressed to the Secretary of State for the Home Department, complaining of the conduct of the plaintiff as a justice during an election for a member to represent the borough in parliament, and praying that he would cause an inquiry to be made into the conduct of the plaintiff, and that on the allegations contained in the memorial being substantiated, he would recommend to Her Majesty that the plaintiff be removed from the commission of the peace. The jury having found that the memorial was bona fide :- Held, that it was a privileged communication, inasmuch as the plaintiff had both an interest and a duty in the subject-matter of the communication; and the Secretary of State had a corresponding duty, a justice of the peace being appointed and removed by the sovereign. Held, also, that a communica-tion made bona fide for the purpose of obtaining redress was privileged, though made to a tribunal which had no direct authority in respect of the matter complained of. *Harrison* v. *Bush*, 5 El. & Bl. 344; 25 L. J., Q. B. 25; 1 Jur. (N.S.) 846 : 3 W. R. 474.

> - As to Conduct of Clerk to Justices. ]letter to the Secretary of State by an inhabitant of a borough, imputing to a person who was the town clerk, and clerk to the justices of the borough, corruption in the latter office, is not a privileged communication. Blugg v. Sturt, 10 Q, B. 899: 16 L. J., Q, B. 39: 11 Jur,

Objection by Parishiener to Constable before Justices.]—Under 5 & 6 Vict. c. 100, a vestry, on precept from the justices, is to make out and return a number of persons within the parish, qualified and liable to serve as constables; the list is to be affixed on the church door, and notice given when and where objections will be heard by the justices, who are empowered at a special sessions to strike out of the list the names. of persons not qualified or liable to serve. vestry held in pursuance of that act, the plaintiff's name was inserted in the list of persons qualified and liable to serve, and he attended a sessions for the purpose of being sworn in, when a parishioner objected to him, and made a statement to the justices, in the presence of other persons, imputing perjury to the plaintiff. In an action for slander the jury found that the defendant made the statement bona fide, believing it to be true :- Held, that the statement was properly made before the justices, and was a privileged communication. Kershaw v. Builey, 1 Ex. 743: 17 L. J., Ex. 129.

Letter by Commanding Officer of Regiment to Superior Officer. ]-Letters from the commanding officer of a regiment to his immediate superior containing charges against the colonel in command, and a conversation with a member of parliament as to a question to be put in the bona fide made, and without malice, such com- House of Commons relative to the dismissal of the

personal resentment on account of other matters, ment was defamatory, but that there was no and that the object of the conversation was to malice on the part of the defendant:—Held, that resentment, are evidence of actual malice, taking 59 J. P. 793. away the privilege. Ib.

Communication of Clerk to Guardians as to Medical Officer. ]—A. was clerk to the board of guardians of a union of which B. was the medical officer, and C. the relieving officer. A pamper was to be removed to another district, and had previously to be examined by B. A., in pursuance of directions from the board of guardians, called twice on B, for the purpose of getting him to see this pauper, but could not get B, to do so. A, then went to C., and asked him to try and get B. to examine the pauper, telling C. at the same time that when he, A., saw B. on the preceding evening, B. was not sober; whereupon C. served B with a formal order to examine the panper, and B. did so. In an action by B. against A. for slander :- Held, that the communication between A. and C. was privileged, and that B. must be nonsuited. Sutton v. Plumridge, 16 L. T.

Report of Chief Constable under Direction of Watch Committee. |- In obedience to the orders of the watch committee given at the request of the magistrates, a head constable compiled a book giving a list of the licensed houses with names, dates, "superintendent's remarks," and other particulars, for the purpose of facilitating the business at the general annual licensing meeting. The plaintiffs were the licensee and barmaid respectively of one of the houses named in the book, and their action was for defamation in respect of a statement in the book that the renewal of the licence of the house was to be opposed on the ground of improper conduct. Copies of the book were supplied by the head constable to the magistrates, and by their direction also to persons having business at the sessions, and to their legal advisers :- Held, that sessions and to their legal advisors.—Field, that the occasion of the publication was privileged.

Andrews v. Nott-Bower, 64 L. J., Q. B. 536;

[1895] 1 Q. B. 888; 14 R. 404; 72 L. T. 530; 43 W. R. 582; 59 J. P. 420-C. A.

Police-Sheets Issued to Metropolitan Police. -It was stated in the police-sheets issued and read to the metropolitan police that an inspector of hackney carriages had been dismissed for having made out accounts for amounts claimed to be due from him, founded on a misrepresentation of duties alleged to have been performed :-Held, that the publication was a libel and was not privileged. Jackson v. Mayne, 19 L. T.

Report by Police for Information of Public.] -Section 4 of the Law of Libel Amendment Act 1888, which provides that the publication at the request of any chief constable of any notice or report issued by the police for the information of the public shall be privileged, is not retrospec-tive. Hopley v. Williams, 53 J. P. 822.

Statement by Ratepayer to Watch Committee

colonel on those charges, are communications a superintendent of police in a borough. The made on privileged occasions. Dickson v. Wilton defendant, a ratepayor made a verbal statement CEurl, 1, E. & E. 419. But circumstances shewing that the letters borough respecting the plaintiff in his capacity were not written from a sense of duty, but from of superintendent. The jury found that the stateprejudice the plaintiff, by reason of such personal the oceasion was privileged. Bannister v. Kelty,

> Charge by Ratepayer against Constable. ]-Charges made by a ratepayer against the con-stable of a district, to a meeting of ratepayers met to investigate the constable's disposal of the money of the inhabitants, are privileged, and may be made by letter, if the ratepayer is prevented from attending. Spencer v. Amerton, 1 M, & Rob. 470.

> Treasurer of Committee for Relief of Poor -Interest of Inhabitants of Parish. |- To a count charging defendant with having spoken and published statements to the effect that plaintiff as treasurer of a relief committee for the purpose of relieving the poor of the parish of T. had received more than he had acknowledged, defendant pleaded that he was a member of such committee and so interested in the proper application of the funds, and that he made the statement to certain inhabitants of the parish of T., who were also interested therein:—Held, that the plea was bad as no interest in the subject-matter sufficient to support a ground of privilege could exist in the inhabitants of a parish. Currigan v. Ryan, 15

> Circular by Member of Friendly Society to other Members. ]-A circular by a member of a friendly society issued to members for the purpose of obtaining a statutory investigation into the solvency of the society is not privileged unless true. Hill v. Hart-Dacis, 51 L. J., Ch. 845; 21 Ch. D. 798; 47 L. T. W. R. 22.

Between Agents of Opposite Parties at Election.]—F, and B. were candidates at a parliamentary election. The defendants were agents of B., and on the day of election, whilst the poll was proceeding, one of them wrote to the agent of F., stating that bribery on F.'s behalf was going on. B. was returned, and on the next day the plaintiff's name was mentioned by the same defendant to F.'s agent as that of a briber. A discussion upon the imputation ensued, which resulted in the defendants transmitting to F.'s agent on the day following a document signed by both of them, "certifying" that the plaintiff had been personally guilty of bribery. In an action of defamation brought upon this doculeged. Dickeson v. Hilburd, 43 L. J., Ex. 37; L. R. 9 Ex. 79; 30 L. T. 196; 22 W. R. 372. ment :- Held, that the occasion was not privi-

Statements made at Election, |-- Words having been spoken at a meeting for the election of an overseer, imputing to a person put up for reelection that he had misappropriated parish moneys while holding the office before :--Held, that the occasion was privileged. George v. Goddard, 2 F. & F. 689.

Statement of Medical Officer of Public School as to Quality of Meat. ]-Words spoken by a as to Police Superintendent. ]-The plaintiff was medical officer to the steward of a public school, to the effect that the plaintiff, a butcher, who all communications passing between the solicitor supplied it with meat, sold bad meat, are priviland the client, leading up to the retainer and leged in the absence of malice. Humphreys v. Stilwell, 2 F. & F. 590.

587

# iii. Ecclesiastical and Religious Matters.

Charge of Bishop. ]-The charge of a bishop to his clergy in convocation is, in the ordinary sense of the term, a privileged communication; on the well-known principle that a communication made bona fide upon any subject-matter in which the party has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter which, without that privilege, would be defamatory and actionable; provided that the occasion on which the communication is made rebuts the prima facie inference of malice, in fact, arising from a statement prejudicial to the character of the plaintiff, and the onus is upon him to prove that there was actual malice, that the defendant was actuated by motives of personal spite or ill-will, independently of the occasion on which the communication was made. Laughton v. Sodor and Man (Bishop), 9 Moore, P. C. (N.S.) 318; 42 L. J., P. C. 11; L. R. 4 P. C. 495; 28 L. T. 377; 21 W. R. 204.

Letter to Bishop as to Incumbent.]—A letter written to a bishop informing him of a report, current in a parish in his diocese, that the inenmbent of a district in that parish had collared the schoolmaster, and that a fight ensued between them, is a privileged communication, if such letter was written to the bishop honestly to call his attention to a rumour in the parish which was bringing scandal on the church, and not from any malicious motive ; and it is not material that the writer of the letter did not live in the district of the incumbent to whom the letter refers. James v. Boston, 2 Car. & K. 4.

Statement by Clergyman in Pulpit. ]-Words spoken by a clergyman from the pulpit concerning a parishioner, though in good faith, and for a commendable purpose, are not privileged.

Magrath v. Finn, Ir. R. 11 C. L. 152.

By Clergyman to Curate. ]-A defamatory communication made by a clergyman to his enrate, for the purpose of obtaining his advice as to the course to be pursued by him in an ecclesiastical matter, is privileged. Clurk v. Molyneux, 47 L. J., Q. B. 230; 3 Q. B. D. 237; 37 L. T. 694; 26 W. R. 104; 14 Cox, C. C. 10—C. A.

Statement to Dissenting Congregation as to Proposed Minister. |- Communications made to a member of a dissenting congregation respecting an individual about to be appointed a minister of that congregation are privileged communications, and caunot be made the subject of an action by such individual. Blackburn v. Blackburn, 4 Bing, 395; 1 M. & P. 33, 63; 3 Car. & P. 146; 6 L. J. (0,8.) C. P. 13: 29 R. R. 583

# iv. Solicitor and Client.

Retainer-Malice.]—If a solicitor reasonably believes that his services may be required by a

relevant to it, and having that, and nothing else, in view, are privileged. Browne v. Dunn, 6 R. 67 —H. L. (E.)

If the retainer is a genuine proceeding, the fact that the solicitor is not well disposed to the person said to be defamed is not evidence of malice. Ib.

Per Lord Bowen: Whether, when a professional relation is created between a solicitor and a client, and communications pass between the solicitor and the client with reference to the prosecution of a third person, or with reference to proceedings being taken against him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, provided he does not say anything which is outside what is relevant to the communications which he is making as solicitor to his client. Quære. Ib.

Letter of Solicitor to Protect Interests of Client-Evidence of Malice, - A solicitor in writing a letter in protection of his client's interests, whether before or after action brought, is acting in pursuance of his ordinary duty as a solicitor, and statements made by him therein are privileged. If the facts are as consistent with the defendant's honesty, believing such statements to be in the interests of his client and to be true, as with his not so believing, there is no évidence for the jmy of malice in fact. Buker v. Carriek, 63 L. J., Q. B. 399; [1894] 1 Q. B. 838: 9 R. 283; 70 L. T. 366; 42 W. R. 338; 58 J. P. 669-C. A.

Letter from Solicitor Vindicating Client's Character. -On the occasion of an unsuccessful application by A. for a summons against B., certain unfounded charges were made against B., and reported in the newspapers. B. having applied to his attorneys, they wrote and published a letter stigmatising the charges as "wicked and deliberate falsehoods," and stating that other falsehoods had also been uttered by A. against B. :—Held, on an indictment for libel against the attorneys of B., that if the letter was written without malice, and with the object of vindicating their client's character, its publication was privileged and excused. Reg. v. Veley, 16 L. T. 122.

Letter Warning Solicitor as to Client.] — Where a defendant wrote to a plaintiff's solicitor in an action of slander, in reply to a demand for an apology contained in a letter from the plaintiff's solicitor, and informed the plaintiff's solicitor of the alleged dishonourable conduct of the plaintiff, which caused the defendant to speak the words, and warned the solicitor to look after his costs, as a person guilty of such dishonourable conduct as the plaintiff had been guilty of to the defendant could not be trusted :- It was held, on demurrer, that the communication was privileged, and that the warning was a deduction from the subject-matter of the privileged communication, and that it was the province of a jury, and not of the court, to say whether this deduction was an excess of the privilege. Jucob v. Lawrence, 14 Cox, C. C. 321.

The plaintiff's attorney having at his desire written to the defendant demanding payment of possible client who does afterwards retain him, an alleged debt, the latter sent a letter to the

plaintiff's character, wholly unconnected with the demand made upon him :—Held, not a privileged communication, although the jury found that the letter was written bona fide, and negatived malice in fact. Huntley v. Ward, 6 C. B. (N.S.) 514; 6 Jur. (N.S.) 18.

Bill of Costs sent by Solicitor. ]-A bill of costs, containing defamatory matter, delivered by an attorney to his client under a judge's order, is not a privileged communication. Bruton v. Doces, 1 F. & F. 668.

Publication by a Solicitor to his Clerk. ]-If a communication made by a solicitor to a third party is reasonably necessary and usual in the discharge of his duty to his client, and in the interests of his client, the occasion is privileged. Pullman v. Hill ([1891] 1 Q. B. 524) dis-\*\*\* Action 1. 110 (1981) 1 91 15 523) (1884) inguished. \*\*\* Bossius v. Golder, 63 L. J., Q. B. 401; [1894] 1 Q. B. 842; 9 R. 224; 70 L. T. 368; 42 W. R. 392; 58 J. P. 670—C. A.

A firm of solicitors, acting for a client, addressed a letter containing defamatory matter to the plaintiff. The letter was dictated to their shorthand-writer clerk, and copied into the pressbook by another clerk in their employment :-Held, that the occasion was privileged. Ib.

## v. Persons in Fiduciary Positions.

Persons in present or past Fiduciary Positions. - A letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the namagement of certain concerns which they had intrusted to him, and in which the writer of the letter was likewise interested, cannot be considered as a libel and made the subject of an action for damages. M. Dougall v. Claridge, 1 Camp. 267; 10 R. R. 679.

A letter written confidentially to B., who employed the plaintiff as steward of his estates, to inform him of certain supposed malpractices on the part of the plaintiff, is not actionable, the defendant acting bona fide. Clearer v. Sarraude, 1 Camp. 268, n.; 10 R. R. 680.

A letter to the manager of a property in Scotland, in which the plaintiff and defendant were jointly interested, related principally to the property and the plaintiff's conduct respecting it, but also contained a passage reflecting on his conduct to his mother and aunt:—Held, that the latter part could not be privileged as a con-Warren v. Warren, fidential communication. 4 Tyr. 850; 1 C. M. & R. 250; 3 L. J., Ex.

A. was engaged to superintend the works of a railway company, and subsequently, at a general meeting of the proprietors, the engagement was not continued, but a former inspector was reinstated. A vacancy subsequently occurred in the situation of engineer to the commissioners for the improvement of the river Wear, and A. became a candidate. B. wrote to C., introducing D. as a candidate, and C., having written to B., informing him that another person had sueceeded in obtaining the appointment, B. wrote an answer to C., reflecting on the conduct of A. whilst in the situation of engineer to the railway

attorney containing gross imputations upon the this letter having been shewn. B. and C. were both shareholders in the railway company, and B. managed C.'s affairs in the railway. B. had not been applied to for his opinion, and the letter containing the libel was written after the termination of one election, and before the other was in contemplation :- Held, in an action by A. against B. for the libel, that the letter was not a privileged communication. Brooks v. Blanchard, 1 C. & M. 779; 3 Tyr. 844; 2 L. J., Ex. 275.

The plaintiff, who had formerly been in trade in partnership with P., which partnership had since been dissolved, was a minister of a dissenting congregation, and brought an action against the defendant for uttering slanderous words, imputing that the plaintiff had taken an improper advantage of P. in the course of partnership, and in adjusting the partnership accounts. An investigation having been made into some charges brought by a Mrs. B., a member of the plaintiff's congregation, respecting the plaintiff's accounts and transactions in his former partnership with P., a correspondence respecting the same took place between a Mr. A., who acted therein on behalf of the plaintiff, and the defendant, who acted on behalf of Mrs. B.:—Held, that letters written by the defendant to Mr. A., in the course of such correspondence, were privileged communications. Hopwood v. Thorn, 8 C. B. 293: 19 L. J., C. P. 94; 14 Jur. 87.

A secretary of an insurance company, being charged with misconduct, was called upon to attend a board of directors, for the purpose of explanation, but declined to do so, whereupon the directors, after hearing the nature of the charges, passed a resolution declaring him to have been guilty of gross miseonduct, and dismissed him from their service; the defendant, who was a director of that company, and also of another company, communicated the fact of the dismissal from the service of the former company for gross misconduct, at a board meeting of the latter company, and proposed a resolution to dismiss him from his employment as their anditor, and in answer to an inquiry from the chairman, said that the misconduct consisted in obtaining money from the solicitor of the company under false pretences, and paying a debt of his own with it, and upon the plaintiff's appearing on a subsequent day with his attorney before the board, to meet the charges against him, the defendant refused to go into them :-Held, that the communication was privileged, and that the defendant's refusal to go into the charges in the presence of the plaintiff and his attorney was no evidence of malice that could properly be submitted to the jury; for that, such refusal being consistent with bona fides, bona fides must be presumed until the contrary was proved. Harris v. Thompson, 13 C. B. 333.

Communication by Surety. ] - Verbal communications, when confidential, are not actionable; and if A. is surety for B. to C., A., if acting bona fide, may lawfully state to C., in an unreserved manner, his opinion of B.'s conduct and character, whatever the charges may be which he thus imputes to him. Dunman v. Bigg, 1 Camp. 269, u.; 10 R. R. 680, u.

Arhitrator.]-To a count in libel alleging that the defendant had written and published of the company. There was a subsequent election, at which A was unsuccessful, in consequence of traveller for a printing house that he had been employment, the defendant pleaded that a disoute having arisen between himself and A., they had agreed to submit the matter in dispute to some respectable printer, who should be in-different between the parties, to be named by A., and that A. proposed the plaintiff, when the defendant refused to submit the matter to the plaintiff, and being subsequently called on to pay a part of the remnneration of the plaintiff as arbitrator, wrote to A. repudiating the demand, and stating as his reason for not submitting the matter to the plaintiff, that he had discharged the plaintiff from his employment for intemperance :- Held, on demnrer to this defence, that the defendant had an interest in alleging reasons why he should not pay the demand, that the words were relevant to the respectability of the plaintiff as arbitrator, and that the communication was therefore privileged. Hobbs v. Bryers, 2 L. R., Ir. 496.

### vi. Landlord and Tenant.

A defamatory communication from A. to B. respecting the inmates of the house occupied by B. as his tenant, is privileged, when such com-munication is made bond fide in consequence of the relation of landlord and tenant, and without malice in fact. Knight v. Gibbs, 3 N. & M. 467;

1 A. & E. 43; 3 L. J., K. B. 135.

A., the tenant of a farm, required some repairs to be done to the farmhouse, and B., the agent of the landlord, directed C, to do the work. C. did it, but in a negligent manner, and during the progress of it got drunk; and some circumstances occurred which induced A, to believe that C. had broken open his cellar door, and obtained access to his cider. A., two days afterwards, met C, in the presence of D, and charged him with having broken his cellar door, and with having got drank and spoiled the work, afterwards told D., in the absence of C., that he was confident C. had broken open the door. On the same day A. complained to B. that C. had been negligent in his work, had got drunk, and he thought he had broken open his cellar :-Held, that the complaint to B. was a privileged communication, if made bona fide, and without any malicious intention to injure C. Toogood v. Spyring, 1 C. M. & R. 181; 4 Tyr. 582; 3 L. J., Ex. 347.

Held, also, that the statement made to C., in the presence of D., was also privileged, if done honestly and bona fide; and that the circumstance of its being made in the presence of a third person did not of itself make it unanthorised; and that it was a question to be left to the jury to determine from the circumstances. including the style and character of the language

used, whether A. acted bona fide, or was influenced by malicious motives. Ib.

Held, also, that the statement to D., in the absence of C., was unauthorised and officious, and therefore not protected, although made in the belief of its truth, if it was in point of fact

false. Ib.

To a count whereby the plaintiff complained that the defendant had written and published of him a libel, stating that he had forcibly re-entered a farm from which the defendant had had him ejected, and had feloniously cut and carried away hay off the farm, and had

discharged for intemperance from the defendant's farm for their benefit. The defendant pleaded employment, the defendant pleaded that a disc that the plaintiff had been ejected by due process of law from the farm, and that the defendant was a candidate for a parliamentary constituency, and, before the election, published the matters complained of, bona fide and without malice, in a newspaper in answer to false charges caused to be published by the plaintiff in the same newspaper, imputing gross misconduct to the defendant as a landlord, especially in his conduct to the plaintiff:-Held, on demurrer, that the defendant had a privilege to publish matter of vindication and defence in answer to the plaintiff's charges. Dwyer v. Esmonde, 2 L. R., Ir. 243.

> Action for Slander against Husband and Wife for Words Spoken by the Wife. |---M. was tenant to T., and both were eesspayers. A house beburnt G. applied to the grand jury for compensation, alleging that the burning was malicious. The wife of M., without his direction, made a statement to T., that G.'s wife had burnt the house with intent to defrand the county :- Held, not privileged either by reason of the relation of landlord and tenant, or by the community of interest as cesspayers. Gillis v. M. Donnell and wife, 18 W. B. 346; Ir. B. 4 C. L. 342.

Letter to Wife of Landlord charging Landlord with Theft. ]-The defendant, who had for some time boarded and lodged with the plaintiff, having left the plaintiff's house, wrote a letter to the wife of the plaintiff, imputing to the plaintiff that he had opened the defendant's box and extracted receipts for board and lodging, and stating that if the plaintiff should not think proper to return them, he (the defendant) would expose him :-Held, that the occasion did not justify the writing of the letter so as to make it. a privileged communication, as no reasonable person could think the course the defendant took was one which he was justified in taking to enforce his own interest, and that the plaintiff was entitled to recover damages although the jury negatived malice. Wenman v. 4sh, 13 C. B. 836; 1 C. L. R. 592; 22 L. J., C. P. 190; 17 Jur. 579; 1 W. R. 452.

# vii. Other Cuses.

Moral or Social Duty-Statement as to a Person's Mind being Affected. ]-A statement in writing that a person's mind is affected is primâ facie a libel. Margan v. Lingen, 8 L. T. 800. Such a publication is malicious, unless made

in discharge of a public or private duty arising out of a matter in which the person making it is concerned, and then made without malice. Ib.

But if fairly warranted by any reasonable exigency, and honestly made, it is privileged.

- Between Relations as to a Proposed Marriage.]—A letter from a son-in-law to his mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations upon the person whom she was about to tions upon the person whom she was about to marry, is a privileged communication, and not actionable, unless malice is shewn. Todd v. Hawkins, 2 M. & Rob. 20; 8 Car. & P. 888.

- To Master as to Dishonesty of Servant. and carried away hay off the farm, and had —The plaintiff, who was valet to S., was with S. defrauded his sisters of money charged on the staying at the Mansion House at Newcastle,

Mayor, They had come from Edinburgh, and were going on further visits. While they were at Newcastle the chief constable there received from the chief constable of Edinburgh a letter. stating that a watch had been stolen from the hotel at Edinburgh where the plaintiff had been staving and suspicion had fallen upon him, but requesting that, as the suspicion was very slight. any inquiry made should be so cautiously con ducted as not to injure the plaintiff if innocent. This letter was sent to the defendant, who told S, privately the contents of it, S., in consequence, discharged the plaintiff, who brought an action for slander against the defendant :- Held (Lopes, L.J., dissenting), that the occasion was privileged; and, there being no evidence of malice, judgment must be entered for the defenslant. Stuart v. Bell, 60 L. J., Q. B. 577; [1891] 2 Q. B. 341; 64 L. T. 633; 39 W. R. 612—C. A.

The defendant bona fide believing that the plaintiff, who was a clerk to M., a customer of the defendant's, and who had been sent to the defendant's shop by M., had, while there, stolen a box from an inner room, went to M., and after telling him of his loss, intimated his suspicion of the plaintiff, saying, "There was no one else in the room, he must have taken it":-Held, that the communication was privileged by the occasion. Amann v. Damm, 8 C. B. (N.S.) 597; 29 L. J., C. P. 313; 7 Jur. (N.S.) 47; 2 L. T. 322;

8 W. R. 470.

Where Suspicion of Theft Committed. ]-A. suspecting B. of stealing meat from his shop, accused her of having done so (no one being by at the time). B. thereupon applied to a police magistrate for a summons against A. A., meeting magstrate for a summons against A. A., meeting a third person, who was in the shop at the time the supposed larceny was committed, told him that proceedings had been taken against him, and said to him, "You were in the shop; did not you see her take it?"—Held, a privileged communication. Faree v. Warren, 15 C. B. (N.S.) 806.

A, having accused B, of stealing ment, a friend of the latter, to whom she had mentioned the fact, called at A.'s shop and asked him if he had necused B. of stealing, to which A. answered, "Yes, and I believe it to be true":—Held, not a

privileged communication. Ib.

The defendant, having a prima facie ground of suspicion, which afterwards proved to be unfounded, that he was being robbed by one of his assistants and the plaintiff, made certain inquiries from two persons having no connection with the matter. To each person the defendant said that the plaintiff had robbed him, and that he would get him imprisoned :-Held, that the occasion was not privileged. Harrison v. Fraser, 29 W. R. 652.

If B., a tradesman, is dismissed from serving A., one of his customers, A. stating as the reason of it that B. charged for goods never delivered, and B., after this, writes a letter to A., vindicating himself, and imputing the dishonesty to a servant of A., this is a privileged communication, if it is bona fide and without malice. Coward v.

Wellington, 7 Car. & P. 531.

Letter to Tradesman as to Authorship of Forged Order for Goods. ]-A tradesman received a letter in the name of the defendant, containing

where S. was the guest of the defendant, the that he had not ordered them. At his request the tradesman sent him the letter containing the order, when he wrote to the tradesman, stating that in his opinion, and he firmly believed, the letter was written by the plaintiff :-Held, that the statement having been made bona fide, was a privileged communication. Croft v. Sterens, 7 H. & N. 570; 31 L. J., Ex. 143; 5 L. T. 683; 10 W. R. 272.

> Communication by Master to Servant of Misconduct of Dismissed Servant. - A railway company dismissed a servant for alleged negligence, and published his name, offence, and dismissal in a monthly list of punishments for serious offences which was exhibited in the rooms occupied by their staff throughout their system :-Held, in an action by the dismissed servant against the company to recover damages for libel, that, as the company had an interest in informing their servants, and the servants a corresponding interest in learning, that negligence would be followed by dismissal, the occasion of would be ionowed by dishibst, the occasion of the publication was privileged. *Hunt* v. G. N. Ry., 60 L. J., Q. B. 498; [1891] 2 Q. B. 189; 55 J. P. 648—C. A.

> Information by Bank Manager as to Person having Transactions with Bank. |- The defendant, manager of a bank, having been applied to for information respecting the plaintiff, who had had business transactions; with the bank with which the applicant was interested, gave to the applicant an anonymous letter, which he had received a year previously, and which contained libellous charges against the plaintiff:—Held, that the communication was privileged. Robshaw v. Smith, 38 L. T. 423.

Character of Persons in whom Defendant has an Interest - Subscriber and Secretary of Charity. ]-A letter by a subscriber to a charity, to the committee, impuguing the moral conduct of the secretary, in reference especially to a person whom the defendant had recommended as a matron, and a second letter to the committee in answer to an answer from them proposing an inquiry : and certain oral statements made before the committee during the inquiry, are privileged, if made in the honest and reasonable relief that the charges were true. Maitland v. Bramwell, 2 F. & F. 623.

Subscriber to Charity and Medical Officer. -But communications made by one member of a charitable association to another, reflecting on the conduct of the medical attendant of the establishment, are not privileged. Martin v. Strong, 1 N. & P. 29; 5 A. & E. 535; 2 H. & W. 336 ; 6 L. J., K. B. 48.

- Insurance Company and Master of Ship.] -The plaintiff, a certificated master mariner, was retained by a shipowner to take command of a ship, and was getting ready to do so when he found that the defendant insurance society had intimated to the owner that if the plaintiff were to take command they would refuse to continue to insure the ship, and by reason thereof the plaintiff lost his employment. The defendants pleaded that they acted on information which they believed to be true that the plaintiff was addicted to intemperance, and that they an order for goods. The goods were sent to communicated their refusal to insure, but not and returned by the defendant, on the ground their information, to the shipowner in good faith and without malice:—Held, that such defence (if proved) was good, the representation made by the defendants being clearly made in the conduct of their own affairs and in matters in which their own interest was concerned, and, further, that such defence was established by proof that the defendants had received such information, and had reason to believe it to be true, without conclusively establishing habits of intemperance against the plannitiff as upon a plea of justification. Hamon v. Falle, 4 App. Cas. 217.

Statement of Association to supply Information about Ships as to Ship.]-An association formed to supply, through an annually published registry, information as to iron ships, to members and subscribers, and reserving the right to make periodical surveys of ships registered, objected to certain alterations made in a ship of their highest classification, inserted the words "class snspended" opposite her name in their list, and refused either to omit those words or to withdraw her name from the list :- Held, that there being no proof of malice, falsehood, or unfair dealing, the association was entitled to publish their bonâ fide opinion, although it was injurious to the property of the shipowners, and a motion by the shipowners to restrain publication of the words "class suspended," and to compel the withdrawal of the ship from the list, was refused with costs. Clover v. Royden, 43 L. J., Ch. 665; L. R. 17 Eq. 190; 22 W. R. 254,

Report of Surveyor as to Ship.]—If the surveyor to a society which publishes an account of the different classes of ships for the information of merchants, underwriters, &c., is requested by a shipawner to survey his ship, and does so in consequence, and makes a report to the society, which classes the vessel according to his report, such shipowner cannot maintain an action against the members of the society for a libed in misdescribing the ship; nor against the surveyor, unless he made a false report. Kerr v. Shedden, 4 Car. & P. 528.

### b. Characters of Servants.

Not Actionable unless False and Malicious, ]— A servant cannot maintain an action against his former master for words spoken, or a letter written by him, in giving a character of his servant, unless the latter proves the malice as well as falsehood of the charge, even though the master makes specific charges of fraud. Weatherston v. Handbins, I Term Rep. 110.

In an action by a servain for a libel in the form of a character, it is necessary to shew implied malice by directly negativing the charge, or express malice altunde; and it is no proof express malice that the master has communicated to the party inquiring his belief as to misconduct, after the servant had quitted his service; nor that he has made a similar communication to persons from whom he received the servant with a good character. Child v. Afflech, 4 M. & Ry. 388; 9 B. & O. 408; 7 L. J. (O.S.) K. B. 272.

A statement made by a late master of a servant to another person who had thoughts of engaging that servant is not privileged where, from other evidence, though of a slight description, the jury has inferred actual malice. \*\* \*Lelly v. Partington\*\*, 2 N. & M. 460; 4 B. & Ad. 700.

If a master, in giving the character of a servant, states in a letter certain facts, the master, in defence of an action brought by his servant for libel, is not bound to prove the truth of every fact he stated: it is enough that he gives such evidence as convinces the jury that he wrote what he did with an honest conviction of itstruth. Ib.

See also Webb v. East, col. 633.

What is evidence of Malice.]—Although a master is not in general bound to prove the truth of a character given by him to a person applying for the character of his servant, yet if he officiously states any trivial misconduct of the servant to a former master, in order to prevent him giving a second character, and then himself, upon application for a character, gives the servant a bad character, the truth of which he is not able to prove, the jury may, from these circumstances, infer malice on the part of the master, in an action against him by the servant. Rogers v. Clifton. 3 Bos. & P. 587.

In answer to an inquiry as to the character of a governess, the defendant wrote a letter in which she said, "I parted with her on account of her incompetency, and not being lady-like or good-tempered." To this letter there was the following postseript :- " May I trouble you totell her, that, this being the third time I have been referred to, I beg to decline any further applications." In an action by the governess against the defendant for writing this letter, she gave evidence tending to negative the statement in it of her qualifications, and she proved that previously the writer had recommended her as a governess. The judge directed the jury, that the letter being an answer to an inquiry into the character of a servant, prima facic it was privileged, but that the letter itself and the facts proved were some evidence for them that the writer was actuated by express malice, to rebut any inference of which the defendant might have given evidence to show that the statement itself of the character was a true one, or that she be-lieved, or had reason to believe, it to be a true one:—Held, that this direction was right. Fountain v. Boodle, 2 G. & D. 455; 3 Q. B. 5

Correction of Previous Good Character. ] The plaintiff, a domestic servant, about to enter the service of B., referred B. for her character tothe defendant, in whose service the plaintiff had been. The defendant being unwell, her husband answered the application, and gave the plaintiff a good character, and B. took the plaintiff intoservice. The defendant recovered, and in a letter written to B. on other matters, said that she, the defendant, had lately been much imposed upon in her kitchen. B. in consequence made-further inquiries of the defendant as to the plaintiff's character; and the defendant in answer spoke the words complained of, viz. that she suspected the plaintiff of dishonesty. The jury, in answer to the judge, found that the defendant intended by her letter to induce inquiries on B.'s. part as to the plaintiff; and they found a verdict for the plaintiff :- Held, that the defendant was bound to correct any error as to the plaintiff's character, into which she supposed B. to have been led by the answer to B.'s former application ; and that the words were spoken under such cir-cumstances as prima facie to be privileged. Gardener v. Slade, 13 Q. B. 796; 18 L. J., Q. B. 334 : 13 Jur. 826.

Voluntary Statement. ]-Where a master, without being applied to, volunteers to give an unfavourable character of a discarded servant, it is prima facie malicious, and not a privileged 101; 8 B. & C. 578; 7 L. J. (o.s.) K. B. 26.

In answer to Letter sent to Obtain Libel. ]-Though a letter giving a false character of a servant may be the ground of an action, yet, if written as an answer to a letter sent, not with a view to obtaining a character, but with an intention of obtaining such an answer as should be the ground of an action, no action can be sustained. King v. Waring, 5 Esp. 14.

In an action for words imputing dishonesty and place, evidence of antecedent good conduct is admissible. Th.

Letter from Employer's Wife to Employed.]-The defendant, the wife of a tradesman, being informed that a female assistant in her husband's employment was dishouest, wrote at his request and sent a letter accusing her of theft, and strongly reproaching her. On an indictment for libel :-Held, that the occasion was privileged, and that, therefore, in the absence of malice the defendant was not liable; and held, also, that the terms of a letter under such circumstances could not be too nicely criticised. Reg. v. Perry, 15 Cox, C. C. 169.

Letter to Person Recommending Servant. -A letter addressed to a person on whose recommendation the writer had taken the plaintiff into his service, to the effect that his conduct had not justified the character given of him, that he had left a balance unaccounted for, and that he ought not to be recommended for morality or honesty, is a privileged communication. Dison v. Parsons, 1 F. & F. 24.

Communication in Interests of Society. ]-A report unfavourable to W. had been drawn up by the Charity Organization Society, and was shewn to persons who made inquiries from the society about W.'s character, with a view to giving her charitable assistance. In an action by W. against the society for libel the judge directed the jury that the communication was privileged, and left to them the question whether malice in fact was proved, which the jury negatived. On appeal from the Queen's Bench Division, which had refused a rule nisi for a new trial :- Held, that the communication was privileged, and that it was not made out that the verdict negativing express malice was against evidence. Where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then, if he bouâ fide and without malice does tell them, it is a privileged communication. Waller v. Loch or Loch, 51 L. J., Q. B. 274; 7 Q. B. D. 619; 45 L. T. 242; 30 W. R. 18; 46 J. P. 484—C. A.

Third Person Present.]—The defendant, suspecting his shopman had embezzled a sum of money which he had received for goods sold by him in the shop, charged him with the embezzle-

Held, also, that the facts that the defendant discharged him from his service. Afterwards his alluded to the plaintiff and induced inquiries brother called upon the defendant to ask him about her were not evidence of malice. Ib. why he had refused to give the plaintiff a character, and in answer to questions put by hisbrother, the defendant spoke the following words, "He has robbed me. I believe he has robbed me for years past. I can prove it, from the circumstances under which he has been discharged by communication. Pattison v. Jones, 3 M. & Ry. me" :-Held, that the words spoken on both occasions were privileged communications, and was no question for the jury. Taylor v. Hawkins, 16 Q. B. 308; 20 L. J., Q. B. 313; 15 Jur. 746.

Held, also, that though there was only evidence of one embezzlement, the excess in the words spoken on the second occasion was not evidence of express malice to be left to the jury. 77

A master having given notice of dismissal to bad conduct to a servant by which she has lost a his footman and cook, they separately went to him and asked his reason for discharging them, when he told each (in the absence of the other) that he (or she) was discharged because both had been robbing him; whereupon each brought an action for the words so spoken to the other :-Held, a privileged communication, and not defamatory. Manby v. Witt, 18 C. B. 544; 25 L. J., C. P. 294; 2 Jur. (N.S.) 1004; 4 W. R.

> Where Expressions exceed Privilege.]—A. being dissatisfied with B., his gardener, gave him notice to leave, and wrote a letter to C., who had recommended him, knowing at the time that B, had applied to C, to recommend him to another situation ; and in that letter stated, "I had another scene with B. in my garden; he was extremely violent, came towards me with an open clasp-knife in his hand, and his eyes starting from their sockets with rage, a perfect raving madman":-Held, that the communication was not privileged, as there were expressions in the kitneersley, 15 C. B. (N.S.) 422; 33 L. J., C. P. 96; 10 Jur. (N.S.) 441; 9 L. T. 415; 12 W. R.

## c. As to Tradesmen and their Dealings.

Statement as to Solvency or Credit. ]-A., a trader, being indebted to B. upon an unexpired eredit, employs C, to sell his goods by auction, and absents himself under circumstances sufficient to induce B, to believe that an act of bankraptey has been committed. B. gives notice to C. not to pay over the proceeds to A., "he having committed an act of bankruptcy." In an action by A. against B., charging this notice as a libel: —Held, by Tindal, C.J., and Coltman and Erle, JJ., to be a privileged communication; dissentiente Cresswell, J. Blackham v. Pugh, 2 C. B. 611; 15 L. J., C. P. 290.

If A. has sold goods to B., a tradesmen, and before the delivery of them C., without being asked or solicited in any way to do so, speaks words injurious to the credit of B. as a tradesman, this is not a privileged communication; but if he had been asked by A. as to the eredit of B, it would have been so, King v. Watts, 8 Car. & P. 614.

In an action for slander imputing to the plaintiff want of means in his business as a road conment in the presence of a neighbour, whom he tractor, the defendant pleaded that at the time had called in to hear what took place when he the words were spoken he was a grand inror and acting in that capacity, and that a portion of the of justice. *Houre* v. *Silverlock*, 9 C. B. 20; 19 business before the grand jury was the considera- L. J., C. P. 215. S. P., *Lewis v. Levy*, El., Bl. & El. tion of applications for the execution of county 537; 27 L. J., Q. B. 282; 4 Jur. (S.S.) 207. works in which the plaintiff was concerned as a W. R. 629. proposed contractor and as a proposed surety for other contractors :- Held, that the occasion was privileged, although the proposals for the several contracts had been accepted at Presentment Sessions, under 6 & 7 W. 4, c. 116, s. 23. Little v. Pomerou, Ir. R. 7 C. L. 50.

Complaint by Customer. ]-Although a customer may use words of reasonable remonstrance or complaint to a tradesman, and the words, though defamatory, may be excused by the occasion, yet if, from the expressions used, or the circumstances of the time and place of speaking, it appears that they were spoken with unneces-sary violence or publicity, then they go beyond the occasion, and there will be evidence of malice by which the excuse will be taken away. Oddy

v. Paulet (Lord), 4 F. & F. 1009.

The defendant, who had purchased a piece of lamb from a butcher, went into the butcher's shop on the following day, and, in the hearing of others, said to the butcher, "I meant to have dealt with you in future, but you changed a piece of lamb I bought yesterday, and substituted a course piece of muttou." Held, that, if used honestly, the words were privileged by reason of the occasion. Crisp v. Gill, 5 W. R. 494.

Repeating False and Prejudicial Reports.]-Where a person originates false reports prejudicial to a tradesman, and being called on by the employers of the tradesman to examine the matters complained of, repeats to them the false statements, such statements are not privileged communications. Smith v. Mutheres, 1 M. & Rob. 151.

Caution in Good Faith.]—Quere, whether a caution bona fide given to a tradesman, without any inquiry on his part, not to trust another, falls within the exception as to privileged communications. By Tindal, C.J., and Erle, J., that it does. By Coltman and Cresswell, JJ., that it does not, Bennett v. Deacon, 2 C. B. 628; 15 L. J., C. P. 289.

In Answer to Inquiry.]—If A. is going to have dealings with B., and he makes inquiries of C., who gives A. information respecting B., this is a privileged communication, as everyone is quite at liberty to state his opionions bonn fide of the respectability of a party thus inquired about. Storey v. Challands, 8 Car. & P. 234.

Circular sent by Secretary to Members of Society for Protection of Trade.]—A circular letter sent by the secretary to the members of a society for the protection of trade against sharpers and swindlers, furnishing information respecting certain bill transaction, is not a privileged communication. Getting v. Foss, 3 Car. & P. 160.

# d. Matters of Public Interest.

## i. Reports of Judicial Proceedings.

Fair Report of Trial in Court of Justice privileged. - It is a good defence to an action for a libel that it consists of a fair and impartial

By the law of England, a fair account of what takes places in a court of justice may be published, but the reporter ought not to mix with it comments of his own, and if the report contains only a fair account of what takes place in the court of justice, the person who publishes it has only to prove that fact under the general issue, and he is cutitled to entire immunity. Andrews v. Chapman, 3 Car. & K. 286.

It is not essential that every word of the evidence of the speeches, and of every word that was said by the judge, should be inserted, if the report is substantially a fair and a correct report of what took place in a court of justice. Ib.

Result of Evidence. |-- A party cannot be justified in publishing the result of evidence given in a court of justice, but the evidence itself must be stated. Lewis v. Wulter, 4 B. & Ald. 605: 23 R. R. 415.

Coloured Account of Proceedings. -- It is libellous to publish a highly-coloured account of indicial proceedings, mixed with the party's own observations and conclusions upon what passed in court, which contained an insinuation that the plaintiff had committed perjury. Stiles v. Nokes, 7 East, 493. S. C. nom. Carr v. Jones, 3 Smith,

A publication of proceedings in a court of justice must be strictly confined to the proceedings in court, and cannot be justified if it contains disparaging observations by any other Contains displaying observations by any other than a judge of the court. Delegal v. Highley, 5 Scott, 154: 3 Bing. (N.C.) 950; 8 Car. & P. 444; 3 Hodges, 158; 6 L. J., C. P. 337.

Report of Statement by Counsel. -A mere statement by counsel in his opening to the jury, unsupported by evidence, is not a fair and an impartial report. Saunders v. Mills, 3 M. & P. 520; 6 Bing. 213; 8 L. J. (o.s.) C. P. 24; 31 R. R. 394.

A report of a libellous speech of counsel given without the evidence by which it was supported, and without any object towards the prosecution of the cause, is not a report of the proceedings of a court of justice within the meaning of the privilege. Kane v. Mulrains, Ir. R. 2 C. L. 402.

A newspaper proprietor has a right to publish either a verbatim or an abridged and a condensed report of what passes in a court of justice, even reflectious there cast upon parties by counsel or otherwise. But it must be done fairly and honourably, so as to convey a just impression of what had passed there. Turner v. Sullivan, 6 L. T. 130.

Whether it is such a fair report is not a question of law for the judge, but a question for the opinion of the jury. Ib.

Citations from Reports of Judicial Proceedings.]-The privilege possessed by reporters of the proceedings in courts of justice, provided the reports are faithful or fair, although they may be derogatory or defamatory to individuals mentioned in them, extends to the writers of law books fairly and honestly citing those reports. Blake v. Sterens, 4 F. & F. 232; 11 L. T. 543.

But reasonable care and diligence must be (though not verbatim) report of a trial in a court used to secure correctness in such citations. 1b. solicitor) to whom such report related had been ordered to be struck off the rolls, whereas in fact the order was that he be suspended for ten years: -Held, that such was not a fair representation of the report, that reasonable eare had not been used, and therefore that it was not privileged.

Report of Trial must be Fair and without Malice. - A fair report of a trial, whether published in a newspaper or a pamphlet, is privileged : but it lies on him who sets up the privilege to shew that he comes within it. It is sufficient if such a report is a fair abstract of the trial; but where there is any evidence on which a jury could reasonably find that the report was not absolutely fair, the question of fairness must be left to the jury. Milissich v. Lloyds, 46 L. J., 7 Moore, 2 C. P. 404; 36 L. T. 423; 25 W. R. 353; 13 Cox, R. R. 533. C. C. 575-C. A.

The defendant, a solicitor, conducted a case in a county court, and sent a report of the proceedings containing matter defamatory of the plaintiff to several newspapers for publication. In an action for libel the jury found that the report was a fair one, but sent with malice :-Held (affirming the judgment of Cockburn C.J.), that no absolute privilege attached to the publication of a report, though a fair one of proceedings in a court of justice, and that the defendant, having been actuated by malice in sending the report. been actuated by mander in senting the reports was liable in the action. Stevens v. Sampson, 49 L. J., Q. B. 120; 5 Ex. D. 53; 41 L. T. 782; 28 W. R. 87—C. A.

A publication, reflecting on the character of the plaintiff, professed to contain a report of the proceedings before two judges of different courts at chambers, on applications, under 5 & 6 Vict.

c. 122, s. 42, to discharge a bankrupt out of custody. The defence was, that it was a fair account of what took place before those judges when acting in a judicial capacity:—Held, that if it was, the defendant was entitled to the verdict. Smith v. Scott, 2 Car. & K. 580.

Held, also, that if the report, though not eorrect, was an honest one, and intended to be a fair account of what really occurred before the

- Report containing Unfair Comment on an Acquittal. \_\_The plaintiff was tried in Brussels for murder, and acquitted. A correspondent of an English journal wrote letters which were inserted in such journal, containing incorrect statements of the evidence, independent comments of the writer upon the character and bearing of the prisoner, and expressions impugning the verdiet of acquittal, and implying that the prisoner should have been found guilty of murder, and was certainly guilty of forgery and fraud. A leading article was also published adopting the same tone:—Held, that if in the opinion of the jury, looking at the letters indivi-dually and not collectively, they did not contain fair, honest and faithful representations of what passed at the trial, they were not privileged. Risk Allah Bey v. Whitehurst, 18 L. T. 615. Held, also, that if by some oversight or want

of firmness on the part of the judge or jury, a and the criminal is let loose on society when he is no presumption one way or the other as to-

Where, in citing a report from the "Law ought to be suffering punishment, a public writer Journal." the author stated that the party (a is privileged in remonstrating with that tribunal if he does so fairly and with reasonable exercise. of judgment, Ib.

Held, also, that if counsel cross-examines a plaintiff, with a view to shew that he has been guilty of that of which he has been acquitted, the libel is thereby aggravated, and the damages must follow the aggravation. Ib.

Libellous Heading. ]-An account published in a newspaper of proceedings in a court of law, containing matter redounding to the discredit of a person in his business of an attorney ereum of a person in his business of an acturey is, whether true or false, rendered actionable as-libellous by the paragraph being headed or intro-duced with the line, "Shameful conduct of an attorney," Lowis v. Chement, 3 B. & Ald, 702; 22: B. B. 530. S. C., nom. Chement v. Lowis (in array), 7 Moore, 200; 3 Br. & B. 297; 10 Price, 181; 22;

- Publication of Judgment alone. - A fair and accurate report of the judgment in an action, published bona fide, and without malice, is privileged, although not accompanied by any report of the evidence given at the trial. Defendants published in the form of a pamphlet a report of the judgment delivered in a former action which plaintiff had brought against them. The pamphlet contained no separate report of the evidence given at the trial and there were passages in the judgment reflecting on plaintiff's character. In an action for libel in respect of such publication the jury found that the pamphlet was a fair, accurate, and honest report of the judgment, and was published bona fide and without malice:—Held, that it was not necessary to ask the jury whether the pamphlet was a fairreport of the trial, that the right questions had been left to the jury, and that the defendants were entitled to judgment on the findings. *Macdonyall* v. *Knight*, 55 L. J., Q. B. 464; 17 Q. B. D. 636; 55 L. T. 274; 34 W. R. 727; 51 J. P. 38—C. A.

A fair and accurate report of the judgment in an action, published bona fide and without malice, is privileged, although not accompanied by any report of the evidence given at the trial. Macdougall v. Knight (17 Q. B. D. 636) discussed 

The rule of law is, that the publication, without malice, of an accurate report of what has been said or done in a judicial proceeding in a court of justice, is a privileged publication, although what is said or done would, but for the privilege, be libellous against an individual, and actionable at his suit, and this is true although. what is published purports to be and is a report, not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report thereof and published without

malice—per Lord Esher, M.R. Ib.

By Lord Halsbury, L.C. —If the report of a judge's judgment or summing-up to a jury did not in fact give reasonable opportunities to the reader to form his own judgment as to what conclusions should be drawn from the evidence given, the publication of such partial, and in that respect inaccurate, representations of the evidence might be the subject of an action for great criminal escapes, and, by a miscarriage of libel to which the supposed privilege in what justice, a scandal is brought on its administration, was said by a judge would be no answer. There

account of the matters upon which he is adjudicating as to bring it within the privilege. If it be so, it must be proved to be so by evidence, and certainly not inferred as a presumption of and certainty of interier as a presumption of a law. Macdongall v. Knight, 58 L. J., Q. B. 537; 14 App. Cas. 194; 60 L. T. 762; 38 W. R. 44; 53 J. P. 691—H. L. (E. The decision of the Court of Appeal affirmed,

not for the reasons given by that court, but because the findings of the jury disposed of all the questions which were properly raised at the trial, the points argued in the divisional court. in the Court of Appeal, and in this House not having been properly raised at the trial. Ib.

The publication of a public record, e.g. a judgment of a court of justice is not, per sc, actionable; and in an action for publishing it, the question, whether it was published with express malice, ought, under the plea of no libel, to be submitted to the jury. Cosgrave v. Trade Auxiliary Co., Ir. R. 8 C. L. 349. The rule that the publication of a fair and

correct report of proceedings taking place in a court of justice is privileged, extends to the record of a judgment entered upon a warrant of attorney. But the publication must be correct, and without influence or comment. MNally, v. Oldham, 16 Ir. C. L. R. 298; 8 L. T. 604.

County Court Judgment—Publication of Extract from Register of Judgments—Trade Protection Association.]—The defendant published in a trade protection journal, under the heading "Extracts from the Register of County Courts Judgments," a statement that a county court judgment had been obtained against the plaintiff for a certain amount on a certain day, but immediately under the heading was appended a note to the effect that judgments contained in the list might have been satisfied. The indement had in fact been obtained against the plaintiff, who had satisfied it by payment a few days subsequently; but such satisfaction had not been entered upon the register. In an action for libel, the plaintiff was non-suited :-Held. that the statement was published on a privileged occasion, and that in the absence of cyidence of express malice on the part of the defendant, the Q. B. 573; [1892] 2 Q. B. 56; 66 L. T. 837; 40 W. R. 696; 56 J. P. 789—C. A.

Erroneous Statement of Judgment in former Action.]—The plaintiff, who traded as R. H. & Co., and the defendants, who traded as R. H. & Sons, were rival manufacturers of sail-cloth. The plaintiff had formerly been a partner in the defendant's firm. In 1885 the defendants brought an action against the plaintiff, claiming (inter alia) an injunction to restrain him from representing his firm to be the original firm of R. H. & Sons. At the trial the action was dismissed without costs as to that issue, and with costs as to the other issues; the judge being satisfied by made any such representation, but that on two or three occasions one of his agents, without his knowledge or concurrence, had represented that the then defendants' firm was the original firm. The then defendant repudiated this as soon as he knew it, and at the trial he offered by his counsel to give an undertaking that he would never

whether a judge's judgment does or does not was inserted in the judgment with the defengive such a complete and substantially accurate dant's assent. In 1886 the present defendants distributed a printed circular, which stated that they were the original firm, and after giving the "Caution," proceeded: "By the judgment the defendant was ordered to undertake not to represent that his firm is, or that the plaintiff's firm is not the original firm of R. H. & Sons. Messrs. R. H. & Sous, finding that serious misrepresentations were in circulation to their prejudice, felt themselves compelled to bring the above action": -Held, that the circular contained an untrue statement of the effect of the judgment in the former action; that it was a libel injurious to the plaintiff's trade; that it was not privileged; that the defendants had published it maliciously; and that the plaintiff was entitled to an injunction, with the costs of the action. But there being no evidence of damage to the plaintiff, except his own affidavit that the publication of the circular was calculated to injure him, and had injured him, in his business, which he said had greatly fallen off since the issue of it; and the plaintiff not having brought the action till three months after he knew of the publication of the circular, only 5*L* damages were awarded to him. *Hayward & Co.* v. *Hayward & Sons*, 56 L. J., Ch. 287; 34 Ch. D. 198; 55 L. T. 729; 35

> What Constitutes a Public Court of Justice-Committee of the House of Lords. ]-A committee of the House of Lords, when conducting an inquiry upon a matter referred to them, constitutes a public court of justice whose proceedings may be reported and commented on. Kane v. Mul-vains, Ir. R. 2 C. L. 402,

> Proceedings before Registrar in Bankruptcy. - Proceedings held in gaol before a registrav in bankruptcy, upon the examination of a debtor in custody, are judicial and in a public court. A fair report, therefore, of these proceedings is protected. Ryalls v. Leader, 35 L. J., Ex. 185; L. R. 1 Ex. 296; 12 Jur. (N.S.) 503; 14 L. T. 563; 14 W. R. 838.

> There is no restriction upon the publication of an accurate report of the proceedings of a court of justice on the ground of its affecting the character of third persons. Ih.

> - Publication of Extracts from Documents open to the Public-Affidavit registered with Deed of Inspectorship-Trade Protection Journal.]—The information contained in an affidavit as to the assets and liabilities of a debtor filed with a deed of inspectorship under the provisions of s. 6 of the Decds of Arrangement Act, 1887, is not the subject of privilege in an action for libel, and if a person publishes for his own profit the office copy supplied to him under the provisions of s. 11, and such information as supplied to him is inaccurate, he publishes it at his own risk, and is liable in damages. Semble per Wright J. (1) whether a person is entitled to publish the con-tents of such an affidavit at all, whether the contents be accurate or not. (2) Whether a person may publish for his own profit merely extracts of information to which the public have a statutory right of access. Reis v. Perry, 64 L. J., Q. B. 566; 15 R. 427; 43 W. R. 648.

Proceedings before Magistrates-Preliminary make such a representation : this undertaking Investigation.]-The rule that the publication place in a public court of justice is privileged office, in the course of a preliminary inquiry, extends to proceedings taking place publicly openly and publicly conducted before a justice, before a magistrate on the preliminary investigation of a criminal charge, terminating in the discharge by the magistrate of the party charged. Lewis v. Lery, El. Bl. & El. 537; 27 L. J., Q. B. 282; 4 Jur. (N.s.) 970; 6 W. R. 629.

A declaration set out, in three separate counts, reports of three separate days' proceedings respectively (on two adjournments) before a magistrate, the report of the first day stating that the plaintiff was charged with perjury, and an adjournment, but reserving the report; the report of the second day also stating an adjournment in language intimating that there would be a report of the proceedings of the day to which the adjournment was; and the third stating the discharge of the parties charged; and the jury found generally that the reports were fair and correct:—Held that the reports of the first two meetings did not lose the privilege by reason of the proceedings there reported not being final. Ib.

One of the reports commenced, "Wilful and corrupt perjury":-Held, that after the verdict of the jury, this must be taken as a description of the nature of the charge, not as an imputation by the publisher of the perjury in fact. Ib.

One of the reports stated that the evidence before the magistrate entirely negatived the story of the plaintiff, which story was the statement of the plaintiff in which the imputed perjury was contained :- Held, not to be privileged; and a plea, justifying this report on the ground that it was a fair and correct report of the proceedings which had taken place, held bad after Ib.

The rule that the publication of a fair and correct report of proceedings taking place in a public court of justice is privileged extends to proceedings taking place publicly before a magistrate, though such proceedings consist of an exparte application for a criminal summous terminating in the refusal by the magistrate to proceed with the charge on the ground that on the facts stated he had no jurisdiction. Usill v. Hales, 47 L. J., C. P. 323; 3 C. P. D. 319; 38 L. T. 65; 26 W. R. 371; 14 Cox, C. C. 61.

Three men who had been employed by a civil engineer in the construction of a railway, applied to a magistrate in open court for criminal process against him under the Masters and Servants Act, 1867 (30 & 31 Vict. c. 141), alleging that as they had not been paid their wages. while he had been paid, they considered he had been guilty of a criminal offence in withholding their money. The magistrate refused the summons, considering that he had no jurisdiction. The men afterwards published a report of the proceedings, which the jury found was a fair and correct report of what occurred:—Held, that the report was privileged. Ib.
In an action for libel there is no distinction

between a mere ex parte investigation before a magistrate, and the regular proceedings in a court of law; and therefore a defendant cannot set up in answer to it any privilege, on the ground that the libel complained of was a report of a mere preliminary investigation before a magistrate, such distinction being abolished. Pinere v. Goodlake, 15 L. T. 676.

It is no justification of an action for a libel in a newspaper that the matter complained of is a

of a fair and correct report of proceedings taking | proceedings which took place at a public policeupon a criminal charge against the plaintiff, although published with no scandalous, defamatory, naworthy, or unlawful motive, but merely as public news. It seems, however, that it is lawful to publish in a newspaper the result of what a justice may think fit to do, upon a matter of criminal charge previous to trial, if the publication contains no statement of the evidence, nor any comments upon the case. Duncan v. Thwaites, 5 D. & R. 447: 3 B. & C. 556: 3 L. J. (o.s.) K. B. 3.

Where justices specially summoned for the purpose sit in their council chamber to hear an application for the issue of a summons on a criminal charge, a fair report of what takes place on such proceedings is privileged, although no evidence is given on oath, and although such proceeding does not result in a final decision but leads to a further inquiry. Kimber v. Press Association, 62 L. J., Q. B. 152; [1893] I Q. B. 65; 4 R. 95; 67 L. T. 515; 41 W. R. 17; 57 J. P. 247

- Report of Observation of Magistrate's Clerk. ]-If a party who has summoned another before a magistrate, draws up a report of what took place on the investigation, it is his duty to give an impartial statement, without any colouring or exaggeration, putting in all that is in fayour of the party accused, as well as that which is against him; and in such report he has no right to insert an observation, to the prejudice of the party, made by the magistrate's clerk; and if he does insert such observation, he is liable, on that ground alone, to an action for libel; and in such a case it is what the judge says that is to be looked at, and not what any other person said who was present at the time. Delegal v. Highley, 8 Car. & P. 444.

Matter outside Jurisdiction of Magistrate. - Where, to a declaration for a libel in a newspaper, the defendant pleaded first, that the ibellow matter was a true and correct account of a statement made by A. and B. before a magistrate; and secondly, that the facts therein stated were true; and the jury found for the defendant on the first plea, and for the plaintiff on the second :- Held, that the plaintiff was entitled to judgment non obstante veredicto on the first plea, on the following grounds: 1. The statement, though correct, did not relate to a matter of which the magistrate had cognisance; 2. The defendant had printed and published that which would not have been actionable as oral slander, and consequently was not protected by giving the names of the anthors at the time of publication. M'Gregor v. Thwaites, 4 D. & R. 695; 3 B. & C. 24; 2 L. J. (o.s.) K. B. 217; 27 R. R. 274.

Coroner's Court, -In an action for a libel contained in a report of a coroner's inquest, evidence of the correctness of the report is admissible under the general issue in mitigation of damages; but no evidence of the truth or falschood of facts stated at the inquest is admissible, as it must be strictly confined to what took place there. East

v. Chapman, M. & M. 46; 2 Car. & P. 570.

In an action for libel, the plaintiff alleged that, being a relieving officer of a certain union, true, fair, just, and correct report and account of and having been examined as a witness at an

the chief secretary for the Lord Lieutenaut of Ireland, stating that the Rev. Mr. C. had said in relation to the plaintiff's evidence at the inquest, that part of it was "nothing short of perjury"; and alleged as innuendoes that the defendant thereby imputed to the plaintiff wilful and corrupt perjury, the giving of false evidence, and swearing falsely. The defendant pleaded, 1st, that at an inquisition held by him as coroner the plaintiff was examined as a witness, and that at the close of the plaintiff's evidence Mr. C., a Roman Catholic clergyman, stated in open court that part of the plaintiff's testimony was "very little short of perjary"; that the defendant transmitted to the chief secretary for the Lord Lientenant of Ireland a true report in writing of the inquisition, which was the alleged libel; and that he so wrote and published the words complained of on a privileged occasion, bona fide and without malice, believing the same to be true. Secondly, that, at the time of the writing and publishing of the alleged libel, the plaintiff was a relieving officer, and the defendant a ratepayer rated for the relief of the poor in a certain union; that the inquest was held touching the death of one of the destitute poor who had been in receipt of outdoor relief in the union : and that in the course of the inquest, evidence was given relating to the administration of outdoor relief by the plaintiff and other relieving officers in the union; that the plaintiff disapproved of the nature of the relief administered, as such matters appeared in the course of the inquest and evidence, and was desirous of having a different and, in his opinion, a better mode of relief adopted, and for that purpose of having a public or other proper inquiry held as to the nature and mode of administering such relief; that the clergyman referred to in the preceding defence had made the statement therein mentioned with respect to evidence given by the plaintiff as to the administration of outdoor relief by him as relieving officer; and that, as such a ratepayer, and being interested in the administration of such relief, the defendant communicated the alleged defamatory matter (being the statement made by the said clergyman) to the chief secretary of the Lord Lieutenant as such secretary, and as being a member of parliament, on a privileged occasion, without malice, and believing the same to be true :- Held, upon demurrer, that both pleas were bad; that the first could not be sustained as a plea relying upon a fair report of judicial proceedings, inasmuch as the alleged libel was the communication of an unsworn defaniatory statement made by a bystander, and forming no part of the proceedings at the inquest, and that neither defence showed that the quest, and that her her the communication was made had any interest in receiving it, which could render the communication privileged. Lynam v. Gowing, 6 L. R., Ir. 259,

Privilege does not extend to Obscene Matter. -A police magistrate had ordered the destruction of copies of a pamphlet, which S. kept at his shop for sale, as obscene books, under 20 & 21 shop for sate, as onscene books, under 20 & 21 or the newspaper without any communication Vict. c. 83, s. 1. This pamphlet was a substantially correct report of the trial of one M. speech only:—Held, first, that the defendant on an indictment for a misdemeanour in selling was not privileged, as it appeared on the defencean obscene work called the "Confessional Un-masked"; but it set out that work in full, whereas a fair one, the speeches of the other guardians.

inquest held by the defendant as coroner, the at the trial it was taken as read, and passages in defendant made a communication in writing to it only referred to :- Held, that the pamphlet, being of such a character that it would necessarily tend to the depravation of the public morals, was an obscene book within 20 & 21 Vict. c. 83, even although the object of those publishing it was to suppress a system they thought immoral and pernicious. Steele v. Brannan, 41 L. J., M. C. 85; L. R. 7 C. P. 261; 26 L. T. 509; 20 W. R. 607

Held, also, that the privilege given by the law to reports of judicial proceedings does not extend to reports which contain matters of an obscene and demoralising character, and that the case was therefore within 20 & 21 Viet, c. 83, and the

decision of the magistrate correct. Ib.

The privilege given by law to reports of judicial proceedings does not extend to reports which contain matters of an obscene and demoralising character, and a magistrate may, under 20 & 21 Viet. c. 83, order the destruction, of copies of obscene books. Ib.

# ii. Other Public Proceedings.

Newspaper Reports of Meetings. 1-Sec 44 & 45 Vict. c. 60, s. 2.

Parliamentary Proceedings. ]-Faithful and fair reports of the proceedings in parliament, although disparaging to the character of indivi-duals, are privileged communications; in the same manner as similar reports of proceedings in courts of justice. Wason v. Walter, S. B. & S. 671; 38 L. J., Q. B. 34; L. R. 4 Q. B. 73; 19 L. T. 409; 17 W. R. 169.

Fair and legitimate criticism in newspapers on the conduct or motives of individuals, as disclosed by such reports, is also privileged. Ib.

The publication of a particular speech in parliament, for the purpose or with the effect of in-juring an individual, is unlawful, unless bon's fide published by a member for the information of his constituents. Ib.

Meeting of Guardians of Poor. ]-The administration of the poor laws, both by the government department and by the local authorities, including the conduct of the medical officer, is matter of public interest; but the publication of a report of proceedings at a meeting of poor-law guardians at which ex parte charges of misconduct against the medical officer of the union were made, is not privileged by the occasion. Purcell v. Sawler, 25 W. R. 362—C. A.

Action for libel published by the defendant in a newspaper. The defendant pleaded that he was a guardian of the poor, and at a meeting of the board of guardians a discussion arose in reference to the plaintiff, and that speeches were made by several of the guardians and by the plaintiff on his own behalf, and that the defendant spoke in discharge of a public duty without malice; also that in order to assist the newspaper reporter he handed to him a correct report of his own speech, and that the proprietorof the newspaper without any communication or of the plaintiff himself not having been given; secondly, that if the privileged occasion failed, the denial of malice did not constitute a defence, and, as to the second defence, that the defendant was responsible for the fair publication of the proceedings when he gave a report of his own speech for publication. Pierce v. Ellis, 6 Ir. C. L. R. 55.

Parish Vestry. - Though a publication of the report of a trial in a court of justice, in the course of which a libel is read, would be privileged : a publication of the proceedings of a parish vestry, at which a libel is read, is not so privileged. Papham v. Pickburn, 7 H. & N. 891; 31 L. J., Ex, 133; 8 Jur. (N.S.) 179; 5 L. T. 846; 10 W. R. 324.

- Report of Medical Officer. If a report made by a medical officer of health to a vestry board, in pursuance of the Metropolis Management Act (18 & 19 Vict. c. 120), contains libellous ment act (13 & 19 vic. 6, 120), contains inclinions matter, a newspaper proprietor is not privileged in publishing it, though without any comment. Popham v. Pickhura, 7 H. & N. 891; 31 L. J., Ex. 133; 8 Jur. (N.S.) 179; 5 L. T. 846; 10 W. R. 324.

Publication of Minutes of General Council of Medical Education.]—By the Medical Act (21 & 22 Vict. c. 90), the General Council of Medical Education and Registration were established, one of their duties being to keep a register of medical practitioners. By s. 29, "if any registered medical practitioner shall after due inquiry be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register" Held, that the publication of the minutes of the conneil, containing a report of their proceedings, comprising a statement that the name of a specified medical practitioner has been removed from the register on the ground that, in the opinion of the council, he has been guilty of infamous conduct in a professional respect, is, if the report be accurate, and published bona fide and without malice, privileged, and the medical practitioner cannot maintain an action of libel against the council in respect of the publication. Allbutt v. Medical Council, 58 L. J., Q. B. 606; 23 Q. B. D. 400; 61 L. T., 585; 37 W. R. 771; 54 J. P. 36—C. A.

Public Meeting.]—The publication of matter defamatory of an individual is not privileged, because the libel is contained in a fair report in a newspaper of what passed at a public meeting. Davison v. Duncan, 7 El. & Bl. 229; 26 L. J., Q. B, 104; 3 Jur. (N.S.) 613; 5 W. R. 253.

- Comment on Conduct of Persons at. 1conduct of persons at a public meeting held for the purpose of promoting the election of a candidate for a seat in parliament may be made the subject of fair and bona fide discussion by a writer in a public newspaper, and unfavourable comments made upon such conduct in the course of such discussion are privileged. *Davies* v. *Duwan*, 43 L. J., C. P. 185; L. R. 9 C. P. 396; 30 L. T. 464; 22 W. R. 575.

VOL. V.

appeared that the appellants had in their newspaper falsely charged the respondent, a public officer, with specific acts of misconduct in the execution of the duties of his office, had vouched for the truth of those charges, and on the assump-tion of their truth, commented on his proceedings in highly offensive and injurious language:— Held, that they were liable. The privilege which covers fair and accurate reports of proceedings in parliament and in courts of justice does not extend to fair and accurate reports of statements made to the editors of newspapers. *Duris* v. *Shepstone*, 55 L. J., P. C. 51: 11 App. Cas. 187; 55 L. T. 1; 34 W. R. 722; 50 J. P. 709—P. C.

Reply to Assailant through Press. ]-A person whose character and conduct have been attacked through the press is privileged in addressing his defence through the same channel, provided he does so bona fide for the purpose of vindicating himself, or of informing the public upon matters which they are concerned to know. Laughton v. Sodor and Man (Bishop), 9 Moore, P. C. (N.S.) 318; 42 L. J., P. C. (11; L. R. 4 P. C. 495; 28 L. T. 377; 21 W. R. 204.

When a party publishes in a newspaper statements reflecting on the conduct or character of another, the aggrieved party is entitled to have recourse to the public press for his defence and vindication; and if, in so doing, he reflects on the conduct of character of his assailant, it is for the jury to say whether he did so honestly in self-defence, or was actuated by malice towards the party who originally assailed him. O'Donoghue v. Hussey, Ir. R. 5 C. L. 124—Ex. Ch.

If the occasion is privileged, and the objection is, that the publication goes too far, and contains matter exceeding the privilege, the question whether it does so or not, is not a question for the court to decide on demurrer, but one for the consideration of the jury on the plea of privilege,

It is a reasonable mode of defence for a person. whose conduct and character have been assailed in a newspaper, to state publicly that his assailant was known to be a person in the habit of making misstatements. Ib.

, In an action for writing to editor of a news-paper a letter imputing to the plaintiff untruthrulness, inability to discharge his debts, and other conduct discreditable to his position as a poor-law gnardian, the defendant pleaded that, being medical officer of a dispensary in the poor-law union of which the plaintiff was guardian, and having, as such officer, caused the seizure of unsound meat and the prosecution of a person by whom it was exposed for sale, he incurred costs in defending an action brought against him for having instituted the prosecution, and that at a meeting of the guardians the plaintiff for the purpose of having his statements published stated that the defendant had acted wrongly with reference to the seizure of the meat, and that his costs ought not to be paid, and that the defendant, in order to prevent credit being given thereto by the public, and in self-defence wrote the alleged libel, believing it to be true and without malice:—Held, that the plea failed to show that the alleged libel was a privileged communication. Murphy v. Halpin, 1r. R. 8 C. L. 127.

Duty of Publisher to give up Name of Writer. Charge of Missonduct against Public Officer.

In an action to recover damages for libel it private character, or treating of private and not of public matters, that may appear in his newspaper. *Hibbins* v. *Lee*, 4 F. & F. 243; 11 L. T. 541.

If he refuses to do so, he places himself in the shoes of the writer, and is entitled to no privilege or excuse founded on sympathy for the publishers of newspapers. *Ib*.

### e. Rebuttal of Privilege by Evidence of Malice.

See post, col. 647.

# C. PRACTICE AND PROCEDURE.

1. Parties.

a. To Sue.

Municipal Corporation, —A municipal corporation cumnot maintain an action for libel in respect of a letter charging the corporation with corruption, for it is only the individuals, and not the corporation in its corporate capacity, who can be guilty of such an offence. Manchester (Mayor) Y. Williams, 60 L. J., Q. B. 23; [181] I. Q. B. 94; 63 L. T. 805; 39 W. R. 302; 54 J. P. 712.

Trading Corporation.]—A corporation may maintain an action of libel in respect of a state ment reflecting on its character in the conduct of its business without proof of special damage. South Hetton Coul Co. v. North Eastern Nows Association, 63 L. J., Q. B. 293; [1894] I. Q. B. 133; 9 R. 240; 69 L. T. 844; 42 W. R. 322; 58 J. P. 196—C. A.

Public Companies.]—An act of parliament, after reciting the difficulties experienced by joint-stock companies in suits for recovering debts and enforcing obligations, and in the proscention of offenders, enacted, that actions commenced by the Hope Company for recovering debts, enforcing claims or demands then due, or which thereafter might become due or arise to the company, might be commenced, and indictments for offences be preferred, in the name of the chairman:—Held, that the chairman night see for a libel on the company, although it was not a corporate body. Williams v. Decumont, 10 Bing. 260; 3 M. & Scott, 705; 3 L. J., C. F. 31.

A company, incorporated under 19 & 20 Vict. c. 47, may maintain an action for libel against a shareholder in the company. Metropolitian Saloon Omnibus Co. v. Huwkins, 4 H. & N. 87; 28 L. J., Ex. 201; 5 Jur. (N.S.) 226; 7 W. R. 255.

Partners may Sue Jointly.]—Partners may join in an action for slander, or for a libel spoken or published of them in the way of their trade. Forster v. Laussen, 11 Moore, 360; 3 Bing. 451; 4 L. J. (o.s.) C. P. 148.

A. and B. may join in an action for a libel, containing imputations injurious to a trade carried on by them jointly as partners. Le Fanu v. Malcomson, 1 H. L. Cas. 637.

Certain words were found by the jury to be defamatory of the plaintifts as co-proprietors of a newspaper:—Held, that the action could be brought by the two co-proprietors; that no special damage need be alleged; and that the jury might give general damages for the libel. Russelt V. Webster, 28 W. R. 59.

And Separately.]—Where works imputing insolvency in trade are spoken of one of the partners in a firm, such individual partner may maintain an action of slander, and record damages for the injury done to lim; and it is not necessarily to be considered as an injury to the partnership, for which a joint action only can be maintained. Harrison v. Berington, 8 Car. & P. 708.

To an action by A. for words imputing insolvency in the way of his trade, which he carried on in partnership with B. and C.; the declaration stating, by way of special damage, that S. had withdrawn his account from A. aud his co-partners; a plea that A. carried on his trade jointly with B. and C., and not otherwise, and that all the damage accraced to B. and to jointly with A., and not to A. alone, is III. Holiason v. Marchant, 7 Q. B. 918; 15 L. J., Q. B. 135; 10 Jun. 156.

Husband and Wife jointly. —A declaration, by husband and wife, for muliciously speaking and publishing of the fennale the words alleged as follows: —"I can prove that J. D.'s wiff chemole) had connection with a man named L. two years ago, but I would rather have the tongue cut out of my mouth than separate man and wife." Special damage, that she was thereby injured in her character and reputation, and became alienated from, and deprived of, the companiouship, and ceased to receive the hospitality, of divers friends, and was deprived of, the companiouship, and ceased to receive the hospitality of divers friends, and especially of her husband, and lost, and was deprived to, or be friendly with her: —Held, that he wife was properly joined in the action. Dartes v. Solomon, 41 L. J., Q. B. 10; L. R. 7 Q. B. 112; 25 L. T. 799; 20 W. R. 167.

An action by husband and wife for words not uttered in his presence, but repeated to him by the wife, impating to her a want of chastity, will not lie against the author of the slauder, the special damage being the husband's refusal to live with the wife in consequence of the imputation upon her. Perkins v. Scott, 1 H. & C. 153; 31 L. J., Ex. 331; 8 Jur. (N.S.) 598; 6 L. T. 394; 10 W. R. 562

An action does not lie at the suit of husband and wife for words slandering the wife in a trade carried on by her, it not being alleged that she was divorced a mensa et thoro, or had a separate maintenance. Saville v. Savan, 1 N. & M. 254; 4 B. & Ad. 514; 2 L. J., K. B. 52.

Wife deserted by Husband, ]—A wife who has been deserted by her husband, and has obtained an order under 20 & 21 Vict. c. 85, 8, 21, for the protection of her money and property from her nusband and his creditors, may maintain an action for a libel without joining her husband. Runsidea v. Brearley, 44 L. J., Q. B. 46; L. R. 10 Q. B. 147; 28 L. T. 24; 23 W. R. 294.

Two Plaintiffs for Different Slanders—Misjoinder.)—By Ord. XVI., v. 1, "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly severally, or in the alternative." Two plaintiffs joined in an action for slander, and delivered a statement of claim alleging several different slanders, some of one plaintiff, and some of the other :—Held, that the plaintiffs were improperly would proceed, and that so much of the state-ment of claim as related to the other plaintiff must be struck out. Booth v. Briscoe (2 Q. B. D. 496) and Gart v. Rowney (17 Q. B. D. 625), discussed. Sandes v. Wildsmith, 62 L. J., Q. B. 404; [1893] 1 O. B. 771: 69 L. T. 387.

#### b. To be Sued.

Joint Stock Company. ]—A joint-stock company is liable to an action for a libel. Lawless v. Anglo-Egyption Cotton and Oil Co., 10 B. & S. 222f; 38 L. J., Q. B. 129; L. R. 4 Q. B. 262; 17 W. R. 498.

Railway Company, ]—An action against a rail-way company, being a corporation aggregate, for a malicious libel is sustainable, for a corporation aggregate may well, in its corporate capacity, cause the publication of a defamatory statement under such circumstances as would imply malice in hav sufficient to support the action. Whit-field v. 8, E. Ry., El, Bl. & El. 115; 27 L. J., Q. B. 229; 4 Jur. (N.S.) 688; 6 W. R. 545.

# 2. Pleadings.

# a. Claim.

### i. Defamatory Matter.

What must be set out.]—Since 15 & 16 Viet-c. 76, s. 61, a declaration for libel or for slander need not state any colloquium, but may set out the words complained of, and put any construc-tion upon them by innuendo. Hemmings v. Gasson, El. Bl. & El. 346; 27 L. J., Q. B. 252; 4 Jur. (N.S.) 834; 6 W. R. 601.

Whether the words were spoken with such meaning is for the jury. Ib.

Words must be applicable to Plaintiff. ]-Where the words written or spoken are not in themselves applicable to the individual plaintiff, no introductory averment or immendo can give such an application. Solomon v. Lawson, 8 Q. B. 823; 15 L. J., Q. B. 253; 10 Jur. 796.

Actual Words must be set out Verbatim.]— Where a declaration for libel sets out a publication which refers to a previous publication; but which, unless by reference to the language of the previous publication, contains no libel, such previous publication must be considered as incorporated in the publication complained of, and must appear in the declaration to be set out

verbatim, and not merely in substance. Ib.

In an action for a libel in a review, it is sufficient to set out the contents of an index (referring to an article in the body of the review), which is of itself a libel; and no reference need be made to the article itself, if the index contains, per se, prima facie libellous matter. Buckinghum v. Murray, 2 Car. & P. 46; 31 R. R. 653.

A declaration stating that the defendant published a libel containing false and scandalous matter of and concerning the plaintiff, "in substance as follows," and setting out the libellous matter with immendoes, is bad in arrest of judgment, as the law requires the very words of the libel to be set out in the declaration, in order that the court may see whether it is a libel or not. Wright v. Clements, 3 B. & A. 503; 22 R. R. 465.

joined, and that they must elect which plaintiff the plaintiff, about to be sold by auction, were stolen property, whereby purchasers were de-terred from bidding, and the sale was defeated, is bad in arrest of judgment, for not setting out the bad in arrest of judgment, for not setting out the words verbatim. Gatabale v. Mathers, I. M. & W. 495; 2 Gale, 64; 5 D. P. C. 69; 1 Tyr. & G. 694; 5 L. J., Ex. 274. S. P., Cook v. Cher, 3 M. & S. 110; Harris v. Warre, 48 L. J. C. P. 310; 4 C. P. D. 125; 40 L. T. 429; 27 W. R. 461.

A declaration for words "that the plaintiff had set fire to his own barley-stack," averring that the stack was insured, and was burnt without his own default, and that the defendant spoke the words of the plaintiff and the fire, is bad on demurrer. West v. Smith, 4 D. P. C. 703. S. P., Rigby v. Heron, 1 Jur. 558.

- Part of Sentence sufficient. I is no objection, that a part only of one sentence in a letter is inserted in a count for libel, if it appears that enough is set out to comprise the substance of the charge made by the defendant against the plaintiff. Rutherford v. Erans, 6 Bing, 451; 4 M. & P. 163; 4 Car. & P. 74; 8 L. J. (O.S.) C. P. 86: 31 R. R. 465.

 Separate Passages to be distinguished. -If separate passages of a libel are set out in one count, they should be described as separate and distinct parts. Tubart v. Tipper, 1 Camp. 352; 10 R. R. 698.

- Words Spoken in two Discourses. Where a declaration sets out words alleged to have been uttered, some in one discourse, and the remainder in a second discourse, and there are in form but two counts, each containing only the words alleged to have been uttered in one dis-course, the declaration will be treated as containing only two counts, though each of such two counts contains separate allegations of the uttering of different words in the particular discourse. Griffiths v. Lewis, 8 Q. B. 841; 15 L. J., Q. B. 249; 10 Jur. 711.

As to one Count explaining another. ]-If a declaration against the publisher of a newspaper contains several counts, charging different libels, which have appeared at different times in several distinct numbers of the paper; each of these counts is to be taken as distinct and separate from the rest; and if the matter of which one of them complains is not libellous on the face of it, the other counts cannot be referred to to explain its meaning, or to show that it was such in reality. Hughes v. Roeres, 4 M. & W. 204; 1 H. & H. 197: 2 Jur. 809.

Words must show Cause of Action.] declaration, stating that the defendant published of the plaintiff a false and malicious libel, purporting thereby that the plaintiff's beer was of a bad quality, and deficient in measure, whereby he was injured in his credit and business, is bad on general demurrer. Wood v. Brown, 1 Marsh. 522; 6 Taunt. 169; 16 R. R. 597.

But where a declaration contained several counts, stating the words constituting such slander, and the fifth alleged that "the defendant wrongfully, and without any reasonable or probable cause, imposed the crime of felony upon the plaintiff":--Held, on a motion in arrest of judgment, that such count was sufficient after verdict. Blizard v. Kelly, 3 D. & R. 519; A declaration for words imputing that tulips of 2 B. & C. 283; 2 L. J. (o.s.) K. B. 6.

Allegation of Criminal Offence sufficient.]— Which imputing that the plaintiff has been guilty of a criminal offence will support an action for slander, without special damage; and it is not necessary to allege in the statement of claim that they impute an indictable offence. Webb v. Heacam, 53 L. J., Q. B. 544; 11 Q. B. D. 609; 49 L. T. 201; 47 J. P. 488.

Allegation of Malicious, Injurious, and Unlawful Advertisement good. —The allegation that the defendant published a malicious, injurious, and unlawful advertisement, seems good without the word "false." Rove. v. Rovek, 1 M. & S. 304.

When Written or Spoken in a Foreign Language.]—In an action for a libel written in a foreign language, the plaintiff must set forth the libel in the original; and if he only sets out a translation of it, the court will arrest the judgment. Zenobio v. Axtell, 6 Term Rep. 162; 3 R. R. 142.

R. R. 142.

A declaration stated, that the defendant said of the plaintiff, "He is a thief, a swindler, and a forger." The defendant pleaded not guilty. The words were proved to have been spoken in the Welsh language, but were of the same meaning as the English words stated in the declaration. The judge allowed the declaration to be amended by inserting the Welsh words. Jenkins v. Phillips, 9 Car. & P. 766; 5 Jur. 252.

In such a case the amendment ought actually to be made by translating the English words in the declaration into Welsh words of the same meaning, and inserting those words in the declaration. It.

Where slanderous words are uttered in a foreign language, the declaration should aver that the persons in whose presence they were spoken understood the language. Amann v. Dannn, 8 C. B. (N.S.) 597; 29 L. J., C. P. 313; 7 Jur. (N.S.) 47.

Ameanment of Claim.]—A declaration alleged that the defendant wrote and published of the plaintiff that "a receipt was obtained from the defendant by fraudulent means, and that the plaintiff was cognisant of such fraud." The judge at the trial allowed the techantion to be amended, by introducing a letter alleged to contain the libel, with the words "meaning thereby" immediately before the libel charged in the declaration:—Held, that the amendment was properly made. Saunders v. Bate. 1 H. & N. 402.

#### ii. Publication.

Publication. —The publication of a libel must be stated in a declaration, but it may be collected from the whole of it, and need not be set forth in any technical form of words. Baldwin v. Elphinston, 2 W. Bl. 1037.

Though, in an action of libel, prefatory averages may be necessary to explain the matter alleged to be libellous, it is enough to state in the declaration, that the publication was of and concerning the plaintiff, without also stating that is was of and concerning such matter. O'Brien. V. Clement, 4. D. & L. 563; 16 M. & W. 159; 16 L. J., Ex. 76, 77. S. P., Clock v. Ward, 4 M. & P. 99; 6 Bing, 409; 8 L. J., (cs.) C. P. 126.

#### iii. Innuendoes,

Necessary when Words not Defamatory per so,—Since 15 & 16 Yiet. c. 76, s. 61, it is not sufficient to aver that words used, which are not in themselves actionable, were used for the purpose of creating an impression unfavourable to the plaintiff, or meant that he ought to be regarded with suspicion of being guilty of something wrong or blameable, but the declaration must attach to the words used some specific meaning which is in itself actionable. Chev. Cooper, 9 L. 7. 329; 12 W. R. 75.

Where the words laid are not per se defamatory in their ordinary sense, or have no meaning at all in ordinary acceptation, there must be an immendo in order to admit evidence that in a peculiar sense they are defamatory. Rawlings v. Norbury, 1 F. & F. 341.

When Unnecessary, ]—If the words spoken are capable of imputing an indictable offence, they are actionable without attaching any immende; and if an immende is attached, it is sufficient to say, "thereby meaning that the plaintiff had been guilty of an indictable offence," without specifying what particular indictable offence is meant. Kindahaw x, Br Cullugh, Ir, R. I. C. L. I.

When written or printed matter in itself imports a libel on the plaintiff, no statement of extrinsic circumstances, by way of inducement, is necessary, and an immendo improperly enlarging the sense will be rejected as surplusage. Harvey v. Fronch, 2 Tyr. 585; 1 C. & M. 11; 2 M. & Scott, 501; 1 L. J., Rx. 281—Ex. (1).

Prefatory Averments cannot be substituted for.]—The immendoes not declaring that the words were spoken with the intention of imputing to the plaintiff a felony, and not importing to enlarge the meaning of those words.—Held, that the prefatory averments which only precised to give the motives of the defendant could not be substituted for those immendoes whereby the plaintiff undertook to give the meaning of the words spoken. Simmons v. Mitchell, 50 L. J., P. O. II; 6 App. Cas. 156; 43 L. T. 710; 29 W. R. 401; 45 J. P. 28T—P. C.

Must be sufficiently Alleged.]—In an action for slander the statement of claim alleged that the defendant falsely and multiclously spoke and published the following of the plaintiff: "Did he (meaning the plaintiff) have a fire twice!" (meaning thereby that the plaintiff lad upon two occasions set his business premises on fire or caused them to be set on fire). "He (meaning the plaintiff) has had two fives and is a dangerous man to have on your premises." (meaning thereby that the plaintiff had upon two occasions witfully set on fire his business premises, or caused them to be set on fire, and was likely to do so again):—Held, that the plaintiff must be nonsuited on the ground that the inhumod owas hisufficiently alleged to give a good cause of action. Juvebs v. Schenditz, 62 L. T. 121.

Must be supported by the Defamatory Words.]
—An innuendo unconnected with a prefatory
averment cannot enlarge the sense of a libel.
Goldstein v. Fuss (in error), 2 Y. & J. 146; 4
Bing. 489; 1 M. & P. 402; 29 R. R. 610.

The following written words, "He is so inflated with 3001, made in my service, God only knows whether honestly or otherwise," &c.:-

without any preliminary averment, warranted an [ innuendo that the plaintiff had conducted himself in a dishonest manner in the defendant's service. Clegg v. Laffer, 3 M. & Scott, 727; 10 Bing, 250; 3 L. J., C. P. 56.

A first count was on the following words: "We are requested to state that the honorary secretary of the Tichborne Defence Fund is not and never was a captain in the Royal Artillery, as he has been erroneously described." Innuendo, that the plaintiff was an impostor, and had falsely and fraudulently represented himself to be a captain in the Royal Artillery. Second count : "the gentleman in question was a paycount: "the gentieman in question was a pay-master in the Royal Artillery, and as such received in due course the honorary rank of captain in the army, which is so stated in his commission. His name appears under the head of paymasters on half-pay in this month's Army List. He is certainly not entitled to hold a command as an artillery officer." Immendo, that the plaintiff was an impostor, and had falsely and maliciously represented himself to be a captain in the artillery. At the trial it appeared that the plaintiff had been a paymaster in the Royal Artillery, that he held a commission as honorary captain in the army, and was addressed and generally known as eaptain. He became honorary secretary to a fund, and in respect of his connection therewith, and his name being attached with the addition "Captain, R.A." to certain advertisements, the alleged libels were published in the defendant's newspaper. On these facts the plaintiff was nonsuited :- Held, that the nonsnit was right; as the words alleged to be libellous did not primâ facie support the innuendoes, there was no evidence to go to the jury of circumstances rendering the statements charged capable of bearing the meaning imputed to them. H. Goodlake, 43 L. J., C. P. 54; 29 L. T. 472.

H. & Sons occasionally received, in payment from their enstomers, cheques on various branches of a bank, which the bank cashed for the convenience of H. & Sons at a particular branch, Having had a dispute with the manager of that branch, H. & Sons sent a printed circular to a large number of their customers (who knew nothing of the dispute)—"H. & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capi-tal and Counties Bank," The circular became known to other persons; there was a run on the bank, and loss inflicted. The bank having brought an action against H. & Sous for libel, with an innnendo that the circular imputed insolveney :- Held (Lord Penzance dissenting), that in their natural meaning the words were not libellous; that the inference suggested by the innuendo was not the inference which reasonable persons would draw; that the onus lay on the bank to shew that the circular had a libellous tendency; that the evidence, consisting of the circumstances attendevidence, consisting of the electronistances accom-ing the publication, failed to shew it; that there was no case to go to the jury; and that the defendants were entitled to judgment. Capital and Counties Bunk v. Henty, 52 L. J., Q. B. 232; 7 App. Cas. 741; 47 L. T. 662; 31 W.R. 157; 47

A declaration stating that the plaintiff was an asphalte manufacturer, and employed by the Board of Ordnance to relay the entrance to their office with new asphalte; and that the defendant,

work, "The old materials have been relaid by you (the plaintiff) in the asphalte work executed you (tue paintin) in the asphalte work excepted in the front of the Ordnance Office, and I have seen the work done, "(meaning that the plaintiff had been guilty of dishonesty in his trade by laying down again the old materials which had been before used at the entrance of the Ordnance Office instead of new asphalte, according to his contract) is good, and the innuendo not too large, as it put no new sense on the words, but mage, as it put no new sense off the words, but only pointed at the intention of the plaintiff. Baboneeu v. Farrell, 15 C. B. 360; 3 C. L. R. 42; 24 L. J., C. P. 9; 1 Jun. (N.S.) 114; 3 W, R. 11.

In an action for a libel in a Dublin newspaper, the first count, after the usual prefatory averments, proceeded thus: "What possessed Lord H. (meaning the Lord-Lientenant of Ireland), if he knew anything about the country, or was not under the spell of vile and treacherous influence, to make his first visit, and that carefully puffed to Long's, the coachmaker (meaning the plaintiff), the other day. If mere trade was his (meaning the Lord-Lientenant's) object, he had several respectable houses open to him (meaning that the house and place of business of the plaintiff was not respectable, and that the visit was paid thereto for political purposes)":—Held, that the inneeded did not enlarge the sense of these words, which were fully capable of the meaning given to them. Barrett v. Long, 3 H. L. Cas. 395.

Another count repeated the same words, and accompanied them with the following innuendo (meaning that the house of business of the plaintiff was not a respectable house in the trade, and that the plaintiff himself was of such a character that he would not be visited in the way of his trade and business, except from some political party or other improper motive) :--Held, that the words were capable of the meaning thus attributed to them; but that if the innuendo was more extensive than the words, it might be rejected as repugnant and void; and that the words, being libellous, were actionable without its aid. Ib.

A declaration stated that the plaintiff was in the employ of one Glass, and that he was at work in his master's barn threshing corn, and that the defendant, to cause it to be suspected that the plaintiff had been guilty of felony, in a eertain discourse concerning the plaintiff said, "I saw one John Gay coming across Master Glass's barn with some barley; and Gay said he was going to feed pheasants with it, and said that where he had that he could have more, and that he had it at Farmer Glass's barn" (meaning the barn where the plaintiff was at work; and that the barley, so alleged to have been in the possession of Gay, was the property of Glass, and that the plaintiff had stolen the same from Glass and had given it to Gay):—Held, that the in-nuendo was too large, and that the declaration was insufficient. Wheeler v. Haynes, 1 P. & D. 55; 9 A. & E. 286; 1 W. W. & H. 645; 8 L. J., Q. B. 3.

A count stated as inducement that the plaintiff was a livery-stable keeper, and by that trade and business acquired profit; that T. P. had become business adding that it is a bank to prove a debt justly due under his commission; and that the defendant spoke these words of and concerning him in his trade—"You (meaning the plaintiff) are a regular prover under bankwell knowing the premises, falsely said of the rupties" (meaning that the plaintiff was accusplaintiff in his trade, and in reference to the tomed to prove fictitious debts under commissions of bankrupt) :-Held, first, that the words after he became mentally incompetent to perdid not impute a charge against the plaintiff in the way of his trade and business; and secondly, that the innuendo imputing a crime punishable by law was badly pleaded as enlarging the natural meaning of the words used, without resting on any introductory averment of a colloquium respecting the proof of fictitious debts. Alexander v. Angle, 1 Tyr. 9: 1 C. & J. 143. S. C., nom. Angle v. Alexander, 7 Bing. 119; 4 M. & P. 870.

A count set forth the following passage of a letter from the defendant to P.:—"I have reason to suppose that many of the flowers of which I have been robbed are growing upon your pre-mises" (thereby meaning that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots, and flowers of the defendant, and had unlawfully disposed of them to P., and unlawfully placed them in P.'s garden). The previous part of the letter stated that the plaintiff, whom P. had taken into his employ as a gardener, had been in the defen-dant's service in the same capacity, and had been discharged for dishonesty :- Held, that the innuendo was not too large, and that the count was good. Williams v. Gardiner, 1 M. & W. 245; 1 Tyr. & G. 578; 5 L. J., Ex. 280—Ex. Ch. A count laid the words as follows:—"You

have robbed me of one shilling tan money: and the innnendo explained the meaning to be, that the plaintiff had frandulently taken and applied to his own use one shilling received by him for the defendant, being the produce of the sale of some tan sold by the plaintiff for and as servant to the defendant; but the facts stated in this innuendo were not alleged by any independent averment :- Held, that the innuendo was bad, as introducing new facts; and that, without the immendo, the count did not charge words actionable in themselves. Day v. Rabinson, 4 N. & M. 884; 1 A. & E. 554; 3 L. J., Ex. 381—

Ex. Ch. Where a declaration alleged that the defendant said of the plaintiff that he had set fire to his own premises, innueudo, that he had been guilty of wilfully setting fire to the premises which, whilst in his occupation, had been destroved by fire :- Held, that the court could not after verdict presume that the jury had found that the defendant meant to impute to the plaintiff that he had done it unlawfully or felouiously, as well as wilfully. Sweetepple v. Jesse, 2 N. & M. 36; 5 B. & Ad, 27; 2 L. J., K. B. 181.

May apply Words used generally to Individual.]-Though defamatory matter may appear only to apply to a class of individuals, yet if the descriptions in such matter are capable, by innuendo, to be shewn directly applicable to any one individual of that class, an action may be maintained by such individual in respect of the publication of such matter. Le Fann v. Malcomson, 1 H. L. Cas. 637.

In such a case the immendo does not extend the sense of the defamatory matter, but merely points out the particular individual to whom the matter, in itself defamatory, does in fact apply. Ib.

A count alleged the libel as follows : "There is strong reason for believing that a considerable sum of money was transferred from Mr. T.'s name, in the books of the Bank of England, by power of the defendant may not deny generally in his attorney obtained from him by undue influence, statement of defence that the "defendant wrote

form any act requiring reason and understanding" :- Held, that although the libellous words pointed at no particular person, yet, as they imputed, in substance, that some one had been guilty of the offence, the plaintiff might, by innuendo, apply them to himself, and that it was a question of evidence, whether they applied to him. Merywether v. Turner, 19 L. J., C. P. 10-Ex. Ch. Affirming, 7 C. B. 251; 15 Jur. 683.

If set out Count can be Read with or without," —Since 15 & 16 Vict. c. 76, s. 61, a count in libel or in slander setting out the words with an innuendo may be read as two counts, one with the innueudo and the other without it, and proof of either is sufficient. Wathin v. Hall, 9 B. & S. 279; 37 L. J., Q. B. 125; L. R. 3 Q. B. 396; 18 L. T. 561; 16 W. R. 857.

Cannot be Abandoned and another suggested.] If a count, for words actionable perse, contains an immendo attributing to the words a meaning of which they are capable, and the jury finds (upon distinct issues)—that the publication is a libel, and that the words do not bear the defamatory sense alleged,-the innuendo cannot berejected to enable the plaintiff to gain the verdiet upon another construction of the words. Magnire v. Know, Ir. R. 5 C. L. 408.

If a good innuendo in a declaration, ascribing a particular meaning to alleged slauderous words, was not supported in evidence, the plaintiff could not reject it at the trial, and resort to another meaning. Williams v. Stott, 1 C. & M. 675; 3. Tyr. 688; 2 L. J., Ex. 303; 3 L. J., Ex. 110.

No Innuendo-Libel not in Terms relating to-Plaintiff ]—A declaration alleged that the defen-dant published of and concerning the plaintiff, the following matter, without alleging that the matter was of and concerning the plaintiff; it then set out the libel, which did not appear on the face of it to relate to the plaintiff, and there was no immendo to connect it with him :-Held, that it was bad even after verdiet. Clement v. Fisher, 7 B. & C. 459; 1 M. & Ry. 281; 6 L. J. (o.s.) K. B. 39.

# iv. Mutter in aggracution of Damages,

A paragraph in a statement of claim in an action for a libel published in a newspaper stated that the defendant knew that the words published would be, and the same in fact were, repeated and published in other editions of the same newspaper :- Held, that evidence of the facts stated in this paragraph would be admissible at the trial, and therefore the paragraph was properly pleaded and ought not to be struck Whitney v. Moignard, 59 L. J., Q. B. 324; 24 Q. B. D. 630.

# b. Defence.

i. Generally.

Drunkenness no Defence. - Actions against words spoken during drunkenness not relieved against. Kendrick v. Hopkins, Cary, 93. Qui peccat ebrius, luat sobrius. Ib. Qui peccat ebrius, huat sobrius.

General Denial that Libel was Falsely and Maliciously Published. |- In an action for libel he relies, either to shew instification or privilege. Belt v. Lunes, 51 L. J., Q. B. 359.

Different Words admitted to have been Spoken -Struck out as Embarrassing. -The defendant having spoken the words alleged, and set out other words which he admitted having spoken, and which he alleged were true and were spoken on a privileged occasion :- Held, that this pleading was embarrassing, and ought to be struck out. Rassum v. Budge, 62 L. J., Q. B. 312; [1893] 1 O. B. 571: 5 R. 336: 68 L. T. 717: 41 W. R. 377: 57 J. P. 361.

Information received from Another-Belief in Truth-Disclosure of Author-No Defence. -A man who receives information which, if true, is injurious to the character of another, is not justified in publishing that information to the prejudice of that other merely because he believes it to be true. Batterill v. Whytchead, 41 L. T. 588.

In an action for a libel, it is no plea that the defendant had the libellous statement from another, and upon publication disclosed the author's name. *De Crespigny* v. *Wellesley*, 5 Bing, 392; 2 M. & P. 695; 7 L. J. (0.8.) C. P. 100 : 30 R. R. 665.

It is not an answer to an action for oral slander. for a defendant to shew that he heard it from another, and named the person at the time, with-out shewing that he believed it to be true, and that he spoke the words on a justifiable occasion. M. Pherson v. Daniels, 10 B. & C. 263; 5 M. & Ry. 251; 8 L. J. (0.8.) K. B. 14.

It is no justification that the libellous matter was previously published by a third person, and that the defendant, at the time of his publication, disclosed the name of that person, and believed all the statements contained in the libel to be true. Tidman v. Ainslie, 10 Ex. 63.

If a defendant, at the time of speaking the slander, gave up the name of the person from whom he heard it, this is no justification ; but if he did this, and at the trial proves that he did in fact hear the slander from that person, it will go in mitigation of damages. Bennett v. Bennett, 6 Car. & P. 586.

It is no justification to an action of slander to plead that such a one told the slander to the defendant. Davis v. Lewis, 7 Term Rep. 17: 4

But if the person repeating the slander at the same time mentions the name of the person from whom he heard it, that may be pleaded in justification to an action brought against the former. Ib.

Newspaper Copying from another-Bad Plea.] -To a declaration for a libel published in a newspaper, which reflected on the plaintiff in his character of an attorney, the defendant pleaded that the libel was first published in a newspaper called "The Hampshire Journal," by G. H. M. and W. H.; and that, at the time of publication by the defendant, it was also stated in such publication that such libellous matter was copied from that newspaper; and that pursuant to 38 Geo. 3, c. 78, G. H. M. and W. H. had made an affidavit that they were the publishers of "The Hampshire Journal," and had not ceased to be so at the time of the publication of the libel :- Held, that this 4 Jur. (N.S.) 970; 6 W. R. 629.

or published the same falsely, or maliciously, as | plea was bad, as it did not state that the persons alleged," but must set out the facts upon which from whose paper the libel was copied were the from whose paper the libel was copied were the original authors. Lewis v. Walter, 4 B. & Ald. 605; 23 R. R. 415.

> Letter in Newspaper commenting on Previous Letter. - In an action for a libel contained in two letters published in a newspaper, a plea that the second letter (which in itself contained a distinct substantive libel) was a fair comment upon the facts stated in the first letter, is a bad plea. Walker v. Brogden, 19 C. B. (N.S.) 65; 11 Jur. (N.S.) 671; 12 L. T. 495; 13 W. R.

> That two Counts alleged same Libel. |--- Where the first and second counts alleged the composing and publishing of two libels, and the defendant in his pleas of justification stated that "the libels so set forth were one and the same supposed libel, and not other and different supposed libels": Held, that such pleas were bad, because it was impossible to say with truth that the two libels alleged to have been severally composed and severally published were one and the same libel. Edmonds v. Walter, 3 Stark. 7; 2 Chit.

> Action by Husband and Wife - Plea that Plaintiff not Husband and Wife good, ]—To an action of slander by the plaintiff and his wife, a plea that the plaintiff, Maria, was not the wife prea that the phillith, Maria, was not the wife of the plaintiff George, is a good plea in bar. Chantler v. Lindsey, 4 D. & L. 339; 16 M. & W. 82; 16 L. J., Ex. 16.

Plea of Not Guilty. ]-In an action for libel the plea of not guilty puts the malice in issue, Houre v. Silverbook, 9 C. B. 20: 19 L. J., C. P. 215. So under not guilty you may disprove the fact of publication, or shew that it is not of an injurions character, or that it was published on some justifiable occasion. O'Brien v. O'lement, 3 D. & L. 678; 15 M. & W. 485; 15 L. J., Ex. 285; 10 Jur. 395.

For words not actionable per se, not guilty puts in issue the special damage alleged, as well as the attering the words. Wilby v. Elston, 7 D. & L. 143; 8 C. B. 142; 18 L. J., C. P. 320; 13 Jur. 706.

In an action for a libel, the defendant at first pleaded not guilty, but afterwards pleaded, to the further maintenance of the action, that the plaintiff had recovered damages against another person for the same grievances. New assignment, that the action was brought for other and different grievances. Plea to new assignment, not guilty:-Held, that this did not admit the innuendoes; and that, by pleading not guilty to the new assignment, the defendant had raised precisely the same issue as if the libel had been set out in the declaration, and the defendant had pleaded not guilty to it. Brunswick (Duke) v, Pepper, 2 Car, & K. 683.

În an action of libel, a plea setting out facts to shew that the alleged libel was a fair comment will not be allowed with not guilty. Lucan (Earl) v. Smith. 1 H. & N. 481: 26 L. J., Ex. 94: 2 Jur. (N.S.) 1170; 5 W. R. 138,

It is a good defence to an action for a libel that it consists of a fair, correct, and impartial report of a trial in a court of justice; and such defence is admissible under not guilty. Lowis v. Lovy, El. Bl. & El. 537; 27 L. J., Q. B. 282; — Privilege.]—Privileged communication is a defence that may be set up under the plea of not guilty. Lillie v. Price, 1 N. & P. 16: 5 D. P. C. 432; 5 A. & E. 645; 2 H. & W. 381; 6 L. J. K. B. 7.

Plea that Words did not bear Meaning alleged.]—A declaration averred, that the defendant used the word "black-sheep" for the purpose of expressing and meaning, and it was understood by the persons to whom the libel was addressed as expressing and meaning, a person notorious by reason of bad character, and of stained and sullied reputation; yet the defendant, intending to cause it to be believed that the plaintiff had conducted himself dishonestly and improperly, published of the plaintiff the libellous matter following:—"Black-sheep" (meaning that the plaintiff was a black-sheep, in the sense and meaning in which the word was used by the defendant). The declaration then set forth a statement of facts respecting the plaintiff; no part was in itself libellous. The defendant plended, as to the publishing of the following part of the libel, that is to say, black-sheep, that the defendant did not use that word for the purpose of expressing or meaning, nor was it understood as expressing or meaning, a person notorious by reason of bad character, or of stained and sullied reputation :- Held, first, that the plea was well pleaded as to that part only of the libel; secondly, that it was rightly pleaded as to the publishing of that part of the libel, and not to the inducement in the declaration as to that part; and, thirdly, that it was not bad as amounting to not guilty; the averment in the declaration as to the word "black-sheep," being properly matter of inducement, which it was necessary to traverse specially. M'Gregor v. Gregory, 11 M. & W. 287; 2 D. (N.S.) 769; 12 L. J., Ex. 204.

Privilege—How Pleaded.]—In an action of slander a plea of privileged communication must allege that the derendant made the communication on a lawful occasion, believing it to be true, and without malice; or at least bona fide. Smith v. Thomas, 2 Scott, 546; 4 D. P. C. 333; 2 Bing. (Xo.) 372; 1 Hodges, 353; 5 L. J., C. F. 52.

Traverse of Special Damage only.]—A plea in bar, which merely denies that the plaintiff has sustained special damage is bad, where the words are actionable in themselves. Ib.

#### ii. Justification.

Plea must be Specific.]—A general plea of justification in an action of libel, where the libel complained of consists of a general charge against the plaintiff, is bad, maless the defendant, in his particulars, states specifically the facts upon which he relies in support of the charge. Abenduer, Labenderer, 68 L. J., Q. B. 89; 1383 2 Q. B. 188; 4 R. 464; 69 L. T. 172; 41 W. 5. 675; 57 J. P. 711–C. A.

A justification may be allowed, in a general form, where the charge is not matter indictable, the detendant rendering particulars of the charges intended to be justified. Behrens v. Allen, 8 Jur. (x.8.) 118. S. F., Early v. Smith, 12 Iv. C. L. R., ADD. XXV.

The practice is, in actions of libel, to allow

-Privileged communication is pleas of justification in a general form with a be set up under the plea of liberal allowance of particulars. Gourley v. v. Price, 1 N. & P. 16; 5 Plimsoll, 42 L. J., C. P. 121; L. R. 8 C. P. 362; A. & E. 645; 2 H. & W. 381; 28 L. T. 593; 21 W. R. 683.

In an action for a libel substantially charging the plaintiff, a shipowner, with sending ships to sea over-insured, over-loaded, and under-manned, and with an habitual disregard for human life in the conduct of his business, a judge at chambers allowed the defendant to plead general pleas of justification, "that the several words and matters concerning the plaintiff were true in substance and in fact," subject to particulars. The court sustained the order, holding it to be a more convenient course than setting out the sevence matters of justification upon the record. 12.

A general plea of justification of a libel contained in an attorney's bill of costs, that it is true, without stating the facts, ought not to be allowed. Bruton v. Downes, 1 F. & F. 668.

A justification merely in the words of the libel, where it was general in its terms, was not sufficient; it ought to have stated the particulars, \$\mathcal{J}Anson v. Stuart, 1\$ Term Rep. 748; 1 R. R. 392.

A justification of a charge of a person being a swindler must state the particular instances of fraud by which the defendant meant to support it. It.

A libel charged an attorney with general misconduct, viz. gross negligence, falsehood, prevariention, and excessive bills of costs, in the business he had conducted for the defendant: a plea in justification, repeating the same general charges, without specifying the particular acts of misconduct, was insufficient. Holmesv. Cuteshy, 1 Taunt, 543.

To a declaration for words, imputing to the plantiff, a pawnbroker, that he had committed the unfair and dishonourable practice of duffing, that is, of replenishing or doing-up goods, being in his hands in a damaged or worn-out condition, and pledging them with other pawubockers, the defendant pleaded, that the plaintiff did replenish and do up divers goods, being in his hands in a damaged or worn-out condition, and pledge them with divers other pawnbrokers.—Hell, bad, on special demurrer, as not being sufficiently specific. Hiskinbulham v. Leach, 10 M. & W. 361; 2 D. (Xs.3) 270; 11 L. J., Ex. 341.

To more Libels than One.]—But where the first and second counts alleged the composing and publishing of two libels, and the defendant, in his pleas of justification, stated that "the libels so set forth were one and the same supposed libel, and not other and different supposed libel, and not other and different supposed libel, and not other and different supposed libel and supposed proposed and severally only the supposed and severally published were one and the same libel. Edmands v. Watler, 2 Chit. 201; 3 Static. 7.

To a declaration containing three counts for three distinct libels, the court refused to allow a defendant to plead one general plea of justification. *Honess v. Stubbs*, 7 C. B. (N.S.) 555; 29 L. J., C. P. 220; 6 Jur. (N.S.) 682; 8 W. R. 188.

Embarrassing Pleastruckout.]—To a declaration setting out part of a newspaper article accusing the plaintiff of base and ungrateful conduct, the defendant pleaded pleas alleging that words in the article charging the plaintiff with bribery were omitted from the declaration. The pleas set out the whole of the newspaper

prejudice, embarrass, and delay the fair trial of the action. Bremridge v. Latimer, 10 L. T. 816; 12 W. R. 878.

Comment must be Justified as well as Fact. ]-Where matter complained of as libellous consists of a statement of facts, and a comment thereon, which comment is not a necessary inference from the facts, a plea of justification is bad, unless it justifies the comment as well as the facts, and it is for the jury to say whether the evidence justifies the comment as well as the facts. Cooper v. Lawson, 1 P. & D. 15; 8 A, & E, 746; 1 W. W. & H. 601; 8 L. J., Q. B. 9; 2 Jur. 919.

Of Statement that Plaintiff had been Convicted.]—Action for publishing the following libel—"The North Eastern Railway Company. Caution. J. A. (the plaintiff) was charged before the magistrate at D. for riding in a train from L. for which his ticket was not available, and refusing to pay the proper fare. He was convicted in the penalty of 9l. 1s. 10d., including costs, or three weeks' imprisonment." A plea costs, or three weeks' imprisonment." A plea alleged a summary conviction adjudging the plaintiff to forfeit 11., and 81. 1s. 10d. costs, and on non-payment and in default of distress, the plaintiff to be imprisoned for three weeks, which conviction at the time of the doing of what was complained of, was in full force. The replication set out the conviction, by which the period of alternative imprisonment was fourteen days. Rejoinder, that the conviction was described with substantial accuracy and truth, as well in the libel as in the plea:—Held, first, that the difference between the conviction and the statement of it published did not make the latter in law libellous. Alexander v. North Eastern Ry., 6 B. & S. 240; 34 L. J., Q. B. 152; 11 Jur. (N.S.) 619; 13 W. R. 651.

Held, secondly, that it was a question for a jury whether the statement of the conviction was substantially true. Ib.

Held, thirdly, that the plea was good, with an allegation that the conviction was in force at the time of pleading. Ib.

To a declaration for printing and publishing of the plaintiff that he was charged at a petty sessions with having travelled on a railway without first paying his fare, and was convicted of the offence in a penalty and costs amounting to 11. 2s., "meaning thereby that the plaintiff had attempted to defraud the company, a plea that he was so charged and convicted as in the declaration mentioned, without expressly justifying the innuendo, is a good plea, as the only offence of which the court has cognisance is that created of when the court has cognisance is that createst by the Railway Clauses Act, s. 103, for travelling without previously paying the fare "with intent to avoid payment thereof." *Biggs* v. G. E. Ry., 18 L. T. 482; 16 W. R. 908.

A party was convicted before the lord mayor of travelling on a railway from London Bridge to Caunon Street without a ticket, and sentenced to a fine of 1s. with costs, or in default three days' imprisonment. The railway company published placards, stating that he had been so con-victed and fined, and describing the alternative

article which charged the plaintiff with bribery pleaded the truth of the statements contained and other improper conduct, and justified the in the placards:—Held, first, that the question whole article so set out :—Held, that these pleas for the jury in such a case is, whether the com-were rightly struck out, as being calculated to pany's account of the conviction is substantially correct. Gwynn v. S. E. Ry., 18 L. T. 738

Held, secondly, that the party was at liberty with a view to the assessment of damages, to enter into all the circumstances which led to the conviction, although such evidence tended to shew that the conviction was erroneous. Ib.

Of Statement that Plaintiff improperly detained the Defendant's Goods.]—A declaration alleged that the plaintiff advertised his goods for sale, and that the defendant published of him and of his sale a notice reciting the advertisement, and stating that he unlawfully detained certain goods of the defendant, which he, the defendant, was informed the plaintiff also intended disposing of, and giving notice that the same were the defendant's property, and any person purchasing would be held responsible; thereby meaning to cause it to be believed that no person could safely purchase any goods at the sale, by means of which persons were prevented from attending, and the sale failed altogether. A plea that the plaintiff did unlawfully detain certain goods of the defendant, who was informed and believed that the plaintiff did intend to dis-pose of the same at the advertised sale, and thereupon the defendant published the words for the purpose of warning all persons from purchasing the goods so unlawfully detained by the plaintiff, and not otherwise, is an answer to the action. Carr v. Duckett, 5 H. & N. 783; 29 L. J., Ex. 468.

Of Charge of being Confederate Swindlers. —A libellous paragraph published of the plaintiff stated that he was a confederate of blacklegs, that he had sought admission into a yacht club, that he gave an entertainment in the expectation of being elected, but was black-balled and the next morning bolted, and some of the tradesmen of the town had to lament the fashionable character of his entertainment. A plea of justification, after alleging facts to shew that the plaintiff was the confederate of persons who had been guilty of cheating at eards, and the facts of his giving an entertainment, and of being black-balled, as mentioned in the libel, stating, that on the following morning he quitted the town and neighbourhood, leaving divers of the tradesmen to whom he owed money unpaid, is bad, inasmuch as such quitting might be innocent, and without any intention to defraud. O'Brien v. Bryant, 16 M. & W. 168; 4 D. & L. 341; 16 L. J., Ex. 77.

Of Allegation of Baseness.]—A declaration alleged that the plaintiff was cashier to Q., and that the defendant in a letter addressed to Q., falsely and maliciously wrote and published of the plaintiff the words, "I conceive there is nothing too base for him to be guilty of." A plea, that the plaintiff signed and delivered to the defendant an I O U, and afterwards, on having sight thereof, falsely and fraudulently asserted that the signature was not his, and the plea averring that the libel was written and published solely in reference to this transaction, is a sufficient justification, as the libel must be understood with reference to the subject-matter. as being "imprisonment with hard labour." He Tighe v. Cooper, 7 El. & Bl. 630; 26 L. J., Q. B. sued the company for libel. The company 215; 3 Jur. (N.S.) 716.

Of Allegation of Incompetence of Schoolmaster. ]-A declaration alleged that the defendant published the following libellous matter of a schoolmaster :- During the last seven years no boys have received instruction at the school. The decay of this school seems mainly attributable to the violent conduct of the master. His treatment of two boys on two separate occasions subjected his modes of punishment to investigation before the magistrates, one boy having been subsequently confined to his bed, under surgical advice for a fortnight." A plea of justification as to part, that for seven years no boys had received instruction at the school, and that on divers days and times the master violently chastised certain scholars, and on one occasion so ill-treated a scholar, that his mode of punishment was investigated before a magistrate, is bad, for not shewing that the decay of the school was attributable to the violent conduct of the master. Smith v. Parker, 13 M. & W. 459; 2 D. & L. 394. 14 L. J., Ex. 52.

Of Allegation of Incompetence in Apothecary. -In a libel, a count charged the defendant with saying of the plaintiff, "He killed my child; it was the saline draught that did it," with an innuendo, that the plaintiff had been feloniously guilty of killing the child; not alleging that the plaintiff was an apothecary, and that at the time he attended the child in its sickness. A plea instifying that the plaintiff injudiciously, in-discreetly and improperly administered the medicine, and that the death of the child was accelerated thereby, is bad; for, as the count did not lay the special damage, that the defendant was an apothecary, the gist of the charge was the manslaughter, and the plea only answered a charge of mala praxis. Edsult v. Russell, 4 Man. & G. 1090; 5 Scott (N.R.) 801; 12 L. J., C. P. 4; 6 Jur. 996.

In another count it was alleged, that the plaintiff was an apothecary, and charged the defendant with having said, "he (the plaintiff) has given my child too much mercury and poisoned it." A plea, that the plaintiff did give the child too much mercury, is bad, for the defendant did not confess and avoid, but extracted a particular and an insufficient part of the charge, and justified that part only. Ib.

Of Allegation of Incompetence in Workman. -To impute to a person actually employed to execute certain work that he has no experience in the work in which he is so employed is a libel upon that person in the way of his profession or calling, and it is no justification to say that such person cannot show any experience in work of the kind which in the opinion of the person making the imputation was requisite. Botterill v. Whytchead, 41 L. T. 588,

Of Allegation of Unseaworthiness.]-To an action for a libel asserting that the plaintiff's vessel (which was advertised to convey passengers and freight to India) was unseaworthy, and had been sold to the Jews to take out convicts; a plea, justifying the charge of unseaworthiness, is bad, inasmuch as it leaves unanswered a material bat, dashned as t leaves manuscred a material part of the charge. Ingram v. Lucson, 6 Scott, 775; 5 Bing. (N.C.) 66; 7 D. P. C. 125; 1 Arn. 387; 8 L. J., C. P. 1; 3 Jur. 73.

lished a libel, that the plaintiff, a proctor, had circumstances revolting to the ordinary notions

been suspended three times, per quod his neighbours were led to think that he had been guilty of extortion. Plea, that he had been suspended once for extortion is ill, as it does not justify the whole charge. Clarkson v. Lawson, 6 Bing. 266; 3 M. & P. 605; 8 L. J. (O.S.) C. P. 36.

Afterwards held that the libellous matter was thus divisible, and that the plea was an auswer as to part. Clarkson v. Lawson, 6 Bing. 587; 4 M. & P. 356; 8 L. J. (o.s.) C. P. 193; 31 R. R.

A defendant published an account of the proceedings under a commission of hunaey, which the plaintiff had attended as a witness, and stated that the plaintiff's testimony, "being unsupported by that of any other person, failed to have any effect on the jury." "The object was to set aside a will." "Mr. Jervis commented with cutting severity on the testimony of Mr. O. (the plaintiff):—Held, that the whole taken together was a libel, and that a plen justifying only the words, "Mr. Jervis commented with only the words, arr. Jervis commented with cutting severity on the testimony of Mr. O.," was ill. Roberts v. Brown, 10 Bing, 519; 4 M. & Scott, 407; 3 L. J., C. P. 168.

Where a libel contains several distinct charges, a defendant may justify a part only; but if the part not justified contain libellous matter, he is liable in damages for that which is so left uncovered by the justification. Clarke v. Taylor, 3 Scott, 95; 2 Bing. (N.C.) 654; 2 Hodges, 65;

5 L. J., C. P. 235.

Where a libel is justified in part, the test totry if the justification is complete, is to read the part which is not justified by itself, without reference to the other parts; and if it does not clearly amount to a libel, the justification is complete. If the part which is not justified contains ambiguous statements, the court will not draw any libellous inference from them, if the plaintiff has not done so in his declaration.

To an action for libelling the plaintiffs, in their business of sellers of medicines, by publishing that the defendants had crushed the hygeist system of wholesale poisoning pursued by the scamps and rascals, the defendants pleaded and proved the conviction of two of the vendors of proved the converted of cools are venants in the plaintiffs' pills for manslangiter:—Held, that the plea was sufficient, and sufficiently proved, though it did not justify the words scamps and reascals," and though one of the victims died notwithstanding he had taken fewer pills than the vendors recommended, it appearing that a larger number would only have accelerated his death :- Held, also, that it was not necessary for the defendants to shew that they had completely crushed the system. Morison v. Harmer, 3 Bing. (N.C.) 759; 4 Scott, 524; 3 Hodges, 108.

- Charge of Murder-Additional Circumstances Libellous and not Justified. ]-In an action for a libel, charging a person with a legal crime, e.g. murder, with circumstances of aggra-vation, if the additional circumstances would be in themselves libellous they must be justified, as well as the bare legal offence. Helsham v. Bluck-wood, 11 C. B. 111; 20 L. J., C. P. 187; 15 Jur.

A declaration for a libel imputing to an officer in the army that he had been guilty of murder, in killing his opponent in a duel, and that the Of Part of Libel only. - A defendant pub- duel was supposed to have been fought under of honour, is not answered by a plea, alleging apology and payment into court cannot be merely that the plaintiff killed his antagonist, pleaded with not guilty to the same part of the and was tried for murder, and acquitted; the declaration. O'Brien's Clement, 15 M. & W. 435; defendant was bound to justify also the matter 2 D. & L. 676; 15 L. J., Ex. 285. of aggravation, Ib.

iii. Payment into Court and Apology.

Rules of Supreme Court, 1883, Ord. XXII.

Payment into Court under 8 & 9 Vict. c. 75-Without Denial of Liability-Verdict for Less than Sum Paid in. ]-In an action for libel the defendants pleaded that the libel was published without malice or gross negligence, published an apology and paid 50L into court. The jury were not informed of the payment into court, and found a verdiet for the plaintiff with one farthing damages:—Held, that the plaintiff was entitled to the 50%, in court, as Ord, XXII, r. 22, made no alteration in the practice where money is paid into court without a denial of liability. Dunn v. Devon and Exeter Newspaper Co., 63 L. J., Q. B. 342; [1895] 1 Q. B. 211, n.; 10 R. 167; 70 L. T.

Payment into Court with Denial of Part of Innuendo-Part to which Payment applies to be Stated. ] - The defendants in an action for libel admitted part of the immuendo and denied the other part, and pleaded Lord Campbell's act, with a payment into court without stating in respect of what part payment was made: - Held, that the defence ought to state to which part the payment was intended to apply. Muckay v. Munchester Press Co., 54 J. P. 22

Justification of Part of Libel—Payment into Court as to Remainder—Embarrassing.]—In an action of libel the defendant by his defence admitted the publication of the words but denied the innuendoes, and pleaded that to the extent of the facts thereinafter stated the words were true in substance and in fact. The defence then set out seriatim a number of facts, and finally contained an admission that the words were not wholly justified by the facts thereinbefore menand the defendant paid 40s. into court in satisfaction of the plaintiff's claim :-Held, that this defence was bad, and, unless amended, must be struck out as contrary to Ord. XXII. r. 1, and also as being embarrassing, inasmuch as it left in doubt what the defendant justified and what he did not. Flewing v. Dollar, 58 L. J., Q. B. 548; 23 Q. B. D. 388; 61 L. T. 230: 37 W. R. 684.

Payment into Court and Apology may be pleaded with Justification.]—The defendant, in an action for a libel published in a newspaper, admitted the publication of the alleged libel, but pleaded that, with the exception of certain innuendoes alleged in the statement of claim, the libel was true. In the alternative he pleaded the insertion of a full apology in the newspaper, and payment into court of 40s. :-Held, that the offering of an apology and payment into court and of a justification could be pleaded together. Hawksley v. Bradshaw, 49 L. J., Q. B. 333; 5 Q. B. D. 302; 42 L. T. 285; 28 W. R. 557—C. A.

Nor with Denial of Innuendo. ]-To an action for libel in a newspaper an apology and payment into court under 6 & 7 Vict. c. 96, cannot be pleaded together with a traverse of the defamatory sense imputed. Barry v. M. Grath, 17 W. R.

Sufficiency of Replication.]—The replication under s. 2 of 6 & 7 Vict. c. 96, need not deny all the facts stated in the plea, but the plaintiff may traverse as much of it as he thinks necessary. Chadwick v. Herapath, 4 D. & L. 653; 3 C. B. 885; 16 L. J., C. P. 104.

Action not to Proceed if Money Paid in is Withdrawn. ]—The plaintiff in an action for libel contained in a newspaper, is not entitled to draw out money lodged in court with defence of an apology under 6 & 7 Vict. c. 96, s. 2, and to procced with the action for the purpose of recovering greater damages. Harris v. Arnott, 24 L. R. Ir.

Sufficiency of Apology. ]-A libel having been published in a newspaper among its ordinary news, and in its usual type, an apology inserted in a subsequent number of the paper, under a general head of "Notices to Correspondents," which was in a type smaller than the rest of the paper, is not a full apology within the statute. Latinev N. Smith, 3 H. & N. 735; 28 L. J., Ex. 33; 4 Jur. (x.s.) 1064; 7 W. R. 13.

When an apology is pleaded, it is for the jury to say whether the apology is reasonably sufficient. Risk Allah Beyv. Johnstone, 18 L. T. 620. A defendant is not bound to insert an apology dictated by the plaintiff, but if he inserts one which an impartial person would consider reasonably satisfactory under all the circumstances of the case, he will be protected. Ib.

Publication of Apology.]—The prosecutors in a trade-mark case offered no evidence against the offender, and he was acquitted, he giving a letter of apology, with authority to the prosecutors to make such use of it as they might think neces-The prosecutors published this letter by advertisements, and continued to do so for nearly two months :- Held, that the arrangement as to the apology was not void as made under duress, and that the proseentors could not be restrained from continuing to publish the letter. Fisher v. Apollinaris Co., 44 L. J., Ch. 500; L. R. 10 Ch. 297; 32 L. T. 628; 23 W. R. 460.

#### iv. Other Pleas.

Plea of Accord and Satisfaction. - An agreement that mutual apologies shall appear in the several newspapers of the plaintiff and the defendant, performed by the latter, is a valid plea of accord and satisfaction to an action for a libel. Boosey v. Wood, 3 H. & C. 484; 34 L. J., Ex. 65; 11 Jur. (N.S.) 181; 11 L. T. 639; 13 W. R. 317.

Plea of former Judgment. |-To an action for But not with Plea of Not Guilty.]—In an words imputing to the plaintiff, in the way of action for a libel in a newspaper, a plea of his trade, that he was dishonest and a cheat, the defendant pleaded a judgment recovered in a been charged was in fact true. former action. Upon the trial of the issue upon nul tiel record, the record when produced shewed that the former action had been brought for calling the plaintiff a thief simply, and not in the way of his trade :—Held, no bar. Wadsworth v. Bentley, 1 B. C. C. 203; 2 C. L. R. 127; 23 L. J., Q. B. 3; 17 Jur. 1077; 2 W. R. 56.

Plea of Agreement to waive Action. ]-In an action for words imputing a crime, an agreement on the part of the plaintiff, to waive his action for words spoken, in consideration that the defendant will destroy certain documents in his possession, or which might afterwards come into his possession, imputing the same crime to the plaintiff, is (when executed by the burning of the papers in his possession) a bar to the action. Lane v. Applegate, 1 Stark. 97; 18 R. R. 750.

#### 3. PARTICULARS.

By Plaintiff-Names of Persons to whom Slander uttered. ]—The plaintiff in an action of slander may be ordered, before defence has been delivered, to give particulars of the names of the persons to whom the alleged slander was uttered. Roselle v. Buchanan, 55 L. J., Q. B. 376; 16

Q. B. D. 656; 34 W. R. 488.

In an action for slander, where the statement of claim alleged that one T., at the request and by the direction of the defendant, uttered the slander complained of, the plaintiff was ordered to give particulars of the names of the persons to whom, and of the place at which, such slander was uttered. Bradbury v. Chaper, 53 L. J., Q. B. 558; 12 Q. B. D. 94; 32 W. R. 32; 48

Of Publication. |- In an action for libel brought by a director of a company against a committee of shareholders in the company for statements contained in a report drawn up and alleged to be maliciously published by them, the defendants had obtained, after the close of the pleadings, an order for particulars of the occasion of any publication by them to persons other than shareholders :- Held, that the defendants were not entitled to such particulars, since the publication complained of clearly included publication to others than shareholders, though not expressly so stated, and sufficiently complied with the requirements of Ord, XIX, r. 4 as to pleading. Roselle v. Buchanan (16 Q. B. D. 656) distinguished, as applicable only to actions of slander. Gourand v. Fitzgerald, 37 W. R. 265-

By Defendant—Defence that Libels true in Substance and in Fact. — The defendant published articles alleging that the plaintiff, who was Governor of Mauritius, had been charged by members of the council with sending to the Colonial Office garbled reports of their speeches. The articles were also alleged by the plaintiff to impute that he had in fact transmitted such garbled accounts. An action for libel having been brought, the defendant pleaded that the alleged libels were true in substance and in fact:—Held, that plaintiff was entitled to further and better particulars, it not being clear whether the defence meant that what was charged against the plaintiff had been truly of the suit, all further proceedings were stayed. reported or that what was reported to have Wilmot v. Maccabe, 4 Sim. 263.

Hennessu v. Wright 57 L. J., Q. B. 594; 59 L. T. 795; 36 W. R. 878—C. A.

To a declaration alleging that the defendant falsely and maliciously wrote to and told persons who had bought certain machines of the plaintiffs, that the machines were infringements of his patents, the defendant having pleaded not guilty, the court ordered him to deliver particulars, shewing in what parts the plaintiffs' machines were an infringement of his patents, and pointing out, by reference to the page and line of his specifications, which part of the inventions therein described he alleged to have been infringed. Wren v. Wield, 38 L. J., Q. B. 88; L. R. 4 Q. B. 213; 20 L. T. 277.

A defendant pleaded that the defamatory matter in the declaration complained of was and is true in substance and in fact. The court ordered him to give particulars of the facts and matters he relied on to justify the libel, or, in default, that the plea should be struck out.

Jones v. Bewicke, L. R. 5 C. P. 32.

\_\_\_\_ Justification—Review of Book. ] — In the review of a book, of which the plaintiff was the author, the defendants published the following passage: "Not to put too fine a point upon it. the author, by his own confession, is a most bare-faced liar." The defendants pleaded that, so far as the alleged libel was a matter of fact, it was true, and, so far as it was a matter of criticism, it was published bona fide:—Held, that the plaintiff was entitled to an order on the defendants to deliver particulars pointing out and referring to the particular passages in the book on which the reviewer relied in support of his statement. Devereux v. Clarke, 60 L. J., Q. B. 773; [1891] 2 Q. B. 582.

### 4. DISCOVERY AND INTERROGATORIES.

Bill for Discovery-Names of Proprietors of Newspaper.]-A person complaining of a libel in a newspaper may file a bill against the printer and publisher to ascertain the names of the proprietors, for the purpose of bringing his action against the proprietors alone. Dixon v. Enoch, 41 L. J., Ch. 231; L. R. 13 Eq. 394; 26 L, T. 127; 20 W. R. 359.

A demurrer to a bill alleging that certain newspapers contained articles or paragraphs, and other matter, libelling the plaintiff; that the defendant was the printer and publisher of the newspapers; and that the plaintiff had instructed his solicitor to bring an action for damages against the proprietors of the news-papers, and seeking for the discovery of their papers, and seeking for the discovery of their names under 6 & 7 Will. 4, c. 76, s. 19, and 32 & 33 Vict. c. 24, was overruled. *Disco*n v. *Enach*, L. R. 13 Eq. 394; 26 L. T. 127; 20 W. R. 359.

- Discontinuance of Action.]-Defendant brought an action, for a libel, against the plaintiffs; the plaintiffs pleaded a justification, and filed a bill for discovery, and a commission to examine witnesses abroad, in support of their plea. The defendant pleaded to the bill, that he had discontinued the action :—Plea overruled, as defendant might commence another action; but upon defendant afterwards undertaking not to bring any other action, and to pay the costs Inspection of Libel.]—In an action of slander, with an indictable offence. Baker v. Lane, 3 inputing to the plaintiff that he was the writer H. & C. 54; 34 L. J., Ex. 57; 11 Jur. (x. s.) 117; of a scandalous letter reflecting on the defen- 11 L. T. 638; 13 W. R. 293. dant, the latter in one of his pleas set forth the letter and justified the words spoken. The court permitted the plaintiff to inspect the letter with witnesses, in order that he might be prepared at the trial to shew that it was not in his hand-

writing. Curtis v. Curtis, 3 M. & Scott, 819.

In an action for libel, the court allowed the defendant to inspect and take facsimile copies by photograph or otherwise, of the documents referred to in the declaration. Davey v. Pemberton, 11 C. B. (N.S.) 628: 8 Jur. (N.S.) 891.

A letter written in answer to inquiries about the character of a servant is privileged in this sense only, that although it contains defamatory statements, it will not support an action for libel unless malice is shewn; but it is not privileged in the sense of being privileged from production, such privilege being confined to communications with the legal advisers of the party. Webb v. East, 40 L. J., Ex. 250; 5 Ex. D. 108; 41 L. T. 715; 28 W. R. 336; 44 J. P. 200.

Inspection of Plaintiff's Books to support Justification. ]-A shareholder in a joint-stock company is not entitled to an inspection of their books for the purpose of proving a plea of justification in an action against him for libel, imputing insolvency to the company. Metropolitan Saloon Omnibus Co. v. Hawkins, 4 H. & N. 146; 5 Jur. (N.S.) 201.

Right to Discovery-Limited to Allegations in Particulars. —Where, in a libel action, the defendant justifies and gives particulars of his justification, he is not entitled to discovery of anything more than the matters relating to those particulars, and an application for a general inspection of the documents disclosed by the plaintiff's affidavit of documents will be refused. Yorkshire Provident Life Assurance Co. v. Gilbert, 64 L. J., Q. B. 578; [1895] 2 Q. B. 148; 14 R. 411; 72 L. T. 445.

Interrogatories-When allowed by Plaintiff. 7 Interrogatories will not be allowed to be administered to a defendant in an action of slander. except under peculiar circumstances. Stern v. Sevastopulo, 14 C. B. (N.S.) 737; 32 L. J., C. P. 268; 10 Jur. (N.S.) 317; 8 L. T. 538; 11 W. R. 862.

In an action of slander, it being shewn that the defendant, at a certain place, in the presence of certain persons, had made imputations against the plaintiff to the effect that he had committed forgery, but that the persons present refused to give him any further particulars, the court allowed interrogatories to be put to the defendant as to the precise words which he had used.

Athinson v. Fosbroke, 35 L. J., Q. B. 182; L. R. 1 Q. B. 628; 12 Jur. (N.S.) 810; 14 L. T. 553; 14 W. R. 832. See also Wood v. Jones, post, col. 635.

— Tending to Criminate.]—The Court will not permit a plaintiff to exhibit interrogatories to the defendant, the answers to which, if in the affirmative, would tend to shew that he composed or published the libel imputing a criminal offence to the plaintiff, and would therefore criminate him. *Tupling v. Ward*, 6 H. & N. 749; 30 L. J., Ex. 222; 7 Jur. (N.S.) 314; 4 L. T. 20; 9 W. R. 483.

Interrogatories will not be allowed in an action of libel if they tend to charge the defendant of high standing at Birmingham. In interro-

The defendant in his answer objected toanswer interrogatories on the ground that to do so "might tend to criminate" him :—Held, a so "might tend to criminate" him:—Held, a sufficient answer. Lamb v. Munster, 52 L. J., Q. B. 46; 47 L. T. 442; 31 W. R. 117.

In an action for libel the court refused toallow interrogatories to be administered to the defendant, the express object being to make the defendant criminate himself if he answered them in the affirmative. Edmunds v. Greenwood, 38 L. J., C. P. 115; L. R. 4 C. P. 70; 19 L. T. 428; 17 W. R. 142.

- As to Authorship of Libel.-In libel after defence denying the writing or publication, the court in the exercise of its discretion, and on the common affidavit allowed the plaintiff to deliver to the defendant interrogatories as to the author-ship and publication of the libel, which in the opinion of the court, was not one which would justify the institution of criminal proceedings. M'Loughlin v. Dwyer, Ir. R. 9 C. L. 170.

In an action against the publisher of a news-paper for a libel contained in a letter from a correspondent and in a leading article thereon. the defence was that the alleged libel consisted of an accurate report of certain public proceedings and fair comment thereon :- Held, that the plaintiff was not entitled to interrogate the defendant as to the names of the persons on whose information the reports were based, or the name of the correspondent who wrote the letter, or as to the original manuscript of the letter. Hennessy v. Wright, 36 W. R. 879—C. A.

- As to Circulation of a Newspaper. ]-In an action for libel against the "Times" the plaintiff interrogated as to the number of copies sold. The defendants refused to state any num-ber, while admitting it was large:—Held, that the plaintiff was entitled to a further and better answer. Parnell v. Walter (24 Q. B. D. 441), followed, but questioned. Rumney v. Walter, 61 L. J., Q. B. 149; 65 L. T. 757; 40 W. R. 174.

In an action for libel against a newspaper which is well-known in the locality in which the action. is to be tried, an interrogatory asking the number of copies printed and circulated of the issue containing the libel is irrelevant and will not be allowed. Parnell v. Watter (59 L. J., Q. B. 125; 24 Q. B. D. 441) overruled. Whittaker v. Scar-borwugh Post Newspaper (h., 65 L. J., Q. B. 561; [1896] 2 Q. B. 148; 74 L. T. 753; 44 W. R. 657

Semble, in the case of an obscure newspaper of small circulation the interrogatory is relevant. Ib.

By Defendant-Names of Persons informing Plaintiff of Libel ]—In an action for libel the defendant pleaded that the libel was true. The substance of the libel was that the plaintiff had fabricated a story to the effect that a certain circular letter purporting to be signed by the defendant had been sent round to the defendant's competitors in business. The plaintiff had in speeches and letters stated that he had seen a copy of the alleged letter, that two of such letters were in existence in the possession respectively of a firm of bankers and a firm of manufacturers at Birmingham, and that his informant in the matter was a solicitor gatories administered by the defendant the plaintiff was asked to state the name and address of his informant, in whose hands he had seen the copy of the letter, and the names and addresses of the persons to whom the letter had been sent, and in whose possession the two letters existed; but he refused to do so on the ground that he intended to call those persons as his witnesses at the trial :- Held, that the defendant was entitled to discovery of the names and addresses of such persons as being a sub-stantial part of facts material to the case upon the issue on the plea of justification. Marriott v. Chamberlain, 55 L. J., Q. B. 448; 17 Q. B. D. 154; 54 L. T. 714; 34 W. R. 783—C. A.

- To enable Defendant to give Particulars.] - Au order having been made for the delivery by the defendant of particulars of the several matters he intended to rely on under his pleas of justification, stating the substance of each case, with the dates of the several matters relied on, or, in default, that the pleas should be struck out; the court refused to allow him to administer interrogatories to the plaintiff for the purpose of enabling him to comply with the order, in the absence of an affidavit disclosing circumstances to warrant a departure from the general rule. Gourley v. Plimsvll, L. R. 8 C. P. 362; 42 L. J., C. P. 121; 29 L. T. 130; 21 W. R. 683.

- Of Persons whose Patronage Plaintiff has -In slander, with special damage particulars refused of the persons to whom the words were spoken, but interrogatories of the persons whose patrouage the plaintiff was supposed to have lost, were allowed. Wood v. Jones, 1 F. & F. 301.

Going to Mitigation of Damages no Plea of Justification.] — In an action for libel, although the defendant does not plead justification, interrogatorics by the defendant going to mitigation of damages are admissible, after service of notice upon the plaintiff that evidence to such effect is intended to be given under the provisions of Ord. XXXVI. r. 37. Scaife v. Kemp, 61 L. J., Q. B. 515: [1892] 2 Q. B. 319; 66 L. T. 589.

\_\_\_\_ Sufficiency of Answer.] In an action for libel the defendant, in answer to an interrogatory asking if she had not written a letter containing certain statements (setting out the alleged libel), and if not those statements, any and what state-ments, replied, "To the best of my recollection and belief I never wrote a letter containing the statements set out, or any of those exact statements. I did write a letter, but on what exact date I cannot say. I kept no copy, and have no copy of the letter, and I am unable to recollect with exactness what the statements contained therein were" :--Held, that the answer was a fair and sufficient answer, and that the defendant could not be called upon from recollection to state, before trial, what was her recollection of the words she used. *Dalrymple* v. *Leslie*, 51 L. J., Q. B. 61; 8-Q. B. D. 5; 45 L. T. 478; 30 W. R. 105.

In an action for libel in which the defendant traversed the publication; denied that the words were published of the plaintiff or in the defamatory sense alleged, and pleaded fair comment; the plaintiff exhibited interrogatories, asking whether the defendant published the libel in two Irish papers specified in the interrogatories, and whether the words were not published of the

(No. 4) as to whether he did not publish the words complained of "in the London Times newspaper, or some other and what newspaper?"
"When did such publication take place?" The defendant answered all the interregatories in the one answer as follows:—"That in bona fide comment on the conduct and language of the plaintiff, and in reference to matters of public interest, I caused to be printed and published of and concerning the plaintiff and others in the several newspapers in the said interrogatories mentioned the words in such interrogatories referred to, honestly believing the same to be true and without malice" ;-Held, that execut as to the fourth interrogatory, the answer was sufficient and was not objectionable, on the ground of its qualified form, but that a further answer should be given to No. 4, giving the date of the alleged publication. Malone v. Fitzgerald,

5. RESTRAINING LIBEL BY INTERLOCUTORY INJUNCTION,

18 L. R. Ir. 187.

See post, col. 663 et seq.

6. OTHER PROCEEDINGS BEFORE TRIAL

Consolidation of Actions. ]-See Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 5.

Actions against different Defendants for same Libel—Time for making Order. ]—An order under s. 5 of the Law of Libel Amendment Act, 1888, for the consolidation of several actions against different defendants in respect of the same or substantially the same libel may be made before the defences in the actions have been delivered. Stone v. Press Association, 66 L. J., Q. B. 662; [1897] 2 Q. B. 159; 77 L. T. 41; 45 W. R. 641—

Staying Multiplicity of Actions, -- Where a plaintiff brought seven actions for seven different publications of the same libel against the defendant, the court ordered proceedings to be stayed in all the actions except one, until that one had been tried. Jones v. Pritchard, 6 D. & L. 520 : 18 L. J., Q. B. 104. See also PRACTICE.

Effect of Demurrer. ]-A demurrer to a declaration in slander does not admit the particular words spoken to have been spoken with the intent attributed to them by the innuendo. Wheeler v. Haynes, 1 P. & D. 55; 9 A. & E. 286, n.; 1 W. W. & H. 645; 8 L. J., Q. B. 3.

It is an erroneous notion that by demurring to a plea of justification the plaintiff necessarily admits the truth of the libellous matter for that which is well pleaded is alone admitted by such demurrer. Jones v. Stevens, 11 Price, 235; 25 R. R. 714.

Defence-Amendment of Defence by adding Plea to Damages-General Reputation of Plaintiff. ]-The plaintiff, a professional jockey, sought to recover damages for a libel which stated that he was in the habit of pulling horses belonging to a certain stable. The defendant pleaded a justification, but sought leave to amend his defence by stating that the defendant was commonly reputed to have been in the habit of so unfairly and dishonestly riding horses (generally and not of a particular stable) as to prevent their plaintiff. The defendant was also interrogaed | winning races :-Held, that the amendment could not be allowed, since it was a plea to damages only. Rules 4 and 15 of Ord. XIX. apply to such facts as are material to the canse of action or defence, and not to damages. Wood v. Durhum (Eurl), 57 L. J., Q. B. 547; 21 Q. B. D. 501; 59 L. T. 142; 37 W. R. 222.

Defence of Servant by Master—Corporation.]—A corporation can act in any ordinary matter of hoshess in the manner in which an individual conducting the same kind of business can act, and there is therefore nothing illegal or ultravires in an association incorporated by royal charter defending their servant in an action for libel in respect of matter published by the servant, if the matter complained of was published in the usual course of their business, and such an application of their frunds is not forbidden by their charter. Broay v. Royal British Narses Association, 66 L. J., Ch. 587; [1897] 2 Ch. 272; 76 L. T. 735; 40 W. R. 86—C. A.

#### 7. TRIAL.

#### a. Evidence.

## i. Generally.

Admissions in Libel.]—Statements made in a libel have the effect of dispensing with proof by the plaintiff, of facts so stated, if they become necessary to support his case. Jones v. Stocens, 11 Price, 235, 25 R. R. 714.

It is not necessary to give evidence to prove the truth of averments in the declaration which accord with statements in the publication. Bagnally. Underwood, 11 Price, 621; 25 R. R. 766.

In a declaration for a libel published concerning the plaintiff as envoy of the state of Chili, it was alleged, by way of inducement, that the plaintiff was the envoy appointed by the state of Chili.—Held, that the libel on the face of it sufficiently admitted Chill to be a state, and the plaintiff to be cuvoy of that state. "Victorial Victorial Victoria Victorial Victorial Victorial Victorial Victorial Victoria Victoria Victorial Victorial V

A declaration commenced by reciting, that the plantiff was and still is a suggeon, practising and carrying on his profession as a surgeon and member of the Royal College of Surgeons, which college has the power of expelling persons guilty of unprofessional conduct. The declaration stated that the libel was published of and concerning the plaintiff, and of and concerning the group of the profession, and of and concerning the college and its power. The defendant pleaded that the plaintiff was not a surgeon, practising or carrying on his profession as a surgeon and member of the Royal College of Surgeons, having the power of expelling persons guilty of unprofessional conduct.—Held, that the power of expulsion, as alleged in the declaration, was material and traversed by the plea; and that a statement of the existence of that power in another part of the libel was not sufficient as evidence of such power. Wabley v. Heatey, 4 Ex. 33; 18 L. J. R. 426.

Evidence of Facts not Pleaded Inadmissible.]
—Evidence is rightly rejected, where the particular facts and circumstances sought to be proved are not stated or referred to in the state ment of defence. Scott v. Simpson. 51 L. J., Q. B. 380; 8 Q. B. D. 491; 46 L. T. 412; 30 W. R. 541; 46 J. P. 408.

ii. Publication.

Libellous Letter — Must be Addressed to Third Person.]—A libel in a private letter must be proved to have been addressed to a third person, not to the party himself. *Phillips* v. Jansen, 2 Esp. 624.

The transmission of a letter by the defendant to his correspondent abroad is a sufficient publication by the defendant. Ward v. Smith, 6 Bing, 749; 4 M. & P. 595; 4 Car. & P. 302; 8 L. J. (0.8.) C. P. 294.

— To Wife of Libeller.]—In an action for the the fact that the defendant has disclosed the libel to his wife is not evidence of publication. Wennhak v. Morgan, 57 L. J., Q. B. 241; 20 Q. B. D. 635; 59 L. T. 28; 36 W. R. 697; 52 J. P. 470.

To Wife of Person Libelled.]—But sending the libel in a letter addressed to the wife of the person libelled is a sufficient publication. Wesman v. Ash. 18 C. B. 886; 1 C. L. R. 592; 22 L.J., C. P. 190; 17 Jur. 579; 1 W. R. 452.

By Governor of Province to his Attorney-General,]—The delivery of a pamphlet by the governor of a distant province to his attorneygeneral, not for any public purpose, but in order that he might peruse it, is such a publication as will make him responsible in an action if the pamphlet is a libel. Wpadr v. Gove, 1601t, 299.

Knowledge of Writer that Letter would be Opened by Third Party.]—In an action for a libel contained in a letter written by the defendant to the plaintiff, proof that the defendant knew that letters sent to the plaintiff were as all yopened by his clerk, is evidence to go to a jury of the defendant's intention that the letter should be read by a third person, which would amount to a publication. Delaevale v. Theesew, 2 Stark, 63.

— Action against Limited Company—Dictation of Letter by Manager to Shorthand-Writer—Delivery to Clerk to Copy)—The manager of a limited company dictated a letter to a shorthand clerk, who type-wrote it and handed it to another clerk, who press-copied it. It was then sent by post addressed to the firm of which the person to whom it was written was a member, and opened and read by the clerks of the firm —Held, in an action for libel, that, assuming the letter to be defamatory, there was publication both to the clerks of the defendant company and to the clerks of the laintiff, and that, not-withstanding that a company can only act by agents, the occasion of the communication to the clerks of the company was not privileged. Pullman v. Hill & Co., 60 L. J., Q. B. 299°, [1891] 1 Q. B. 524; 64 L. T. 691; 39 W.R. 263—C. A. But see Busenies V. Gobbet, sun, col. 584.

Reading Letter Alond before other Persons.]
—If a man reads a libel on another to himself and then reads it alond before other persons, that makes him a libeller. The defendant received an anonymous letter whits at a meeting of a lodge of which both he and the plaintiff were members. The defendant read the letter to himself and then by leave of the chairman read it to the members present. The jury found that the letter contained defamatory matter reflecting on the plaintiff:—Held, a publication of the libel. Korzeter v. Typrell, 67 J. P. 532—C. A.

Postmark on Letter-How far Evidence. A letter, written by the defendant, and containing a libel, was dated in Essex, and addressed to a person in Scotland. It was proved to have been in the Colchester post-office, and, after being marked there, to have been forwarded to London, on its way to Scotland. It was produced at the trial with proper post-marks, and with the seal broken, but not by the party to whom it was addressed :- Held, sufficient prima facie evidence of a publication in Essex, and that it had reached its address in Scotland, Warren v. Warren, 4 Tyr. 850; 1 C. M. & R. 250; 3 L. J., Ex. 294.

If a letter containing a libel has the post-mark on it, this is prima facie evidence of its having been published. Shipley v. Todhunter, 7 Car. & P.

680

Postcard, ]-The transmission by post of an uncovered postcard containing matter libellous of the person to whom it is addressed is an actionable publication of the libel; and it is no defence to an action for the libel that the writer had an interest in the making, and the person addressed a corresponding interest in receiving the communication, that it was made bona fide believing the contents to be true, without malice and in the bona fide belief that the mode of communication was reasonable. Robinson v. Jones, 4 L. R., Ir. 391.

Libel in Handwriting of Agent - Proof of Knowledge of Principal Necessary. - In an action for a libel contained in a letter, proof that it was written by the defendant's daughter, who was authorised to make out his bills, and write his general letters of business, is not sufficient, unless it can be shown that such libel was written with the knowledge of, or by the procurement of, the defendant. *Harding* v. *Greening*, 1 Moore, 477; Holt, 531; 8 Taunt. 42.

Request to Publish Defamatory Statements.] -P. was chairman of, and E. was present at, a meeting of a board of guardians on an occasion when there was a discussion concerning the plaintiff's conduct, in the course of which defamatory statements concerning him were made. Reporters for the local press attended the meeting in the ordinary discharge of their duty. E., during the proceedings, said "he hoped the local press would take notice of this very scandalons case," and requested the chairman to give an outline of it. The chairman complied, and in the course of his statement said, "I am glad gentlemen of the press are in the room, and I hope they will take notice of it." E, added, " And so do I The chairman further expressed a hope that publicity would be given to the matter. A correct but condeused summary of the proceedings, containing matter defamatory of the plaintiff, was afterwards inserted in two local newspapers. An action for libel was thereupon brought against E. and P. The declaration charged them with publishing the reports in question, which were set out verbatim. The judge directed a vertication to be entered for them, being of opinion that there was no evidence of the publication by them of the libels complained of:—Held, a misdirection. Parkes v. Prescott, 38 L. J., Ex. 105; L. R. 4 Ex. 169; 20 L. T. 537; 17 W. R. 773—Ex. Ch.

Where a man makes a request to another to

in outline, and the agent publishes that matter, adhering to the sense and substance of it, although the language is to some extent his own, the man making the request is liable as the publisher. Ib. There is a great difference between the autho-

rity which will make a man liable criminally for the acts of his agent, and that which will make him liable civilly. A principal is not civilly liable unless the agent's authority is by the agent duly pursued, but the principal may be criminally liable though the agent has deviated very widely from his authority. Ib.

Shewing Caricature by Request.]-A person who, having a copy of a libellous caricature, shows it to another, on being requested so to do, is not thereby liable to an action for maliciously publishing. Smith v. Wood, 3 Camp. 323: 14 R. R. 752.

Handwriting of Defendant.]—If the manuscript of a libel is proved to be in the handwriting of the defendant, and it is also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there is no evidence given to shew that the printing and publication were by his direction. Reg. v. Lovett, 9 Car. & P. 462.

A libellous paper, in the handwriting of the defendant, found in the house of the editor of a newspaper in which the libel complained of appeared, is admissible against the defendant, notwithstanding several parts of it have been erased, and are omitted in the newspaper, provided the passages erased do not qualify the

libel. Tarpley v. Blabey, 2 Bing. (N.C.) 437. If A. sends a manuscript to the printer of a periodical publication, and does not restrain the printing and publishing of it, and it is printed and published in that publication, A. is the publisher and liable to an action. Burdett v. Abbott, 5 Dow, 165, 201; 14 East, 1. See Bond v.

Donalas, 7 Car. & P. 626. In an action for a libel contained in an article against church-rates, written by the defendant, and published in the T. S. newspaper, the MS. in the handwriting of the defendant addressed "To the editor of the T. S.," and sent to the T. S. office, is evidence to shew that the defendant intended the article to be published in that newspaper. The plaintiff may also, for the same purpose, give in evidence handbills on the same subject, published by the defendant about the same time; and, to shew that the libel was published with an intent to injure the plaintiff,

evidence may be given that one of the handbills

was carried backwards and forwards before his

door. Bond v. Donglas, 7 Car. & P. 626.
In an action of libel, the plaintiff, in order to prove the publication of the libel, tendered secondary evidence of the contents of a letter written by the defendant. On the part of the defendant, a document was produced as the original :-Held, that the judge was at that stage of the cause bound to hear the evidence on both sides, and to decide whether the document offered was the original or not; and that, if it was, the secondary evidence was inadmissible.

Boyle v. Wisman, 11 Ex. 360; 3 C. L. R. 1071;

24 L. J., Ex. 284; 1 Jur. (N.S.) 894; 3 W. R. 577.

Authorship of Libel proved by other Docupublish defamatory matter, a statement of which ments, I—It was proved that in September the he gives him for the purpose, whether in full or defendant sent a letter to the plaintiff, containing

several passages of a libellous letter published in in it. Brunswick (Duke) v. Harmer, 3 Car. & the following November in a newspaper :-Held, K. 10. that, in an action for the publication in the responded office, and of a newspaper corresponding with might be read in evidence to shew the animus of that therein mentioned, is sufficient proof of the defendant. Tarpley v. Blabey, 2 Bing, (x.c.) publication in an action or in an indictment 437; 2 Scott, 642; 1 Hodges, 414; 5 L. J., against the proprietor for a likel. Magne v. C. P. 83.

In an action of libel, charging the defendant with having in a letter published a libel upon the plaintiff, to which the defendant pleaded defendant's name was spelt in a peculiar manner are admissible, as evidence that the libel in question, which contained the defendant's name, spelt with the same peculiarity, was written by the plaintiff. Brookes v. Tickborne, 5 Ex. 929; libel, evidence that the plaintiff had, many years

In order to prove that the defendant had published a libel, which was contained in a printed pamphlet, a witness was called, who stated in substance that the defendant gave her a copy of the pamphlet : that she lent it several times to persons, expecting that they would return it to her; that the persons to whom she had lent it had returned her the same, or a copy, but that she could not swear it was the very same, though she had no reason to doubt it :- Held, that there was evidence for the jury that the pamphlet returned to the witness was the same given to her by the defendant. Fryer v. Gathercole, 4 Ex. 262; 18 L. J., Ex. 389; 13 to in the letter-press part of the libellous article.

In an action for a libel contained in a song, which had been published by singing in the streets, a witness who had sung it was called, but the identical copy from which he had sung it could not be produced; notice to produce the original having been given, proof that a copy produced was similar to that which had been sung; that the manuscript had been delivered sing; that the mainteeripe had been dealyers, by H., one of the defendants, to M., the other, to print: that M. accordingly printed 1,000 copies, and sent 300 of them to H.; and that several were delivered by him to the witness :-Held, sufficient evidence from which a jury might infer a joint publication by both defendants. v. Hudson, 7 A. & E. 283, n.; 1 H. & W. 680; 5 L. J., K. B. 95.

In Newspapers-Proof of Proprietorship. In an action for a libel in a newspaper, a certified copy of the stamp-office declaration was put in, which stated the title of the newspaper to be "The Leicester Herald and Midland Counties Advertiser," and the intended place of publica-tion to be "No. 23, Charles Street, in the parish of St. Margaret, in the borough of Leicester, The newspaper containing the libel had the same title, but the place of publication in the imprint at the end of it was, "at the corner of Charles Street and Hadfield Street, in the parish of St. Margaret, in the borough of Leicester" :- Held, that this sufficiently shewed the identity of the newspaper, so as to allow it to be given in evidence under 6 & 7 Will. 4, c. 76, s. 8. Baker v. Wilhinson, Car. & M. 399.

If J. H. and M. S. are registered at the stampoffice as the sole proprietors of a newspaper "that is to say, J. H. as legal owner, as mortgagee, and M. S. as owner of the equity of redemption,"

Fletcher, 4 M. & Ry. 311; 9 B. & C. 382; 7 L.J. (0.s.) K. B. 269.

In an action for a libel in a newspaper, it is sufficient proof of the publication to prove that the painting of which the canada peakers in the first publish the libel in the defendant accounted for the stamp that operation; letters, not otherwise evidence in the cause, written by the plaintiff, and in which the days, written by the plaintiff, and in which the

> against the proprietor of a newspaper for a after the libel was printed, sent a person to the newspaper office to buy a copy of the newspaper in which it appeared, and to whom a copy was accordingly sold at the office, is sufficient evidence of publication. Brunswick (Duke) v. Harmer, 14 Q. B. 185; 19 L. J., Q. B. 20; 14 Jur. 110

> Liability of Printer and Editor.]-If the printer and the editor of a magazine are sued for a libellous article contained in it, they are both liable for a libellous lithographic print which is contained in the work, though it was not printed by the printer, provided that the print is referred Watts v. Fraser, 7 Car. & P. 369.

- Liability of Vendor - Knowledge Contents.]-The vendor of a newspaper in the ordinary course of his business, though he is prima facie liable for a libel contained in it, is not liable, if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his own part; and that he did not know, and had no ground for supposing, that the newspaper was likely to contain libellous matter. If he can prove those facts he is not a publisher of the libel. But whether such a person can escape liability for the libel if he knows, or onght to know, that the newspaper is likely to contain libellous matter, quæve. Emmens v. Pottle, 55 L. J., Q. B. 51; 16 Q. B. D. 35±; 53 L. T. 808; 34 W. R. 116; 50 J. P. 228-C. A.

If the publication of a libel consists in merely selling a few copies of a periodical, in which it is contained, one question for the jury is, did the parties know what it was they were selling? Chubb v. Flannigun, 6 Car. & P. 431.

On the trial of an action against the publisher of a monthly periodical for a libel contained in it, articles published from month to month alluding to the action, and attacking the plaintiff, are receivable as evidence quo animo the libel was published, and as shewing that the publisher considered it as applying to the plaintiff. Chubb v. Westley, 6 Car. & P. 436.

A porter who, in the course of business, delivers parcels containing libellous handbills, is not liable in an action for libel, if shewn to be ignorant of the contents of the parcel. Day v. Breum, 2 M. & Rob. 54.

Contents Bill of Newspaper in Window this is sufficient to fix J. H. as a proprietor of of Third Party.]—In an action for a libel in a the newspaper in an action for a libel contained newspaper, the plaintiff cannot give evidence of the contents of a placard pasted in the winstates what will appear in the defendant's news-paper respecting the plaintiff, and that which it foretold does appear accordingly. Raikes v. Richards, 2 Car. & P. 562.

### iii. Defamatory Words and Innuendocs.

Actual Words Alleged must be Proved. |-- It is necessary to prove the actual words alleged or enough of them to sustain the action, and it will not be sufficient to prove the speaking of other words of similar meaning, and involving the same charge. M. Connell v. M. Kenna, 10 Ir. C. L. R. 511. S. P., Armitage v. Dunster, 4 Dougl. 291.

The witness must prove the words used, and cannot be allowed to state the impression produced upon his mind by the whole of the conversation. Harrison v. Berington. 8 Car. & P.

It is sufficient to prove part only of a sentence laid in a count in slander, if that part is of itself intelligible and actionable, and the remainder is not a qualification of the part proved. Orpwood v. Barkes, 4 Bing. 461; 12 Moore, 492; 5 L. J. (0.8.) C. P. 167; 29 R. R. 559.

Though all the actionable words laid in any one count are not proved, yet, if some are, the plaintiff will be entitled to a verdict. Compagnon

v. Martin, 2 W. Bl. 790.

Words spoken at different times may be given in evidence on one count. Churlter v. Barret,

Peake, 32.

The words alleged in a declaration were, "The plaintiff's wife is a great thief, and ought to have been transported seven years ago"; the words proved were, "She is a bad one, and ought to have been transported seven years ago " :- Held. that the words proved did not support the declaration. Hancock v. Winter, 2 Marsh, 502; 7 Taunt, 205.

The defamatory words set out in a declaration on a libel must be proved as laid, and it is a variance if the words as alleged are materially regulatified by evidence of words not contained in the declaration, although such words as qualified are still libellous. Rainy v. Brawo, L. R. 4 P. C. 287; 27 L. T. 249; 20 W. R.

873.

The defendant, after the publication of a libel, and before the action was brought, destroyed the letter containing the libellous words :- Held, that, as the defamatory writing was not in existence, secondary evidence of the contents of the letter by witnesses who heard it read was admissible, but that the actual words used as laid in the declaration must be proved, and not the substance or impression the witnesses received of the words, as otherwise the witnesses, and not the court or jury, would be made the judges of what was a libel. Ib.

Before declaration, the plaintiff gave notice of his intention to move for a rule for the production of the letter containing the words of the libel as set out in the declaration. An affidavit in answer by the defendant, stated that he, the defendant, had destroyed the letter, but made no objection to the terms of the alleged libel set out in the plaintiff's affidavit:—Held, that the plaintiff's affidavit being merely for the purpose of the production of the letter, was not admissible

to prove the words of the libel. Ib.

An allegation of slanderons words, accomdow of a third person, although the placard panied with an assertion of a fact as the foundation of the words, is not supported by evidence of the words, accompanied with an assertion of the speaker's belief only of the fact. Cook v. Stokes, 1 M. & Rob. 237.

Where the whole of the words laid in any one count constitutes the slanderous charge, the whole must be proved. But, where there are distinct slanderous allegations in any count, proof of any of them is sufficient. Flower v. Pedley, 2 Esp.

If a letter, set out as inducement, is alleged to contain "the words and matter following," ' and when the letter is read, it is found to contain all that is stated in the declaration and something more, this is no variance. Bourke v. Warren, 2 Car. & P. 307.

Extract-Whole Publication to be Read. ]defendant has a right to have the whole of the publication read from which the passages charged are extracts. Cooke v. Hughes, R. & M. 112; 27 R. R. 733.

In an action for a libel contained in a newspaper, the defendant has a right to have read, as part of the plaintiff's case, another part of the same newspaper referred to in the libel complained of. Thornton v. Stephen, 2 M. & Rob,

Criticism on Book-Book to be put in. |-- In an action by an author for an alleged libel in a criticism on his book, there being nothing in the libel which did not relate to the book, and the only question being whether the criticism was fair; the book must be put in by the party who desires to comment upon it. Strains v. Francis, 4 F. & F. 939.

Where Spoken in a different Manner to that alleged. |-A count for slanderous words spoken affirmatively, is not supported by proof that they were spoken by way of interrogatory. Burns v. Holloway, 8 Term Rep. 150.

Slanderons words, charged as addressed to the plaintiff in the second person, are not supported by evidence of words spoken of him in the third person, though so spoken in his presence. Stannard v. Harper, 5 M. & Rv. 295.

Words Spoken in a particular Sense. ]-If the words used have been spoken in a sense different from their ordinary meaning, facts should be given in evidence to show that they may have been used in a particular sense. After that has been done a bystander may be asked, what did you understand by the expression used? But without such a foundation being laid the question is not allowable. Daines v. Hartley, 3 Ex. 200; 18 L. J., Ex. 81; 12 Jur. 1093.

In a libel the writer suggested the propriety of the plaintiff "withdrawing into his own natural and sinister obscurity," the word "natural" being printed in Italies :- Held, that the plaintiff could not ask a witness what he understood by the word "matural" thus printed, but that the jury might look at the paper, and form their opinion as to the meaning. Brunswick (Duke) v. Harmer, 3 Car. & K. 10.

Other parts of Newspaper to show in what Sense Words used .]-The defendant published in a newspaper, of which he was the editor and passages in the same newspaper, besides those containing the libels complained of, were shown to the witnesses. The defendant having obtained that the advertisement was not a libel. Keyzor a conditional order for a new trial:—Held, by v. Newcomb, 1 F. & F. 559. May, C.J., that other passages of the same newspaper might be adduced in evidence to illustrate the meaning of the passages charged to be libellous:—Held, by O'Brien, J., that other publications by the defendant, whether contemporaneous, or precedent, or subsequent, were not admissible in evidence on the question of the sense of the libel unless directly referred to and in that way virtually made part of the libel complained of; and that they were only admissible to prove malice or deliberation, or upon the question of damages. Belton v. O'Brien, 16 L. R. Ir. 97.

Secondary Sense-Evidence to support.] Where words, which are not slanderons in their primary sense, are taken in a secondary sense distinct from their primary sense, there must be evidence of facts which would reasonably make then defamatory in their secondary sense, Ruel v. Tatnell, 43 L. T. 507; 29 W. R.

Proof of Innuendo.]—The plaintiff alleged in his statement of claim that the defendant falsely and maliciously spoke and published of the plaintiff the words, "His shop is in the market," meaning thereby that the plaintiff was going away, and was guilty of fraudulent conduct in his business, inasmuch as he had received subscriptions from members of a certain club, well knowing that they would be unable to obtain any benefit therefrom:—Held, that the words, not being in themselves defamatory, and there being no evidence to wholly support the innuendo, the defendant was entitled to judgment.

— On Failure to Prove Innuendo another cannot be adopted.]—In an action of slauder, where the plaintiff, in his statement of claim, annexes a meaning to the words complained of, and fails to sustain such meaning, he cannot discard that and adopt another. Ih.

When Court will Amend. ]-The court will not amend if it is of opinion that by the words, as proved, the defendant did not mean to imply a slanderous charge. Campield v. Bird, 3 Car. & K.

When there is a variance between the declaration and proof, the proper time to apply to amend the declaration is at the conclusion of the plaintiff's case. Rainy v. Bravo, L. R. 4 P. C. 287; 27 L. T. 249; 20 W. R. 873.

#### iv. Justification.

Generally.]—Evidence, shewing the occasion of writing a document, which, if bona fide, is not a libel, because a privileged official communication, is admissible under the general issue, to shew that the writer believed the facts stated therein to be true, although no justification is pleaded. Fairman v. Ives, 1 D. & R. 252; 5 B. & Ald. 642; 1 Chit. 85; 24 B. R. 514.

In an action by an optician against a newspublisher, several libels of the plaintiff, who paper proprietor for inserting an advertisement brought an action thereon. At the trial other alluding to him as a licensed hawker and quack in spectacle secrets, evidence that this was true is admissible under the general issue, as shewing

> Libel True in every Particular. - A plea, stating the libellous matter complained of true in substance and effect," means that it is true in every material particular; and if the defendant does not prove such statement to be true, the plea is not proved, although he proves facts of the same description. Weaver v. Lloyd, 4 D. & R. 230: 2 B. & C. 678; 1 Car. & P. 295; 2 L. J. (o.s.) K. B. 122; 26 R. R. 515.

> A plea in an action for a libel contained three material allegations, as to one of which, the jury in the course of the summing up expressed themselves satisfied that the proof failed. The judge told them, that, to warrant a finding in favour of the defendant, they must be satisfied that all three of the allegations were substantially made out. The jury, after two hours' deliberation, returned a verdict for the defendant upon that plea. The court refused to set it aside. Napier v. Daniel, 3 Scott, 417; 2 Hodges, 187; 3 Bing. (N.C.) 77; 6 L. J., C. P. 62,

Where the defendant charged the plaintiff with having, on a certain occasion, acted from motives of spite and lucre, and pleaded a justification, which failed as to the latter feature of the charge :- Held, that the libel being entire, the defendant was not entitled to a verdict on the plea as it stood, or to any part of it. Cory v. Bond, 2 F. & F. 241.

Action for a libel; plea justifying, as true, part of the libel, which comprised several libellous allegations. On the trial the judge asked the jury to find separately as to the truth of the several allegations justified. The jury found that some of the allegations were not true, and that others forming an important part of the libel were true. A verdict was entered for the plaintiff. A judge made an order that the Master should not allow the plaintiff the costs of the witnesses called only to disprove that part of the plea which was found to be true. On a motion to reseind this order :-Held, by Lord Campbell, C.J., Patteson and Coleridge, JJ., that the order was improper, the issue being indivisible. Erle, J., dissentiente. Biddulph v. Chamberlayne, 17 Q. B. 351.

Of Charge of Forgery.]—In an action for a libel, to support a plea of justification, stating that the plaintiff had forged and uttered, knowing it to be forged, a bill of exchange, and to justify a verdict for the defendant, the same evidence must be given as would be necessary to convict the plaintiff, if he was on trial for those offences : but if the evidence falls short of satisfying the jury that the strict legal offence was committed, they may take the facts proved into their consideration, in estimating the damages, Chalmers v. Shackell, 6 Car. & P. 475.

Of Charge of Bigamy. ]-A plea to a libel, in which the defendant justifies on the ground that which the detendant justines on the ground that the plaintiff was guilty of bigamy, requires the same strictness of proof as is required on the trial of an indictment for bigamy. Wilmett v. Harmer, 8 Car. & P. 695,

If. in justifying a libel that the plaintiff was

guilty of polygamy in marrying three wives who inquiry, where the words complained of are were all living at the same time, the defendant spoken upon a justifiable occasion. Hooper v. pleads that the plaintiff was guilty of polygamy 2 Pracecti, 2 Scott, 672; 2 Bing. (N.C.) 457; 5 in marrying three persons named who were all L. J., C. P. 177. living at the same time; it is sufficient proof of the marriages to shew the actual marriages as to two, and reputation and cohabitation as to the third; because, if by the term "polygamy" the offence of bigamy is meant, the substance of the issue is made out by proof of the two marriages; and if by the term "polygamy" the mere fact of these marriages is meant, as distinct from the crime of bigamy, evidence of reputation and of cohabitation is receivable. Ib.

Of Charge of Theft — Whether Goods are Servant's Perquisites.]—In an action by a dis-charged servant against his master for slander, imputing robbery, he pleaded that the servant had robbed him in giving away pieces of bread: -Held, that if they were such as the servant might fairly suppose the master would not object to his disposing of, the jury should find for the servant. Roberts v. Richards, 3 F. & F.

Of Charge against Solicitor of disclosing Confidential Communications. ]-In an action for a libel, a plea justifying a charge of having disclosed confidential communications made to the plaintiff as an attorney, may be supported by proof of the disclosure of communications made to him by his clients, which are not of that strictly privileged character which would prevent his examination as a witness. Moore v. Terrell, I N. & M. 559: 4 B. & Ad. 871.

Of the words "Libellous Journalist"-Proof of Judgment against Plaintiff in Action for Libel. —A libel upon the plaintiff contained charges of misconduct in relation to his office of coroner on an inquest, and concluded in these terms: "There can be no court of justice unpolluted which this 'libellous journalist' (meaning the plaintiff), this violent agritator and sham ing one plantarian, this violent eignator and satant humanitarian, is allowed to disgrace with his presidentship." The defendant, in justification of the words, "libellons journalist," pleaded, that the plaintiff, on the 20th March, 1828, being the proprietor of a public journal, intending to injure C. in his profession, published of him a scandalous libel, setting it out. The proof was, that in 1828, an action had been brought by C. against the plaintiff in respect of the libel, published by him as proprietor of a medical newspaper, in which action 100% damages had been recovered :-Held, that the words "libellous journalist" imputed to the plaintiff habitual libelling and moral misconduct, and that the judge did not misdirect the jury, in stating, that the question was, whether the libel on C. was a scandalous and malicious libel, and that the defendant ought to have produced other evidence than that of the record of that action, for the purpose of proving that it was a scandalous and malicious libel. Wakley v. Cooke, 4 Ex. 511; 19 L. J., Ex. 91.

> v. Privilege. See ante, col. 571, et sen.

> > vi. Malice.

Generally, -In an action of slander the existence of express malice is only a matter for prevent him giving a second character, and then

Express malice may be proved if evidence that the imputation is in part false, even where the communication is of such a nature as to raise a primâ facie presumption of absence of malice. Blagg v. Sturt, 10 Q. B. 899; 16 L. J., Q. B. 39; 11 Jur. 1011—Ex. Ch.

Defendant's Evidence of Bona Fides—Letter containing Foundation of Charges.]—In an action for libel, a letter written to the defendant, containing a statement of the facts, upon which he founded his charges, is receivable on his behalf, to shew the bona fides with which he acted. Blackburn v. Blackburn, I M. & P. 33, 63; 4 Bing. 395; 3 Car. & P. 146; 29 R. R. 583; 6 L. J. (O.S.) C. P. 13.

To rebut Privilege.]—Where the words are spoken on a privileged occasion, the plaintiff will be nonsuited, unless evidence of express malice is given. Caulfield v. Whitworth, 18 L. T. 527; 16 W. R. 936.

A communication being shewn to be privi-leged, it lies on the plaintiff to prove malice in fact ; in order to entitle him to have the question of malice left to the jury, he need not shew circumstances necessarily leading to the conclusion that malice existed, or such as are inconsistent with its non-existence, but they must be such asraise a probability of malice, and be more consistent with its existence than with its nonexistence. Somerville v. Hawkins, 10 C. B. 583;

20 L. J., C. P. 181; 15 Jur. 450.

In an action for defamation, no distinction can be drawn between one class of privileged communication and another. The same considerations apply to all cases of privilege, whether the communication be made in answer to inquiries with reference to character, or from a sense of legal, moral, or social duty. Where the occasion is privileged, the burden of proof is on the plaintiff to shew that the defendant was the plantal to shew that the defendant was acting from some other motive than a sense of duty. Clarke v. Molymeuz (3 Q. B. D. 237) followed. Jenare v. Debnege, 60 L. J., P. C. 11; [1891] A. C. 73; 63 L. T. 814; 39 W. R. 388; 55 J. P. 500—P. C.

Defamatory words carry with them prima facie evidence of malice, which may be rebutted by evidence of the occasion upon which they were spoken; if that occasion is such as to render them privileged, and if nothing further appearsfrom the evidence given in support of the plain-tiffs case, the judge ought to direct a nonsnit; but if any additional evidence is given from which the jury may infer that the defendant did not honestly believe the imputations to be true, or that he was actuated by some sinister motive and not by an honest desire to discharge hisduty, the judge is bound to leave the case to the jury, who are to say whether the defendant spoke the words under the influence of a sinister motive or not. Jackson v. Hopperton, 16 C. B. (N.S.) 829; 10 L. T. 529; 12 W. R. 913.

Although a master be not in general bound toprove the truth of a character given by him to a person applying for the character of his servant, yet if he officiously state any trivial misconduct of the servant to a former master in order to himself upon application for a character give the | been made, that is of itself sufficient prima facie servant a bad character, the truth of which he is not able to prove, the jury may from these circumstances infer malice against the master in an action against him by the servant, Rogers v. Clifton, 3 Bos. & P. 587.

— Words in Excess of Occasion.]—In an action for libel, if the libel is published on a privileged occasion, and there is no evidence of malice, the defendant is entitled to judgment. Per Curiam: When the Judge has ruled that the libel was published on a privileged occasion, there can be no liability for such publication unless the jury expressly find that it was published maliciously. A finding by the jury that the statement exceeded the privileged occasion is not equivalent to a finding of actual malice, and is immaterial. Nevill v. Fine Arts and General Insurance Co., 64 L. J., Q. B. 681; [1895] 2 Q. B. 156; 14 R. 587; 72 L. T. 525; 59 J. P. 371— C. A.

In an action for libel, where the Judge rules that the occasion is privileged, nothing short of evidence of malice will displace the privilege. X. C., 66 L. J., Q. B. 195 : [1897] A. C. 68; 75 L. T. 606; 61 J. P. 500—H. L. (E.)

When the occasion is privileged, merc intemperance of language, though forming evidence of malice, will not operate, if malice is negatived, to take away the privilege. Cowles v. Potts, 34 L. J., Q. B. 247; 11 Jur. (N.S.) 946; 13 W. R.

The plaintiff, a printer at Maidstone, had been employed by the defendant, the deputy clerk of the peace for the county, to print the register of electors for the county, the expense of which is defrayed from the county rate, and allowed by the justices at quarter sessions. In 1854, the defendant employed another printer, who agreed to do the work at a lower rate than that which the plaintiff required, and he wrote a letter to the fluance committee, appointed to superintend such expenses, in the conclusion of which he imputed improper motives to the plaintiff in the demand which he had made, and accused him of an "attempt to extort a considerable sum of money from the county by misrepresentation."
In an action for libel:—Held, that the occasion of writing the letter prima facie rebutted the presumption of malice, but that it was a question for the jury whether the sentence complained of for the fury whether the sentence companies of as exceeding the privilege was evidence of malice. Choke v. Wildes, 5 El. & Bl. 329; 3 C. L. R. 1090; 24 L. J., Q. B. 367; 1 Jur. (N.s.) 610; 3 W. R.

When a letter containing defamatory words is written upon a privileged occasion, surrounding circumstances are to be considered in determining whether the words used are so much too violent for the occasion as to rebut the presumption of the absence of malice arising from the privilege of the occasion; and if from surrounding circumstances it appears that the words are capable of two constructions, one of which is compatible with the absence of maliee, then the presumption of the absence of malice which existed in the first instance from the privilege of the occasion should be allowed to prevail throughout. Spill v. Maule, 38 L. J., Ex. 188; L. R. 4 Ex. 232; 20 L. T. 675; 17 W. R. 805—Ex. Ch.

evidence of express malice. Palmer v. Hummerston, 1 Cab. & E. 36.

Proof that the words are false, without evidence that they are false to the defendant's knowledge, will not entitle the plaintiff to have the question of malicc left to the jury. Cautfield v. Whitworth, 18 L. T. 527; 16 W. R. 936.

At the trial of an action for slander, the plaintiff's witnesses proved that the slanderous statements were untrue in fact, but also that they were the natural and reasonable inferences from what took place and they professed to describe; and that the defendant was present at the occurrence to which the slanderous statements referred. The judge ruled that the occasion was privileged; but that the plaintiff must have a verdict unless the defendant proved that the statements were made without malice:-Held. a right direction; the presence of the defendant being some evidence that the statements were made with a knowledge that they were untrue. Hartwell v. Vessey, 3 L. T. 275.

Where an underwriter, in discussing with an agent of the assured, a claim on his part as for a total loss, made a statement purporting to be founded on a letter of the assured which he professed to have seen, implying a design to make such claim dishonestly, no such letter having been written:—Held, that the occasion was privileged, but whether the communication was so would depend on the motive with which it was made, and whether there was a mere mistake or a statement wilfully false. Hancock v. Case, 2 F. & F. 711.

Previous Dispute.]—In an action for words, which are prima facie privileged, evidence tending to make out an admission by the defendance of the provide of the provider of the dant subsequently to the speaking of the words of a dispute existing between him and the plaintiff before the speaking of the words about a sum of money claimed to be due from the defendant to the plaintiff, is admissible to shew express malice. Simpson v. Robinson, 12 Q. B. 511; 18 L. J., Q. B. 73; 13 Jur. 187.

Conduct of Defendant at Trial.]-Where a justification of the truth of the words had been pleaded, and the plaintiff, during the trial, offered to accept an apology and a verdict for nominal damages, if the defendant would withdraw the plea of justification, which the defendant refused to do, though he did not attempt to prove it :—Held, that this conduct on the part of the defendant was also proper to be left to the jury, with reference to the question of malice, as well as that of damages. Ib.

Other Slanderous Words. ]-Other slanderous words may be given in evidence to shew the animus of the defendant. Camfield v. Bird, 5 Car, & K. 56.

Non-actionable Words spoken to Another Person.]-In an action for words spoken to A. concerning the plaintiff, evidence of words (not in themselves actionable) spoken to B. may be received to shew the malice of the defendant. Mead v. Daubigny, Peake, 125,

What is Evidence of Malice—Wilfully False allowed to Justify.]—Where words were given evidence has been given evidence by the plaintiff, in order to prove a maishowing an utterly untrue statement to have closs intent by the defendant, which were not Words not in Declaration-Defendant stated in the declaration:-Held, that the defendant might prove the truth of such words. Warne v. Chadwell, 2 Stark. 457; 20 R. R.

Publications previous to Libel. -In an action for libel, the defendant pleaded the general issue, and also a plea, under 6 & 7 Vict. c. 96, denying actual malice, and stating an apology. On the trial the plaintiff, in order to prove malice, tendered in evidence other publications of the defendant, going back above six years before the publication complained of :—Held, that these publications were admissible. Barrett v. Long, 3 H. L. Cas, 395.

Writ of Inquiry in former Suit. ]-A writ of inquiry issued in a former suit against the defendant for speaking similar slanderons words, may be received in evidence to prove malice. Jackson v. Adams, 1 Hodges, 78; 4 L. J., C. P. 194.

 Statements made subsequent to Libel. When a libel or slander is prima facie a privileged communication, it is open to the plaintiff to put in evidence statements made by the defendant subsequently to the libel, as tending to shew malice in the defendant at the time of publication of such libel. The judge ought especially, if there is a considerable interval between such statements and the publication, to direct the jury to consider whether such subsequent statements might not refer to something which happened subsequently to the libel, so as not to shew malice in the defendant at the time of the publication of the libel charged. Hemmings v. Gusson, El. Bl. & El. 346; 27 L. J., Q. B. 252; 4 Jur. (N.S.) 834; 6 W. R. 601.

The plaintiff may give evidence of anything that the defendant afterwards said, that goes to shew malice in him, provided that it cannot be the subject of another action. Defries v. Davies, 7 Car. & P. 112.

Where a plaintiff, having proved the words laid in the declaration, offered evidence of other actionable words spoken by the defendant afterwards :-Held, that although special damage not laid in the declaration cannot be given in evidence, yet evidence may be given of any words, as well as any act of the defendant, to shew quo aninio he spoke the words which are the subject of the action. But the judge should direct the jury to give damages only for the words which are the subject of the action. Rustell v. Marquister, 1 Camp. 49, n.

If a letter contains matter libellons in itself and requiring no explanation, although the letter is not a privileged communication, letters subsequently written and actionable in themselves may be given in evidence to shew the malice which dictated the first letter. Pearson v. Le Maitre, 5 Man. & G. 700; 6 Scott (N.R.) 607; 12 L. J., C. P. 253 ; 7 Jur. 748.

Where an action was brought on a libel contained in a letter, which might have been held for a privileged communication, the plaintiff, anticipating the answer of the defendant, gave the evidence other letters containing the same libel, written on occasions not privileged:— Held, that he might well do this. *Ib*.

- Subsequent Publications of Libel. ]-In

evidence may be given, for the purpose of shewing malice, that the defendant went to the editor of another newspaper, and procured the insertion of the libel in that paper, stating that he had got it inserted in one already; and the circumstance of there being a count in the declaration charging the second insertion as a distinct publication, will not make any difference as to the admissibility of the evidence. Delegal v. Highley, 8 Car. & P. 444.

In an action for a libel in a weekly periodical publication, a witness was allowed to prove a purchase of a copy after the action brought as well as before, for although not evidence for the purpose of aggravation, it was to shew that the paper was deliberately circulated. Plunkett v. Cobbett, 2 Selw. N. P. 1042; 5 Esp. 136.

A subsequent publication brought out even after issue joined, may be evidence to shew the motives of the party. Macleod v. Walley, 3

Car. & P. 311.

On the trial of an action for libel published in a newspaper, the plaintiff was allowed to give in evidence a second paragraph, subsequently published in the same paper, in which the libellous charge was re-asserted, for the purpose of shewing the defendant's intention, Adhins, 2 Scott (N.R.) 11; 1 Man. & G. 807.

Action against Publisher of Newspaper— Personal Malice of Writer of Libel.]—In an action for libel against the publisher of a magazine, evidence of the writer's personal malice against the plaintiff is inadmissible. Robertson v. Wylde, 2 M. & Rob. 101.

Charge of Incompetence-Evidence of Competence on other occasions.]-In an action for libel charging the plaintiff with want of com-petence and skill, as a surgeon, in particular work done for the defendant, evidence is not admissible (to shew malice) that the plaintiff has on other occasions acted competently and skilfully in such capacity. Brine v. Buzulgette, 3 Ex. 692; 18 L. J., Ex. 348.

Charge of Malicious Prosecution-Evidence of Statements of Witnesses before Magistrates. -In an action for a libel, charging the plaintiff with a false and malicious prosecution, in which the defendant pleads that the statements in the alleged libel are true, evidence is not receivable of statements made by witnesses examined before the magistrates on behalf of the prosecution, in order to shew quo animo the prosecution was conducted. Newton v. Rowe, 1 Car. & K.

Charge of Perjury—Evidence of subsequent Indictment Ignored.]—In an action for words imputing perjury, to shew the quo animo, the plaintiff may give in evidence an indictment subsequently preferred by the defendant against him, which was ignored. Tute v. Humphrey, 2 Camp. 73 n.

Plea of Justification.]—The mere pleading a justification is no evidence of malice. Laulfield v. Whitworth, 18 L. T. 527; 16 W. R. 936.

Where Malice must be Implied. ]-The defenan action for libel, after the plaintiff has proved the plaintiff's relations, and charged him with the publication of the libel in one newspaper. making the communication was rather to com- had in fact prevailed in the plaintiff's neigh-promise the felony than to promote inquiry, or bourhood, and were the common topic of conpromise the felony than to promote inquiry, or to enable the relations to redeem the plaintiff's character :- Held, that this was not a privileged communication, that malice must be implied, and that the existence of it was not a fact to be left to the consideration of a jury. Hooper v. Truscott. 2 Bing. (N.C.) 457; 2 Scott, 672; 5 L. J., C. P. 177.

Disproof of Malice by Defendant-Truth of Facts not Pleaded. ]—The defendant spoke to with irregularity in her conduct as a servant girl. in consequence of which the plaintiff lost her place: the only plea was not guilty:—Held, that the defendant might disprove malice in the various methods by which it is usually disproved, yet that he was estopped from giving evidence of the truth of the facts as rebutting the malice, because he had not pleaded that the facts were true. Rum-sey v. Webb, Car. & M. 104; 11 L. J., C. P. 129.

Phough in such case the absence of the proof of special damage (that the plaintiff thereby lost her place) cannot affect the verdict, yet the jury may consider it in assessing damages. Ih.

> vii. Damages. See post, col. 667, et sea.

viii. Other Matters.

Of Previous Slander for which Damages recovered. - Previous slander, from which damages have been recovered, may be given in evidence. Summons v. Blake, 1 M. & Rob. 477.

Of Subsequent Slander.]—Where the words are unambiguous, subsequent words of the same import are inadmissible. Peurce v. Ornsby, 1 M. & Rob. 455. S. P., Symmons v. Bluke, 1 M. & Rob. 477.

Of Libels not relating to same Subject. ]-Other libels published by the plaintiff of the defendant, not relating precisely to the same subject, cannot be received in evidence, either in bar of the action or in mitigation of damages. Man v. Brown, 4 D. & R. 670; 3 B. & C. 113; 2 L. J. (o.s.) K. B. 212.

A plaintiff cannot give in evidence other libels A plantific cannot give in evidence order mode published concerning him by the defendant, unless they directly refer to the libel set out in the declaration. Finnerty v. Tipper, 2 Camp.

Of Rumour. ]-In an action for slander, imputing to the plaintiff unnatural practices, the defendant, having pleaded not guilty, a witness for the plaintiff was asked, on cross-examination, "Have you heard from other persons that the plaintiff is addicted to the practices of that kind?"—Held, that the question was not allowable, because it was not confined to rumours existing before the words were spoken by the defendant. Thompson v. Nyc, 16 Q. B. 175; 20 L. J., Q. B. 85; 15 Jur. 285.

Where a defendant, at the time of uttering the words, referred to certain reports, current against the plaintiff, which he stated he had reason to believe were true :- Held, that, on not guilty, the defendant might prove, by cross-examination

versation before the words were uttered by the defendant. Richards v. Richards, 2 M. & Rob.

- Of Character of the Plaintiff. -In an action of slander for imputing felouv, with a count for maliciously charging the plaintiff with theft before a justice, to which the defendant pleaded the general issue, and also a justificapleaded the general issue, and also a Jassinear tion of the slander, averring that the charge of felony was true; evidence of general good character is not admissible for the plaintiff. Cornwall v. Richardson, R. & M. 305; 27 R. R.

Semble, where a slander imputes the commission by the plaintiff of a particular offence, evidence of an antecedent general reputation of his general bad character, or of his having some vicious habit, leading to the particular act, is admissible. Bell v. Parke, 11 Ir. C. L. R. 413.

But this rule does not let in evidence of a general reputation, that he was guilty of the par-

general reputation, that he was gainly of the par-ticular offence charged by the slander. *Ib*. Evidence of rumours shown to have been originated by the defendant is not admissible.

Charge of Keeping Gaming House-Evidence of Character of House. —In an action for a libel which imputed that the plaintiff's house was opened as a gaming-house, under the leadership of a woman of notorious character, the plaintiff alleged in his declaration that his house was a club-house, and that divers persons paid annual subscriptions. The payment of subscriptions was denied by one of the pleas, and evidence was given that a book was kept for subscribers' names, and that two gentlemen wrote their names in this book; but no evidence was given of the payment of any subscription :- Held, that there was evidence to go to the jury in support of the allegation in the declaration. Guy v. Gregory, 9 Car. & P. 584.

- Evidence of Character of Wife of Plaintiff. |-The defendant pleaded several pleas, but none of them at all referring to the plaintiff's wife:—Held, that the plaintiff could not go into evidence, to shew that his wife was a respectable person, as on these pleadings she must be taken to be so. Ib.

Evidence of Profession—Solicitor—Book of Admissions.]—In an action for a libel on the plaintiff, tending to injure his credit and reputation in his profession and business of an attorney, and published of him in his profession and business; the book of admissions produced by the proper officer, as well as proof that the plaintiff practised as an attorney, is sufficient evidence of his being an attorney. Jones v. Stevens, 11 Price. 235; 25 R. R. 714.

Charge of being "Papal Rebel"-Limit of Cross-examination of Plaintiff. ]-A tidewaiter in the customs brought an action against the publisher of a newspaper for a libel, imputing to him that he was a papal rebel, a traitor, and an idolator; that he was a member of an association for the conversion of England to the Roman Catholic faith, and had enlisted himself in the service of a foreign potentate, and was bound of the plaintiff's witnesses, that such reports never to decline from the purpose of annihilating all religious beliefs other than the Roman Catholic innuendoes, and if they are not, he is bound to religion and popery. At the trial he stated that he was a Roman Catholic, and had subscribed money to an association for the conversion of England to the Roman Catholic faith, but had done no other act to become a member of it :-Held, first, that he could not be asked, on crossexamination, whether his name was not written in a certain book of the association, no notice having been given to produce the book. *Darby* v. *Ouseley*, 1 H. & N, 1; 25 L. J., Ex. 227; 2 Jur. (N.S.) 497; 4 W. R. 463.

Held, secondly (the plaintiff having admitted that he held himself bound by the canons and decrees of the Church of Rome), that he could not be asked whether he considered himself bound by the notes and comments of the Rheims Testament, since that was an inquiry into his

religious belief. Ib.

Held, thirdly (the plaintiff having given in evidence a paragraph in a subsequent newspaper containing similar imputations against plaintiff), that the defendant was not entitled to have read, as part of the plaintiff's case, a paragraph in that newspaper on the subject of "Papal prosecutions," but having no reference to the other paragraph. Ib.

Statute of Limitations.]—A count, in an action for a libel, was in respect of a newspaper published more than seventeen years before action. The Statute of Limitations being pleaded: Held, that the plea was negatived by proof that a single copy had been purchased from the defendant for the plaintiff by the plaintiff's agent within the six years. Brunswick (Duke) v. Harmer, 14 Q. B. 185; 19 L. J., Q. B. 20; 14 Jur. 110.

Other counts were, in respect of other libels, alleged to impute to the plaintiff the libellous matter charged in the first count, which was set out by way of inducement in each count. The libels themselves, in those other counts, did not refer to that in the first count. The Statute of Limitations was pleaded to so much of these counts as related to the matter in the first count : -Held, that the plea was negatived as to those

counts also. Ib.

#### b. Functions of Judge and Jury.

Duty of Judge-Question whether Words capable of Defamatory Meaning.]—It is for the judge to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to decide whether such meaning is truly ascribed to it. Blugg v. Sturt, 10 Q. B. 899; 16 L. J., Q. B. 39; 11 Jnr. 1011—Ex. Ch.

The judge is not bound to state to the jury, as matter of law, whether the publication com-plained of is a libel or not; but the proper course is for him to define what is a libel in point of law, and to leave it to the jury to say whether definition; and as incidental to that, whether plaintiff. Parmiter v. Coupland, 6 M. & W. 105; 9 L. J., Ex. 202; 4 Jur. 701.

Words incapable of Defamatory Meaning Nonsuit. |- In an action for libel it is the duty of the judge to determine, upon the evidence ably conveyed by the words used to persons of adduced at the trial, whether the words comordinary understanding, but what was the plained of are reasonably capable of the dedefendant's intention in using those words, famatory meaning ascribed to them by the O'Brien v. Salisbury (Marquis), 54 J. P. 215.

withdraw the case from the jury and to direct either a nonsnit or a verdict for the defendant. Hunt v. Goodlake, 48 L. J., C. P. 54; 29 L. T. 472

Where a plaintiff brings an action for slander and the words relied on do not in any sense bear a defamatory meaning, the judge is justified in withdrawing the case from the jury, but in no other case can the defamatory meaning of the words be treated as a matter of law. v. Salisbury (Marquis), 54 J. P. 215.

Fox's Act.]—Fox's Act applies only to proceedings by way of criminal information or indictment for libel, and has nothing whatever to do with civil actions based upon the libel. Thomas v. Williams, 49 L. J., Ch. 605; 14 Ch. D. 864; 43 L. T. 91; 28 W. R. 983.

Questions for Jury.]—In cases of libel the meaning of the words used, the fairness of a report, and the meaning of comments added by Jepanen, are questions entirely for a jury to decide, and should not be hastily withdrawn from a jury. Street v. Licensed Victuallers' Society, 22 W. R. 558. a reporter, are questions entirely for a jury to

Whether Words in Fact Defamatory.]-Where the manager of a newspaper brings an action in respect of an alleged libel upon himself contained in words concerning that newspaper, it is for the jury to say (i.) whether the words, in the particular instance, bore the defamatory sense alleged, or were merely used extravagantly and without conveying any grave imputation; (ii) whether they applied to the plaintiff. Australian Novespaper Co. v. Bennett, 63 L. J., P. C. 105; [1894] A. C. 284; 6 R. 484; 70 L. T. 597; 58 J. P. 604—P. C.

In an action of libel for having written letters to the plaintiff's employers, in consequence of which the plaintiff was dismissed from his employment, the judge directed a nonsuit on the ground that the letters were only cautions, and not libellons :- Held, that the nonsnit was wrong, as the question whether the letters were libellous or not ought to have been left to the jury. Hart v. Wall, 46 L. J., C. P. 227: 2 C. P. D. 146; 25 W. R. 373. See also O'Donoghue v. Hussey, Ir. R. 5 C. L. 124—Ex. Ch.

Where words of suspicion admit fairly, and in their natural sense, of two meanings, the one being an imputation of suspicion only, the other of guilt, the sense in which they were uttered should be left to the jury. Simmons v. Mitchell, 50 L. J., P. C. 11; 6 App. Cas. 156; 48 L. T. 710; 29 W. R. 401; 45 J. P. 237—P. C.

Jury to Decide on Reasonable Sense of Words-Intention of Defendant immaterial. ]-Wherever an alleged libel is capable both of a harmless and an injurious meaning, it will be a the publication in question falls within that question for the jury to decide which meaning the readers would on the occasion in question it is calculated to injure the character of the have reasonably given to it, and for this purpose surrounding circumstances may be taken into consideration. Churchill v. Gedney, 53 J. P. 471.

It would be misdirection on the part of a judge if he told the jury in an action for slander, that the question was not what was the sense reasonQuestion whether Tendency of Matter In- nonsuit; but wherever there is evidence, either jurious to Plaintiff, I-If the language of the intrinsic or extrinsic, of malice to answer the proper question for the jury is, not whether the intention of the publisher is to injure the plaintiff, but whether the tendency of the matter is injurious to him. Fisher v. Clement, 10 B. & C. 472: 8 L. J. (o.s.) K. B. 176.

Where the tendency of an alleged libel is to injure the plaintiff, it is the duty of the judge to state to the jury that the publication is a libel, without leaving it to them to consider whether it was the intention of the defendant to injure the plaintiff. *Harris* v. Wilson, 4 M. & Ry. 605; 9 B. & C. 643; 7 L. J. (o.s.) K. B. 302.

In an action for libel, the declaration stated that the plaintiff and M. had been duly convicted of conspiring to extort money from C., and received judgment; but that the defendant published that the counsel who moved for judgment had stated plaintiff to be the writer of a letter which was in fact written by M. Issne was joined on a plea of not guilty. Plaintiff, at the trial proved the publication and the indictment and sentence, the letter being set out in the indictment as an overt act of the conspiracy, and called the counsel as a witness, who deposed that he had in fact made the statement :- Held. that on this evidence, it was properly left to the jury whether the publication was a libel, and the jury having found a verdict of not guilty, that this was not contrary to the evidence. Stockdule v. Tarte, 4 Ad, & E, 1016.

Judge may state his own Opinion as to Libel. In an action for libel, it is no misdirection that the judge, in addition to leaving the proper questions to the jury, stated his own opinion as to the libelious nature of the publication. Durby v. Ouwdey, 1 H. & N. 1; 25 L. J., Ex. 227; 2 Jur. (N.S.) 497; 4 W. R. 463.

On the trial of an issue of not guilty in an action for libel, it is no misdirection if the judge leaves to the jury the question whether or not the publication is libellous, without stating his opinion as to the particular publication, or defining what generally constitutes a libel. Baylis v. Lawrence, 11 A. & E. 920; 3 P. & D. 526; 9 L. J., Q. B. 196; 4 Jur. 652.

Defence of Privilege appearing on Plaintiff's Case—Duty of Judge.]—The burden of shewing that an alleged libel is a fair report of a judicial proceeding lies on the defendant; but it is sufficient if this clearly appears from the plaintiff's evidence. Where the plaintiff's contention is that the report is rendered unfair by certain omissions, if the judge thinks such omissions to be immaterial, he may decline to leave the case to the jury, and order verdiet and judgment to to the jury, and order vertice and judgment to be entered for the defendant. Kimber v. Press Association, 62 L. J., Q. B. 152; [1893] 1 Q. B. 65; 4 R. 95; 67 L. T. 515; 41 W. R. 17; 57 J. P. 247.

Judge to Rule whether Occasion creates Privilege.]-It is a question of law to be determined by the judge, whether the occasion of publishing defamatory matter is such as to repel the inference of malice, so as to constitute a privileged communication; and if at the close of the plaintiff's case he is of opinion that the communication is privileged, and there is no evidence, intrinsic their bills; and I came to town in consequence or extrinsic, of malice in fact, the judge ought to of it myself":—Held, that, as in actions of

libel is ambiguous, and it is doubtful whether it immunity derived from the occasion of the publiimputes any injurious matter to the plaintiff, the cation, that question must be determined by the Cook v. Wildes, 5 El. & Bl. 329; 3 C. L. R. 1090; 24 L. J., O. B. 367; 1 Jur. (N.S.) 610; 3 W. R. 458,

Action by an assistant master of the government school at St. Helena against the commanding officer, a member of the executive government in that island, for a libel contained in a letter written by him to the colonial secretary of the island, stating that the plaintiff was drunk and disorderly at a certain time and place. At the trial the letter was not given in evidence, or the publication proved, but the judge told the jury that they had to find whether it was a privileged communication or not, and directed them to decide whether or not the defendant had taken sufficient care to ascertain the truth of the statement made to the colonial secretary, and upon this it would be for him to decide whether his communication was a privileged one or not. The jury found for the plaintiff with damages, and the judge, a few days afterwards, gave judgment concurring with the verdict :- Held, that the proceedings were altogether irregular, and judgment arrested, the judge having misdirected the jury, first, in leaving it to them to determine whether the alleged libel was contained in an official document and a privileged communication; and secondly, in not leaving it to them to say whether the letter, if published, was bona fide; and if so found, then it was for him to determine whether, under all the circumstances, it was not a privileged communication. Stave v. Griffith, 6 Moore, P. C. (N.S.) 18; L. B. 2 P. C. 420; 20 L. T. 197.

Question of Malice for Jury.]-In an action for words imputing felony to the plaintiff, the eircumstances and occasion of speaking them should be submitted to the consideration of the jury, to whom it belongs to determine whether the defendant acted without malice and bona fide. Padmere v. Lawrence, 3 P. & D. 209; 11 A. & E. 380; 9 L. J., Q. B. 137; 4 Jur. 458.

In an action for slauder in giving a character of a servant, although the occasion primâ facie justifies the communication of matter which yould otherwise be actionable, yet if, at the close of the plaintiff's case, there is any evidence which would warrant the jury in inferring actual or express malice, the judge cannot withdraw the case from them. Jackson v. Hopperton, 16 C. B. (N.S.) 829; 10 L. T. 529; 12 W. R.

In an action for a libel, where the judge has decided that the occasion of publication was justifiable, so as to render the alleged libel a privileged communication, the plaintiff, without offering any fresh evidence, is entitled to have the libel itself submitted to the jury, in order that they may say whether it does not on the face of it shew express malice. Gilpin v. Fowler, Ex. 615; 23 L. J., Ex. 152; 18 Jur. 292; 2 W. R. 272-Ex. Ch.

Where, in an action for slandering the plaintiffs as bankers, it was proved that W. said to the defendant, "I hear that you say that the plain-tiffs' bank at M. is stopped; is it true?" and the defendant answered, "Yes, it is. I was told so. It was reported at C., and nobody would take slander there are two sorts of malice, one in law the defendant on that issue, in a case in which the jury to say, first, whether the defendant understood W. as asking for information, and whether he had uttered the words merely by way of honest advice to regulate W.'s conduct; and if they were of that opinion, secondly, whether, in ancy were of that opinion, secondar, whether, in so doing, he was guilty of any malice in fact. Bromage v. Prosser, 6 D. & R. 296; 4 B. & C. 247; 1 Car. & P. 475; 3 L. J. (O.S.) K. B. 203; as by B. al. 28 R. R. 241.

A., having undertaken to build a honse for B., employed C., a carpenter, to do some of the woodwork, for which A, had given an estimate. The bill sent in having exceeded the estimate, B. applied to D, to recommend him a surveyor to measure the work, npon which D, told B, that he had seen C. take away some of the quarterings; B, informed A, of it, who came to D, and asked him did he say so: to which D, answered, "Yes, I saw the man employed by you take from B.'s house two long pieces of quartering; I hallooed to the man." In an action of slander by C. against D. the judge left it to the jury to say, whether the words imputed felony : and, if they thought they did, told them that still the plaintiff was not entitled to recover, unless he shewed express malice, or the jury believed from the circumstances that the defendant was actuated by malicions motives :- Held, that the direction was right. Kine v. Sewell, 3 M. & W. 297; 7 L. J., Ex. 92.

A jury was directed to find whether a libel was a privileged communication, and if so, whether it was attended with express malice, and they found for the plaintiff, with damages, but that the defendant was not actuated by express malice:—Held that the verdict was right, and that the plaintiff was entitled to retain his damages. Blackburn v. Blackburn, 4 Bing, 395; 1 M. & P. 33, 63; 3 Car. & P. 146; 6 L. J. (0.8.) C. P. 13; 29 R. R. 583,

### 8. PRACTICE AFTER VERDICT.

Staying Proceedings — Plaintiff after trial convicted of Felony imputed,]—Where a verdict has been found with damages in an action for words imputing felony, the court will not stay the proceedings or grant a new trial, on the ground that since the trial the plaintiff has been convicted and attainted of the same felony: a fortiori, where the defendant has been examined as a witness upon the trial of the indictment, Symmons v. Blake, 2 C. M. & R. 416; 4 D. P. C. 263; 1 Gale, 182,

Action against Manager of Newspaper-Damages previously recovered against other Managers of same Paper. |-If A. and B., having recovered in separate actions for libels against different parties engaged in the management and publication of the same newspaper, commence fresh actions against the same parties, each suing that party against whom the other has recovered, the court will not interfere in a summary way to set aside the latter proceedings. Martin v. Kennedy, 2 Bos. & P. 69.

Setting Verdict for Defendant aside-Publication of Libel and Application to Plaintiff not Disputed.]-In an action for libel, although the circumstances, the publication is a libel, on the general issue, yet if they find a verdict for Ir. 55.

and the other in fact, it ought to have been left to | no question is made as to the fact of publication, nor as to its application to the plaintiff, the court can set aside the verdict. Hukowell v. Ingram, 2 C. L. R. 1397.

> Arrest of Judgment-No Libel on record. -After verdict for a plaintiff on the issue of not guilty, the court will arrest the judgment if no libel on the plaintiff appears on the record. Hearne v. Stowell, 12 A. & E. 719; 4 P. & D. 696; 11 L. J., Q. B. 25; 6 Jur. 458.

> Charge of Bribery not specifying to whom Money given. —Indement arrested in an action for defamatory words respecting a bribe, because the charge did not specify to whom the money was given. Purdy v. Stacey, 5 Burr.

> Entire Damages on Two Counts in Slander—Second Count not Actionable, --Where there were two counts in slander, and entire damages, judgment was arrested, because the words in the latter count were not actionable. Onslow v. Horne, 3 Wils. 177; 2 W. Bl. 750.

New Trial-Not Granted on Question of Fact. -A declaration stated, that on a certain night a gentleman was hocussed and robbed in a publichouse kept by the plaintiff : innuendo that a person had been feloniously drugged and robbed in the public-house of the plaintiff, and thereby intending to cause it to be believed that the public-house of the plaintiff was the resort of, and frequented by felons, thieves and depraved and bad characters, The jury having returned a verdict for the defendant, notwithstanding that witnesses called for the plaintiff stated, that they had ceased to frequent the plaintiff's house in consequence of the publication, and that they understood the libel as an imputation upon the plaintiff, and upon the character and conduct of his house, the court refused to grant a rule for a new trial, Broome v. Gosdon, 1 C. B. 728,

—— Inadequate Damages.]—A new trial will be granted for inadequacy of damages in an action for slander where the smallness of the amount shews that the jury has made a compromise, and instead of deciding the issues submitted to them, has agreed to find for the plaintiff for nominal damages only. Falrey v. Stanford, 44 L. J., Q. B. 7; L. R. 10 Q. B. 54; 31 L. T. 677; 28-W. R. 162.

In an action for slander a new trial will not be granted on the ground that the damages are inadequate, unless there has been a mistake in point of law on the part of the judge, or a mistake in the calculation of figures or misconduct by the jury. Forsdike v. Stone, L. R. 3 C. P. 607: 37 L. J., C. P. 301.

- Excessive Damages. ]-Where the plaintiff has obtained a verdict in an action for libel the court will not grant a new trial on the ground of excessive damages, unless they think that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them. Pracel v. Graham, 59 L. J., Q. B. 230; 24 Q. B. D. 53; 38 W. R. 103. Where there was no reasonable proportion

between the damages and the circumstances of the judge is to leave it to the jury whether under the case, the verdict was set aside on the ground. Proceedings on Recognizances of Newspaper Proprietors,—An application under 11 Geo. 4 & 1 Will. 4, c. 73, to enforce the recognizances taken under 60 Geo. 3 & 1 Geo. 4, c. 9, must state distinctly that the defendant in the action for libel was either the editor, conductor or proprietor of the newspaper; and an allegation that he was the primer and publisher was instifficient. Branswick (Duke), Exparte, 3 Ex. 829; 18 L. J., Ex. 304

Writs of execution having been sued out, without affect on a judgment against the publisher of a newspaper for libel, the count allowed a scire facias to issue on the recognizance of the starters taken under 90 (6e.3 & 1 (foc. 4, c. 9, and 11 (foc. 4 & 1 Will. 4, c. 78, the attorney general's flat having been first obtained. Browswick (Duke), Ex parts, 6 Ex, 22; 21 L. J., Ex. 13.

Upon an application for leave to proceed against sureties upon their recognizance or board to the Crown under 11 Geo. 4 & 1 Will. 4, c. 73, s. 3, the court acts judicially, not ministerially, and may refuse the application if, upon the facts before them, they are of opinion that the plaintiff is not entitled to proceed against the sureties. James v. Irana; Chaplin, In re, 2 H. & C. 270; 32 L. J., 5x. 25+; 9 Jur. (x.s.) 728; 8 L. 7, 672; 11 W. R. 1079.

Costs.]—The jury having found that the apology was not sufficient, but that the money mad into court was sufficient to cover the damage, the judge directed a verificit for the plaintiff, with L. damages.—Held, that the plaintiff was deprived of costs by 3 & 4 Vict. c. 24, 8.2. Lettone v. Suffit, 4. H. & N. 185; 5 Jur. (X. S.) 127.

— Gertificate under 3 & 4 Vict. c. 24, s. 2—

'Immediately afterwards.")—In an action for shander the judge certificile for costs under 3 & 4 Vict. c. 24, s. 2, ten days after the trial and during the assizes for another county:—Held, that the certificate must be set aside, not having been given "immediately afterwards" within the meaning of the section. Foradhev. Stone, 37 L. J., C. P. 301; 3 L. R., C. P. 607; 18 L. T. 722; 16 W. R. 476.

for libel and slander the jury found a verdiet for the plaintiff with 6d. damages on each count. who tried the case for a certificate for costs, but did not state under what statute he made the application. The judge thought that the application referred only to the slander counts under s. 126 of the Common Law Procedure Act (Ireland), 1858, and said that he would look into the matter, and give a certificate if he could. At the rime the judge did not remember 31 & 32 Vict. c. 69, by s. 1 of which, where in actions for libel the jury give damages under 40s., the plaintiff shall not be entitled to more costs than damages unless the judge before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record that the libel was wilful and malicious. The judge did not sit again for five days. The plaintiff then applied for a certificate for costs under 31 & 32 Viet, c. 69, and the judge certified that the libel was wilful and malicious :- Held, that the certificate was good notwithstanding the delay.

Mayee v. Moyers, 18 W. R. 842.

- In Actions of Slander-Effect of 21 Jac. 1, c. 16, s. 6.]-In an action of slander imputing felony to the plaintiff, the jury gave a verdict for 1s., and the judge certified, under 3 & 4 Vict. c. 24, s. 2, that the slander was wilful and malicions, and under 30 & 31 Vict. c. 142, s. 5, that there was sufficient reason for bringing the action in the superior court :- Held, that the plaintiff was not entitled to costs: for that by 21 Jac. 1, c. 16, s. 6, which was unrepealed, he, having obtained a verdict for less than 40s., was was only entitled to as much costs as damages; and the subsequent statutes were in the negative. and, therefore, only enabled the judge or court to certify for or allow such costs as the plaintiff was entitled to before the statutes passed.

Murshall v. Martin, 39 L. J., Q. B. 85; L. R. 5
Q. B. 239; 21 L. T. 788; 18 W. R. 378. See infra

In considering whether to certify for costs upon a verdict being found for a plaintiff in an action for shander, the judge, although he disapproves himself of the action having been brought, will give effect to an indication by the jury of a contrary opinion, and will treat a verdict for 40s, as such an indication. Hume v. Marshall, 37 L. T. (0.8.) 711.

Figure 19 (a) 1. F. 600) overried.
Garnet v. Bradley, 48 L. J., £x. 186; 3
App. Cas. 944; 39 L. T. 261; 26 W. R. 698.
Where, therefore, a plaintiff in an action for slander obtained a verdict, but recovered only one furthing damages, and the judge declined to make any order or grant any certificate, and the master taxed the costs for the plaintiff in the ordinary way:—Held, that the master was right, the costs under such circumstances following the ovent. Ib.

meaning of the section. Forsilite v. Stone, 37
L.J., C. P. 301; 3 L. R., C. P. 607; 18 L. T. 722;
16 W. R. 976.

— Certificate under 31 & 32 Vict. c. 69,
s. 1—"Immediately afterwards."]—In an action
for libel analysander the jury found a vertilet for
the plaintiff immediately applied to the judge
who tried the case for a certificate for costs, but
light are twice the accordance of the costs between and against the defendants. Hopdid not relieve the case for a certificate for costs, but
light are twice the case for a certificate for costs, but

Costs — Witnesses proving Truth.]—In an action for a libel, the defendant pleaded not guilty, and a justification. The publication being prima facie privileged, the plaintiff called witnesses to prove that the facts therein stated were false. The defendant called other witnesses to prove that the set there is the vice of some of these witnesses was not known to the defendant when he published the libel, but the facts charged were alleged to have taken place in a town where the plaintiff and the defendant of the province of some of the facts of t

facts, as they were material to answer the case of malice shown by the plaintiff's witnesses who spoke to the falsehood of the facts, the jury being at liberty, from the circumstances, to infer the knowledge of the truth or falsehood on the part of the defendant, and that the plaintiff was not entitled to the costs of any of his witnesses called to prove the falsehood of the charges. Harrison v. Buch, 5 El. & Bl. 344; 25 L. J., O. B. 99; 2 Jur. (X.S.) 90; 4 W. R. 199

#### 9. RESTRAINING LIBEL BY INJUNCTION.

Court of Common Law—On Trial of Action for Libel—Matter injurious to Trade.)—The court has power to issue an injunction to restmin a defendant from publishing of the plaintiff, to the injury of his trade, matter which a jury has found to be libelious. Scarby v. Eusterbrook, 3 C. P. D. 339; 27 W. R. 188.

Semble, that this power may be exercised by the judge who tries the cause. Ib.

Court of Equity.]—A court of equity will not interfere by injunction to prevent the publication of a libel. Clark v. Erceman, 11 Beav. 112; 17 L. J., Ch. 142; 12 Jur. 149.

Whether a libel be public or private, the only method is to proceed at law; the court of equity has no cognisance unless it is a contempt by being an abuse of the proceedings. Anon., 2

Atk. 469.

B. & Co. obtained a patent, entitling them, as the inventors of a new mode of preparing thread, to use the term "glacé," or "patent glacé." They ascertained that the defendants were selling thread by the name of "patent glace"; and after a correspondence between the parties, B. & Co. thereupon filed a bill to re-strain them from using the term. The court directed a motion for an injunction to stand over, with liberty to the plaintiffs to bring an action. The plaintiffs published a report of the proceedings on the hearing of the motion, which report stated that it was established in evidence that the plaintiffs were the first to use the word in question. The defendants moved to restrain the publication of the report, on the ground that it was untrue, the fact being that evidence was not gone into on the motion, and that it would have the effect of obstructing justice and pre-judicing their case. Upon the hearing of the motion, the court considered that the publication. though unfair, was not a libel, and not such as would obstruct the course of justice, and refused the motion. Brook v. Erans, 29 L. J., Ch. 616; 6 Jur. (N.S.) 1025; 8 W. R. 688. And see Coleman v. West Hartlepool Ry., 8 W. R. 734.

The court will punish, as for a contempt, those who make the publication of its proceedings the vehicle of a libel; but although it has the power of restraining the publication of its proceedings pending litigation, it will not restrain the publication of every unfair report purporting to represent what takes place in open court.

Ib.

— Libel Injurious to Property.]—A court of equity has jurisdiction to restrain the publication of any document tending to the destruction of property, whether consisting of money or of professional reputation by which property is acquired. Dixon v. Holden, L. B. 7 Eq. 488; 20 L. 7. 387; 17 W. B. 482.

The publication of a notice stating that the plaintiff was a partner in a bankrupt firm was restrained. Ib.

The court of chancery has no jurisdiction to restrain the publication of a libel as such, even if it is injurious to property. Prudential Assurance Co. v. Knott, 44 L. J. Ch. 192; L. R. 10 Ch. 142; 31 L. T. 866; 23 W. R. 249.

The prosecutors in a trade mark case offered no evidence against the offender, and he was acquitted, he giving a letter of apology, with authority to the prosecutors to make such use of it as they might think necessary. The prosecutors published this letter by advertisements, and continued to do so for nearly two months:—Held, that the arrangement as to the apology was not void as made under duress, and that the prosecutors could not be restrained from continuing to publish the letter, Fisher v. Apollinaris Co., 44 L. J., Ch. 500; L. R. 10 Ch. 297; 32 L. F. 628; 32 W. R. 460.

— Libel Injurious to Trade.]—Upon the motion for an injunction to restrain the issuing of an advertisement containing false representations enleutated to injure the plaintiff's trade, the court was of opinion that, netwithstanding the decision in Productial Assertance 6. v. Enast (appra). It is not power by the Judicature Act, s. 25, subs. 8, to restrain the publication of such an advertisement, but declined to do so upon an interlocutory application. Therefore, it is a substantial to the Edward Co. V. Massen, 46 L. J., Ch. 718; 8 6 km. D.

The court has no jurisdiction to restrain by injunction the publication of a libel injunction to trade. Thumas v. Williams, 49 L. J., Ch. 605; 14 Ch. D. 864; 43 L. T. 91; 28 W. R.

988.

The Court of Chancery refused an injunction to restrain the defendants from continuing to publish statements that the skates about to be introduced by the plaintiffs were an infringement of the defendants' patent. Humersmith Skating Rink Co., T. Dublin Skating Rink Co., Ir. R. 10 Eq. 255.

There is no jurisdiction to restrain a publication, whether libellous or not, merely because it may tend to injure property. *Ib*.

 Imputation on Solvency of Trader—Oral and Written Statements.]—B. was employed to manage one of L.'s branch offices for the sale of machines, and resided on the premises. dismissed by L., and on leaving gave the postmaster directions to forward to his private residence all letters addressed to him at L.'s branch office. He admitted that among the letters so forwarded to him were two which related to L.'s business, and that he did not hand them to L., but returned them to the senders. After his dismissal he went about among the customers, making oral statements reflecting on the solvency of L., and advised some of them not to pay L. for machines which had been supplied through himself. L. brought an action to restrain B. from making statements to the customers or any other person or persons that L. was about to stop payment, or was in difficulties or insolvent, and from in any manner slandering L. or injuring his reputation or business, and from giving notice to the post-office to forward to B.'s residence letters addressed to him at L.'s office, and also asking that he might be ordered to withdraw the notice already given to the post-office :- Held,

that the court has jurisdiction to restrain a among the shareholders, a circular containing person from making slanderous statements calcu- very strong reflections on the mode in which the lated to injure the business of another person, and that this jurisdiction extends to oral as well as written statements, though it requires to be exercised with great caution as regards oral statements; and that in the present case an injunction ought to be granted. Hermann Loog v. Bean, 53 L. J., Ch. 1128; 26 Ch. D. 306; 51 L. T. 442; 32 W. R. 994; 48 J. P. 708-C. A.

- Describing Ship as "Class Suspended." -An association formed to supply, through an annual published registry, information, as to irou ships, to members and subscribers, and reserving the right to make periodical surveys of ships registered, objected to certain alterations made in a ship of its highest classification, inserted the words "class suspended" opposite her name in their list, and refused either to omit those words or to withdraw her name from the list :-Held, that there being no proof of malice, falsehood, or unfair dealing, the association was entitled to publish bona fide opinion, although it was in-jurious to the property of the shipowners, and a motion by the shipowners, to restrain publication of the words "class suspended," and to compet the withdrawal of the ship from the list, was referred by the ship from the list, was referred by the ship from the list. fused with costs. Clover v. Royden, 43 L. J., Ch. 665; L. R. 17 Eq. 190; 22 W. R. 254.

Rival Works-Advertisement to mislead Public. -- Where there are two rival works, the court will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work, but will not restrain him from publishing an advertisement tending to disparage that other work. Seeley v. Fisher, 11 Sim. 581; 10 L. J. Ch.

To restrain Publication of Letters.]-A. brought an action against B., the editor of a newspaper, for stating in his paper that the plaintiff was the author of a certain libellous article which had appeared in the paper. To this action B. pleaded, by way of justification, that the matter from which the article had been drawn up had been furnished by the plaintiff in the action coming on for trial, the defendant. Upon the action coming on for trial, the defendant submitted to a verdict of 40s, in favour of the plaintiff. The defendant afterwards showed some of the letters to third persons. Upon a motion before answer, to dissolve an injunction which the plaintiff had obtained to restrain the publication and production of the letters, the court refused the application, more especially as upon the motion for the injunction the plaintiff had produced an affidavit to the effect that the verdict was taken under an arrangement that the letters should be given up, which affidavit was not sufficiently contradicted on the motion to dissolve. Palin v. Gathercole, 1 Coll. 965.

Interlocutory Injunction.]—The High Court has jurisdiction to grant an interlocutory injunction restraining the publication of a libel. Bonnard v. Perryman, 60 L. J., Ch. 617; [1891] 2 Ch. 269; 65 L. T. 506; 39 W. R. 435.

Circular on Management of Company. ]-

company had been brought out, and on the conduct of the promoters and directors, and proposing a meeting of shareholders to take steps toprotect their interests. The company commenced an action to restrain the further publication, and applied for an interlocutory injunction, which was granted by Vice-Chancellor Bacon :- Held, on appeal, that the court hasjurisdiction to interfere on interlocutory application to restrain the publication of a libel. Quartz Hill Consolidated Gold Mining Co. v. Beall, 51 L. J., Ch. 874; 20 Ch. D. 501; 46 L. T. 746; 30 W. R. 583-C. A.

But held, that this jurisdiction is to be exercised with great caution, and will not in general be exercised unless the applicant satisfies the court that the statements in the document complained of are untrue. Ib.

Held, further, that still more caution is requisite where the document in question is prima facie a privileged communication, so as not to be actionable unless express malice is proved, the question of malice being one which cannot conveniently be tried on an interlocutory application. Ib.

In the present case the court not being satisfied on the evidence that the statements in the document were false or malicious, the order foran injunction was discharged. Ib.

Statement as to Solvency of Friendly Society. ]—An interlocutory injunction was granted to restrain the circulation of an untrue statement as to the financial position of a friendly society. Hill v. Hart-Davis, 51 L. J., Ch. 845; 21 Ch. D. 798; 47 L. T. 82; 31 W. R. 22.

- Trade Libel-When Granted. ]-Since the passing of the Judicature Acts the court has jurisdiction to restrain by interlocutory injunction the publication of a trade libel, but as, if it grants such an injunction, it must pronounce the publication to be libellons before it has been found so by a jury, the jurisdiction is to be exercised only in the clearest cases, where any jury would say that the matter complained of was libellous, and where if they found otherwise their verdict would be set aside as unreasonable. Liverpool Household Stores Association v. Smith, 57 L. J., Ch. 85; 37 Ch. D. 170; 57 L. T. 770; 58 L. T. 204; 36 W. R. 485—C. A.

The question as to granting injunctions torestrain publication in a newspaper of reports and correspondence containing unfavourable statements as to the position and solvency of a joint stock company, considered. Injunction to restrain the publication of future articles reflecting unfavourably on a company, refused on the ground of the difficulty of granting an injunction which would not include matters that might turn out not to be libellous; and because if the injunction was granted in terms to restrain what was libellous the question of libel or no libel would have to be tried in a very unsatisfactory way on motion to commit. Ib.

— Libel Injurious to Trade—Before De-livery of Statement of Claim.]—The court has jurisdiction under the Judicature Act to grant an interlocutory injunction restraining the publica-A solicitor, acting for some shareholders in a tion of libels alleged to be injurious to the company, printed and circulated, but only plaintiff's trade before delivery of the statement. of claim in an action to recover damages for such | libel, not excused or justified, but for which the libels. Punch v. Boyd, 16 L. R., Ir. 476.

Exhibition of Portrait Model of Man tried for and acquitted of Murder. ]—An interlocutory injunction restraining the publication of a libel until the trial of the action will not be granted where there are conflicting affidavits as to whether the plaintiff has or has not consented to such publication. Circumstances under which an interlocutory injunction in actions of libel should be granted considered. Monson v. Tussaud, 63 L. J., Q. B. 454: [1894] 1 Q. B. 671; 9 R. 177; 70 L. T. 335; 58 J. P. 524—C. A.

Per Lords Justices Lopes and Davey: The case of Bonnard v. Perryman ([1891] 2 Ch. 260) has established, as a rule of practice, that such an injunction shall not be granted except in cases where a verdict for the defendant would be set aside as unreasonable. Per Lord Halsbury: The case of Bonnard v. Perryman cannot restrict the discretion to be exercised on the facts of each case as to whether it is "just and convenient," within s. 25 of the Judicature Act, Halsbury and Lord Justice Davey: There is no distinction, as regards the power of granting an interlocutory injunction, between a case of libel affecting trade or property and one affecting characters. Ih

\_\_\_\_ Statement of Principles, not Facts.]—On a motion on the part of trustees of a building society, which was also a bank for deposits at interest, for an injunction to restrain until an action for libel could be brought, the publication and sale of a book containing alleged libellous paragraphs in reference to the annual balancesheets and solvency of the society :- Held, that success and solvency of the society — riem, that inasmuch as no malice was proved, and the paragraphs complained of, if false, were false as paragraphs computation of a mass, were mass as statements of principles, not of facts, an injunction could not be granted. *Mulkera* v. Wand, 41 L. J., Ch. 464; L. R. 13 Eq. 619; 26 L. T. 831.

#### D. DAMAGES

# 1. GENERALLY.

What may be Considered-Whole Conduct of Defendant.]—In assessing damages, the jury are entitled to take into consideration the whole conduct of the defendant in the matter, from the time the libel was published down to the time their verdict is given. Prued v. Graham, 59 L. J., Q. B. 280; 24 Q. B. D. 53; 38 W. R. 103—C. A.

Where other Actions pending.]-In an action by a proprietor of a newspaper against a rival newspaper proprietor, for a libel contained in the statement of a printers' society, published in the defendant's paper as an advertisement, and charging the plaintiff with oppressive conduct towards his printers:—Held, that the jury was not bound to take into consideration that who had published the libel, but that they might who had phonesical the hold, our that they integrite the plaintiff such damages as they thought had arisen from the decline of circulation, even subsequently to his action, and this, as general damage. Harrison v. Pearse, 1 F. & F. 567.

publisher has previously been sued, and a verdict given against him for nominal damages, is liable in substantial damages for the injury proved to have been sustained by the plaintiff in consequence of and since the publication. Frescoe v. May, 2 F. & F. 123.

— Where only one Publication of Newspaper proved within Six Years.]—A first count, to which the Statute of Limitations was pleaded. was upon a libel in a newspaper more than six years old. Other counts, for other recent libels, referred to this libel. A publication of the libel in the first count having been proved within six years :- Held, that the judge was not bound to direct the jury to limit the amount of the damages, on the first count, to the injury occasioned by the single publication proved. Brunswick (Duke) v. Harmer, 19 L. J., Q. B. 20; 14 Q. B. 185; 14 Jur. 110.

- Where subsequent Publications proved to shew Malice.]—When a subsequent publication is put in evidence to show the animus of the defendant, if the judge in summing up leaves to the jury whether the proposed publication is libellous, and, if so, to assess the damages, he is not bound to point their attention to the subnot common to point their attention to the subsequent publication, and tell them not to give damages for it. Durby v. Ouseley, 1 H. & N. 1; 25 L. J., Ex. 227; 2 Jur. (N.S.) 497; 4 W. R.

Arrest of Plaintiff in consequence of Libel. |-In an action for a libel published in the Hue and Cry Police Gazette, charging the plaintiff with fraud, and offering a reward for his apprehension, evidence having been given, with the consent of the defendant's counsel, of the arrest of the plaintiff in consequence of the advertisement after the commencement of the action :- Held, that the defendant could not afterwards complain that the judge, in his summing up, did not expressly tell the jury that they were not to take the subsequent arrest into their consideration in estimating the damages for the libel. Goslin v. Corry, 8 Scott (N.R.) 21; 7 Man. & G. 342.

Excessive Damages. ]—Sixty pounds damages in an action of slander, where it was proved that, in consequence of the speaking of the words, the plaintiff lost an employment worth 50. a year, besides board, &c., are not excessive. Jackson v. Hopperton, 16 C. B. (N.S.) 829; 10 L. T. 529; 12 W. R. 913.

Nominal Damages.]—The editor and proprietor of a newspaper published gross and offensive libels of the plaintiff, a elergyman, to which no justification was pleaded. No special damage was proved, but it was shewn that the plaintiff, in a letter addressed to another newspaper, described the defendant's publication as the dregs of provincial journalism," and had published a statement imputing conspiracy and published a statement imputing conspiracy and subornation of perjury to some of his opponents, in which charge the defendant believed himself to be included. The jury having found a verilist for the plaintiff, with a farthing damages:— Held, that, under the circumstances, the jury which wall compare to the acquisition that the over-Nominal Damages against Publisher— might well come to the conclusion that the case Liability of Author of Libel. —The author of a was not one for substantial damages, and that

In an action of slander, where there is no real

injury, the jury may find a verdict for nominal damages. Wakelin v. Morris, 2 F. & F. 26.

which the plaintiffs are entitled, the prospective injury which may accrue to the partnership from the defendant's act. Gregory v. Williams. I Car. & K. 65.

In a joint action of libel by two partners, damages cannot be given for any injury to their private feelings, but only for such injury as they may have sustained in their joint trade or basiness. Haytharn v. Lawson, 3 Car. & P. 196.

Entire Damages on Several Slanders. -No valid judgment can be given upon an assessment of entire damages upon several counts in slander, one of which counts discloses no cause of action. Day v. Robinson, 4 N. & M. 884; 1 A. & E. 554; 3 L. J., Ex. 381—Ex. Ch.

And in such case a venire de novo will be awarded. Ib. S. P., Pemberton v. Colls, 10 Q. B. 461; 16 L. J., Q. B. 403; 11 Jur. 1011.

in one count, and entire damages are given, they are recoverable. Griffiths v. Lewis, 8 Q. B. 841; 15 L. J., Q. B. 249.

6 & 7 Vict. c. 96, s. 2-Payment into Court.] To an action for a libel the defendant pleaded in accordance with 6 & 7 Vict. c. 96, s. 2, that the alleged libel was inserted in a newspaper without actual malice, or gross negligence, and warmen action mance, or gross negagenes, and that he had made a full apology, and paid 51, into court. The judge directed the jury, that in assessing the damages they were to disregard in assessing the admings they were to disregard the payment into court, and to award damages independently of such amount:—Held, a right direction. Janes v. Mackie, 37 L. J., Ex. 1; L. R. 3 Ex. 1; 17 L. T. 151; 16 W. R. 109.

#### 2. SPECIAL.

Words are not actionable, with special damage, Worts are not actionate, wat special tallings, miles they are of themselves disparaging. Kelly v. Partington, 3 N. & M. 117; 5 B. & Ad. 45; 3 L. J., K. B. 104. S. P., Sheahan v. Ahearne, Ir. R. 9 C. L. 412.

Loss of Material Temporal Advantage.] The special damage necessary to support action for defamation, when the words spoken are not actionable in themselves, must be the loss of some material temporal advantage.

Roberts v. Roberts, 5 B. & S. 384; 33 L. J. Q. B.
249; 10 Jur. (N.S.) 1027; 10 L. T. 602; 12 W. R.

Hospitality of Friends.]—If, in consequence of words spoken, a plaintiff is deprived of substantial benefit arising from the hospitality of stantial bounds arising from the hospitality of friends, this is a sufficient temporal damage whereon to maintain an action. Moore v. Meagher, 1 Taunt. 39; 3 Smith, 135; 9 R. R. 702.

Married Woman. ]-Loss of the hospi-

there was no ground for a new trial. Kelly v. support an action for slander of a married woman, Sherolock, 35 L. J., Q. B. 269; L. R. 1 Q. B. 686; although ther hasband is living and bound to married the married woman, and the sheriff of the sher support an action for stander of a married volume, although 'her husband is living and bound to maintain her. Drivies v. Soloman, 41 L. J., Q. B. 10; L. R. 7 Q. B. 112; 25 L. T. 799; 20 W. R.

In Actions by Partners.]—For a libel against a on Wife.]—In an action by husband and wife co-partnership, the jary may take into their for slanderous words actionable in themselves, consideration, in estimating the damages to Refusal to Employ Wife as Servant-Slander special damage the loss sustained by reason of a party having refused to employ the wife as a servant. Dengate v. Gardiner, 4 M. & W. 5; 7 L. J., Ex. 201; 2 Jur. 470.

Married Woman living apart from Husband.]—The plaintiff, a married woman living apart from her husband, brought an action of slander against the defendant. The alleged slander was in respect of words not actionable per se, and the consequences were stated to be that the plaintiff had suffered annoyance, loss of friends, credit, and reputation, and that through the defendant having caused an irreparable breach between the plaintiff and her husband, her husband had deprived her of her own house and of an income :—Held, that the damage alleged as the consequence of the slander was not Q. B. 461; 18 L. J. Q. B. 493; 11 Jur. 1011.

Special damage so as to give a cause of action.

Bur where some of the words spoken are defined by the solution of the words spoken are defined by the solution of the solution.

Special damage so as to give a cause of action.

Weldon v. De Bathe, 54 L. J., Q. B. 113; 83

Must arise from Use of Words.] - Special damage, which is necessary in order to make words actionable, must be such as naturally or reasonably arises from the use of the words. *Haddon* v. *Lott*, 15 C. B. 411; 3 C. L. R. 144; 24 L. J., C. P. 49.

- Illness in Consequence of Slander,] The fact that defamatory words, not actionable in themselves, have occasioned illness, does not constitute special damage so as to give a right of action, either to the person defamed or (if a married woman) to the husband, illness not being the natural or immediate result of words spoken.

Allsopp v. Allsopp, 5 H. & N. 534; 29 L. J., Ex.

315; 6 Jur. (N.S.) 433; 2 L. T. 290; 8 W. R.

Plaintiff cannot go into evidence to shew that his wife had become ill and died soon after the publication of the libels. Guy v. Gregory, 9 Car. & P. 584.

Loss of consortium of Husband. ]-When a wife brought an action to recover damages from A. for slander uttered by him to her husband, A. for shifter accrete by min to her missiand, imputing to her that she had almost been seduced by B. before marriage, whereby she lost the consortium of her husband:—Held, that the cause of complaint would not sustain the action, for that the special damage did not shew in the conduct of the husband a natural and reasonable consequence of the slander. Lynch v. Knight, 9 H. L. Cas. 577; 8 Jur. (N.S) 724; 5 L. T. 291.

The loss of maintenance by wife may be made the subject of a claim for damages, but it must be distinctly averred. Ib.

Slander on Wife of Trader-Loss of Custom.]—An action by a trader alleging that the defendant falsely and maliciously spoke and published of his wife, who assisted him in his business, and in relation to such business, certain words accusing her of having committed adultery managed woman, process of the inspiration works accounting the resided and carried tallity of friends is sufficient special damage to upon the premises where he resided and carried on business, whereby he was injured in his business, and certain specified persons and others who had theretofore dealt with him ceased to do so, is maintainable on the ground that the injury to his business is the natural consequence of the words spoken, which would prevent persons resorting to his shop. Riding v. Smith, 45 L. J., Ex. 281; I Ex. D. 91; 34 L. T. 500; 24 W. R.

Held, also, that special damage might be proved by general evidence of the falling off of his business, without shewing who the persons were who had ceased to deal with him, or that they were the persons to whom the statements were made. Ib.

- Loss of Trade. ]-The saying of a commission agent, that he is an unprincipled man, and borrowed money without repaying it, is not actionable, unless there is special damage; but if this was said to a person who was going to deal with him, and did not do so in consequence of the speaking of the words, that is special damage; although, if the person had dealt with him, the dealing might have turned out unprofitable. Storey v. Challands, 8 Car. & P. 234.

Damage not natural Consequence of Words spoken. ]-Claim, that the plaintiff was a candidate for membership of the R. club, but upon a ballot of the members was not elected; that a meeting of the members was called to consider an alteration of the rules regarding the election of members; that the defendant falsely and maliciously spoke and published of the plaintiff as follows: "The conduct of the" plaintiff "was so bad at a club in M. that a round robin was signed urging the committee to expel" him; "as however" he was "there only for a short time, the committee did not proceed further"; whereby the defendant induced a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plain-tiff from again seeking to be elected to the club: -Held, upon demurrer, that the claim disclosed no cause of action; for the words complained of, not being actionable in themselves, must be supported by special damage in order to enable the plaintiff to sue; and the damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of the defendant's words. Chumberlain v. Boyd, 52 L. J., Q. B. 277; 11 Q. B. D. 407; 48 L. T. 328; 31 W. R. 572; 47 J. P. 372—

Damage too Remote.]-The proprietor of a public amusement cannot maintain an action against a man for a libel on one of his performers, by reason whereof she was deterred from appearing on the stage. Ashley Harrison, Peake, 194; 1 Esp. 48; 3 R. R. 686.

Wrongful Act of Third Person induced by Slander, —The wrongful refusal of a third party to fulfil a contract may give a right to special damage for a slander if such refusal be the probable consequence of the utterance of the slander. Société Française des Asphaltes v. Farrell, 1 Cab. & E. 563.

Where special damage is necessary to sustain an action for slander, it is not sufficient to prove plaintiff from his employ before the end of the term for which he had contracted; but the special damage must be a legal and a natural consequence of the slander. cocks, 8 East, 1; 9 R. R. 361. Vickars v. Wil-And see Rustell v. M'Quister, 1 Camp. 49, n.

No Special Damage-Novice in Religious Community.]-In an action for slander for words imputing unchastity to the plaintiff (alleging, in substance, that she had left her home, not to go into a convent, but because she was pregnant), the plaintiff alleged that the words were spoken of her as a novice in a religious community, and that by reason of the slander (1), she was disqualified from continuing as a novice; (2), disqualified from re-entering the community, as she bona fide intended, after leave of absence for the purpose of attending a sick relative; (3), she was shunned and avoided by her neighbours and friends. The plaintiff had admittedly entered the community as a postnlant, and commenced her novitiate, but left within and commenced her novinate, but the winning seven months of her admission, and was continuously absent for three years before the date of the slander. No evidence was given that the slander reached the community. By the rules of the community six months should be spent therein as a postulant, and two years as a novice, before profession as a nun, until which the postulant or novice acquired no status in the community. The sisters of the community were precluded from holding any worldly goods, and on profession, took vows of poverty, the income of their property (if any) being held for the benefit of the institution; and the Rev. Mother was directed, according to the rules of the Council of Trent, to provide for the wants of those who were subject to her in food, elothing, &c. :-Held, that assuming the words to have been spoken of the plaintiff as a novice, they were not actionable per se, or without evidence of special damage; and that there was no evidence of special damage within the rules of law applicable to cases of oral slander sufficient to sustain the action, Dwyer v. Mechan, 18 L. R., Ir. 138.

Not Necessary that Words should be Believed by Person whose Act constitutes Damage. ]—In order to support an action for defamatory words actionable only in respect of special damage, it is not necessary that the person whose act constitutes the special damage should have believed the defamatory charge, should have beneved the defaultatory charge, provided that he acted in consequence of the words having been spoken. Knight v. Glibb, 3 N. & M. 467; 1 A. & E. 43; 3 L. J., K. B. 135.

Must be Caused by Slander, not by Repetition of it.]-In an action of slander, a plaintiff, in shewing special damage, must confine his proof to the evidence of persons who received the slanderous statements from the defendant himself. Rutherford v. Evans, 4 M. & P. 163; 6. Bing. 451; 4 Car. & P. 74; 8 L. J. (o.s.) C. P. 86; 31 R. R. 465.

The plaintiff alleged special damage from words spoken by the defendant :- Held, that this allegation could not be supported by proof that the defendant had spoken the words to B., and that damage ensued in consequence of B.'s an action for slander, it is not sufficient to prove repeating them as the words of the defendant, a mere wrongful act of a third person, induced Ward v. Weeks, 7 Bing, 211; 4 M. & P. 796; 9. L. J. (o.s.) C. P. 6.

ticular person, who was not present when the usually had and otherwise would have given slander was uttered has ceased to show hospi- without saving who those persons were, or h tality to the plaintiff in consequence of a subsequent repetition by some one in such person's hearing of the slander complained of, is no evidence of special damage. Clarke v. Margan, 38 L. T. 354.

A. spoke slanderous words of B. in the hearing of A., B., and C. only; C. repeated the slander to D., who, in consequence, would not employ B. :-Held, that in an action by B. against A., this special damage could not be gone into, as D. did not hear A. speak the words. Tunnicliffe v. Moss, 3 Car. & K. 83.

a police constable, in consequence of a report duly made to them of a censure uttered on such police officer by a justice of the peace, is in itself sufficient evidence of special damage to resent same action of slander against the justice, Kendillon v. Maltby, Car. and M. 402; 2 M. & Rob. 438. But see Musster v. Lamb, 52 L. J., Q. B., 726; 11 Q. B. D. 588; 49 L. T. 252; 32 W. R. 248; 47 J. P. 805—C. A.

In such an action evidence of malice is necessary; for it is the duty of the justice to express his opinion of the conduct of police constables, in order that the police commissioners may have proper information on which to proceed, in making inquiries to enable them to regulate the force under their direction. Ib.

For verbal slander not actionable per se, the declaration alleged as special damage, that, in consequence of the speaking of the words, four of the plaintiff's customers had ceased to deal with him. Three of those persons proved only that they ceased to deal with the plaintiff in consequence of reports they had heard in the neighbourhood; but the fourth proved the speaking by the defendant of words substantially as charged, and stated that he did not deal with the plaintiff afterwards :- Held, some evidence of special damage. Ba (N.S.) 638; 1 L. T. 296. Buteman v. Lyall, 7 C. B.

In an action by a surgeon and an accouchenr That action of a single and a servant had darked inputing that a female servant had had a bastard child by him, whereby D. would 1 H. & N. 251; 26 L. J., Ex. 81. not employ him as an acconchenr, and he was otherwise injured in the way of his business, it was proved that the words were spoken by the defendant in conversation with D. :- Held, that the plaintiff was not entitled to recover such damages in respect of a general loss of business as might have been caused by repetitions of the slander, but could not have arisen directly from the speaking of the words by the defendant to D. Diron v. Smith. 5 H. & N. 450 ; 29 L. J., Ex. 125.

character as an auctioneer, and the fact that he is not actionable, unless the owner sustains some had had a transaction with a third party in the damage thereby. Ingram v. Lawson, 9 Car. & P. way of his business as an auctioneer to which the 326. words might apply, is sufficient to support the allegation. Ramsdale v. Greenwere, 1 F. & F. 61.

summer, inputing mechanisms or one parametr, then without payment, and to be accessed in the second to state, that he was employed to delaration for words by B. againt C., that this pread to a dissenting congregation at a certain hon-delivery was special damage resulting from themselved the derived considerable words spoken by C. to A., the counsel of C. may profit by his preaching, and that by reason of ask A, on the trial of the action for the words, the scandal, "persons frequenting the chapel had whether he did not refuse to deliver the goods refused to permit him to preach there, and had from what other persons said of B, and what

In an action for slander, evidence that a par-|discontinued giving him the profits which they without saying who those persons were, or by what authority they excluded him, or that he was a preacher duly qualified. Hartley v.

Herring, 8 Term Rep. 130; 4 R. R. 614.

A plaintiff was possessed of shares in a silver mine, touching which shares certain claimants had filed a bill in chancery, to which the plaintiff had demurred :-Held, that, without alleging special damage, he could not sue the defendant for falsely publishing that the demnrrer had been overruled; that the prayer of the petition (for the appointment of a receiver) had been granted, and that persons duly authorised had arrived at the The dismissal by the police commissioners of mine :-Held, also, that an allegation that the plaintiff was injured in his rights, that the shares were lessened in value, that divers persons believed that he had no right to the shares, that the mine could not be worked, and that he had been prevented from disposing of his shares, and from working the mine in so ample a manner as he otherwise would have done, and was prevented from gaining divers profits which would otherwise have accrued to him, was not a sufficient special damage. *Malachy* v. *Soper*, 3 Bing. (N.C.) 371; 3 Scott, 723; 6 L. J., C. P. 32.

> Proof of Special Damage-General Injury to Business. |- In an action for libel, the rule of law is not, that if the plaintiff relies only on general injury to his business, he may shew by witnesses. the general diminution of that business, because the law assumes the existence of a general injury; and if the plaintiff seeks specific damages, he must give specific evidence. Delegal v. Highley, 8 Car. & P. 444.

> On a statement of special damage by loss of eustom, the customers themselves must be called. Barnett v. Allen, 1 F. & F. 125.

For words spoken of the plaintiff in his trade or business, with a general allegation of loss of business, it is competent to the plaintiff to prove, and the jury to assess damages for a general loss or decrease of trade, although the declaration alleges the loss of particular enstomers as special

. — General loss of Hospitality.]—Semble, that evidence of a general falling off, since the time when the slander was uttered, of the hospitality shewn to the plaintiff is evidence of special. damage. Ib. See Riding v. Smith, 1 Ex. D. 91; 45 L. J., Ex. 281; 24 W. R. 487.

When not Pleaded-Libel on a Ship.]-In a declaration for a libel upon a ship, imputing When sufficiently Alleged.]—A declaration was an ended by inserting an allegation that of special damage, although he has not aversed the words were spoken of the plaintiff in his in his declaration, because a libel upon a charge.

By Cross-examination of Plaintiff.]--If In an action for consequential damage from A. has sold goods to B., and would not deliver slander, imputing incontinence to the plaintiff, them without payment, and it is alleged in a 614.

#### 3. CIRCUMSTANCES IN AGGRAVATION OF.

Justification Pleaded. ] - Action for a libel. Plea, not guilty and a justification. The latter plea was abandoned at the trial, and the defence relied upon was that the alleged libel was a privileged communication :- Held, that the plea of justification was no evidence that the communication was not made bona fide, though it might be considered by the jury in aggravation of damages, after they found that the communication was not so made. Wilson v. Robinson, 7 Q. B. 68; 14 L. J., Q. B. 196; 9 Jur. 726.

Ridicule.]-Proof that the plaintiff had been made the subject of laughter at a public meeting is admissible, as identifying his person with the subject of a libel, and as proof of the consequences which had necessarily resulted to him from its application. Cook v. Ward, 4 M. & P. 99; 6 Bing, 409; 8 L. J. (o.s.) C. P. 126; 31 R. R.

Gratuitous Circulation of Paper.]-In an action for a libel published in a newspaper, evidence that copies of the newspaper containing the libel had been gratuitously circulated in the plaintiff's neighbourhood, though they are not shewn to have been sent by the defendant, the publisher, is admissible to show the extent of the circulation of the paper, and the consequent injury to the plaintiff. Gathercole v. Miall, 15 M. & W. 319; 15 L. J., Ex. 179; 10 Jnr. 337.

Other Circumstances.]—If a defendant by his pleading admits the publication, the plaintiff is still at liberty to shew the manner of the publication, with a view to the amount of damages. Vines v. Serell, 7 Car. & P. 163.

A proprietor of a newspaper published a libel on a tailor, stating that he had been flogged (which turned out to be a pure fabrication); and although it was complained of at once, and the falsehood of the statement shewn, delayed pub-lishing any contradiction until after action; these circumstances were left to the jury as evidence of negligence, and a verdict for very large damages was not disturbed. Harrison, 1 F. & F. 565.

In an action for a libel, other papers, which are in themselves libels on the plaintiff, may be given in evidence to increase the damages. v. Huson, Peake, 166. But see Cook v. Field, 3 Esp. 133; 6 R. R. 822.

### 4. CIRCUMSTANCES IN MITIGATION OF,

Suspicion of Truth of Libel.]-In an action for a libel, a defendant may under the general issue prove in mitigation of damages any ground of suspicion short of facts, which would, if pleaded, have amounted to a complete justification. Knobell v. Fuller, Peake's Add. Cas. 139; 4 R. R. 896. But see Underwood v. Parkes, Stra. 1200 ; Mullett v. Hulton, 4 Esp. 248.

But he cannot give evidence of any fact in mitigation of damages which would be evidence to prove a justification of any part of the libel; he ought to justify as to that part. Vessey v.

those persons did say. King v. Watts, 8 Car. & P. | occurred before one of his majesty's commissioners of inquiry respecting corporations :-Held, that the defendant could not give evidence of the accuracy of the report as a matter of justification, but that he might give such evidence in mitigation of damages. Charlton v. Walton, 6 Car. & P. 385.

> Justification not Pleaded-Character of Plaintiff.]—Where there is no plea of justification, questions cannot be asked tending to shew the plaintiff's previous bad character in mitigation of Bracegirdle v. Bailey, 1 F. & F. damages.

> Provocation.]—The defendant may give evidence of provocation in mitigation of damages, and may for that purpose show that the plaintiff had used expressions calculated to provoke him, both in writing and verbally. Trapley v. Blaby, 7 Car. & P. 395, S. C., nom. Tarpley v. Blabey, 2 Bing. (N.C.) 437; 2 Scott, 642; Hodges, 414; 5 L. J., C. P. 83.

> In order to the admission of libels by the plaintiff in mitigation of damages, it must be shewn with precision that such libels are of given date, and relate to the libels by the defendant. Ib.

The defendant may shew, in mitigation, that he was provoked to issue the libel by publications of was provoked to issue the role by publications of the plaintiff reflecting upon the defendant, Watts v. Fraser, 7 A. & E. 323; 1 M. & Rob. 449; 7 C. & P. 369. S. P., Moore v. Oastler, 1 M. & Rob. 451.

In an action for libel, general evidence that the plaintiff has been in the habit of libelling the defendant is inadmissible. Wakley v. Johnson, R. & M. 422; 27 R. R. 767. S. P., Finnerty v.

Tipper, 2 Camp. 76.
The defendant, cannot, in mitigation of damages, put in newspapers deposited at the Stamp Office, containing libels on himself by the plaintiff; for, non constat that any such newspapers were published, or came to the knowledge of the defendant. Nor can the defendant put in the copy of a work published by the plaintiff, unless to show that such work came to his knowledge and provoked him to write the libel. Watts v. Fraser, 2 N. & P. 157; W. W. & D. 451; 7 A. & E. 223; 6 L. J., K. B. 226; 1 Jur.

Rumour and Hearsay.]-Evidence to prove that a libel was merely a repetition of common rumours, which were prevalent at the time of the facts imputed to the plaintiff, and on which the libel was founded, is inadmissible for the purpose of reducing the damages. Waithman v. Weever, 11 Price, 257, n.; D. & R. N. P. 10; 25 R. R. 770.

A defendant may shew, in mitigation of damages, that he heard the libellous statement from a third person, Duncombe v. Daniell. 2 Jur. 32.

Action for a libel alleging that the plaintiff, a theatrical critic, had endeavoured to extort money by threatening to publish defamatory matter concerning a deceased actress. Defence : that the allegation was true in substance and fact:-Held, that evidence of rumours before the publication of the libel that the plaintiff had committed the offences charged in it, and evi-Pike, 3 Car. & P. 512.

dence of particular facts and circumstances

A libel purported to be a report of what tending to shew the misconduct of the plaintiff as a theatrical critic, could not be admitted in reduction of damages. Scott v. Sampson, 51 L. J., Q. B. 389, 18 Q. B. D. 491; 46 L. T. 412; 30 W.R. 541; 46 J. P. 408.

Held, further, that assuming such evidence to be material, it was rightly rejected, for the particular facts and circumstances were not stated or referred to in the pleadings as required by Ord, XIX. r. 4. Tb.

Taking Libel from Newspaper.]—Where a libellous letter refers to a newspaper, as containing the slanderous matters imputed to the plaintiff, the defendant may give the newspaper in evidence in mitigation of damages. Mullett v. Hulton, 4 Esp. 248.

Newspaper Copying from Another. ]—In mitigation of damages the defendant was allowed to skew that he copied the libellous statement from another newspaper, but was not allowed to skew that it appeared concurrently in several other newspapers. Susmices v. Mills. 6 Bing. 213; 3 M. & P. 52; 8 L. J. (0.8) C. P. 24; 31 R. R. 394. See Creecey v. Curr., 7 Car. & P. 64.

Newspaper Publishing Communication of Correspondent. —In an action against the clitors of a newspaper for libel, the fact of the libel being published on the communication of a correspondent is not admissible in mitigation of damages. Tulbuttv. (Furk. 2 M. & Rob. 312.

mepeating previous Privileged Publication.]—A libel in a newspaper in substance and bona file and without malice or ill intent taken from a previous publication which was privileged is sufficient to justify a jury in giving only nominal damages. Datis v. Cutbush, 1 F. & F. 487.

— Proof that Plaintiff has recovered Damages for same Libel in another Paper.]— In an action for a libel published in a newspaper, the defendent cannot go in evidence in mitigation of damages to show in the same their has appeared in another newspaper from which the plaintiff has already recovered to the libel from another cannot be seen that the defendant may she with at he copied the libel from another newspaper, and omitted several passage contained in that newspaper with referred on the character of the plaintiff. Creevey v. Curr, 7 (2ar, S.P. 64.

V. SLANDER OF TITLE.

See SLANDER OF TITLE.

J. S.

# DEFENCE.

See PRACTICE (PLEADING).

Of the Realm.]—See WAR.

DELAY.

See WAIVER.

# DELIVERY ORDER.

See SALE OF GOODS.

# DEMURRAGE.

See SHIPPING.

# DENTIST.

See MEDICINE.

# DEPOSIT NOTE.

See BILLS OF EXCHANGE.

# DEPOSITIONS.

Before Magistrates.]—See CRIMINAL LAW. Under Commissions.]—See EVIDENCE.

## DESCENT.

See ESTATE.

# DESIGNS.

See COPYRIGHT.

# DE SON TORT.

See EXECUTOR AND ADMINISTRATOR—TRUST,

# DESTROYED INSTRU-MENTS.

See EVIDENCE.

22-2

## DETINITE

- A. WHAT IS, 679.
- B. ACTION FOR
- - 1. In what Cuses.
    - a. Generally, 679. b. For Goods, 680.

      - c. For Deeds and Securities, 682. d. For Letters, 684.

  - 2. On Distresses, 684.
  - 3. Parties to Sue. 684.
  - 4. Statute of Limitations, 685.
  - 5. Staying Proceedings, 686.
  - 6. Damages and Costs, 686.
  - 7. Judgment and Execution, 688.
- C. COMPELLING DELIVERY OF CHATTELS, OR GOODS DETAINED, 688.

#### A. WHAT IS.

The word "detain," in detinne, means an ad-S Jur. 894. Gledstane v. Hewitt, 1 C. & J. 565;
 Tyr. 445; 9 L. J., Ex. (o.s.) 145.
 Detinue is a personal action, in which com-

pensation or amends is sought to be recovered, though the goods, or their value, are also sought to be recovered. Crossfield v. Such, 8 Ex. 159; 22 L. J., Ex. 65; 1 W. R. 82.

#### B. ACTION FOR.

#### 1. IN WHAT CASES.

### a. Generally.

Description of Articles Detained.]—In detinne the nature of the articles sought to be recovered must be distinctly specified. Friedel v. Castle-reagh, 11 Ir. R., C. L. 93.

Defendant admitting Possession-Estoppel. If a person, who writes an answer to a demand made upon another person of certain things, saying that he has got them, and thereby induces the claimant to bring an action against him, he is liable to such claimant in detinne, although it does not appear that he had the general controlling power over the things. Hall v. White, 3 Car. & P. 136.

Several Articles-Motion to Assess Damages as to One. ]-In detinue for several things the court will not, on motion, assess the damages as to one article, and strike it out of the declaration on its being delivered up to the plaintiff. Phillips v. Hayward, 3 D. P. C. 362; 1 H. & W.

Defence of Co-tenancy to be Specially Pleaded.]

-A defence that the defendant was tenant in common with the plaintiff must be specially pleaded. Mason v. Furnell, 12 M. & W. 674; 1 D. & L. 576; 13 L. J., Ex. 142.

Justifying Detention.] - A defence that the defendant is justified in detaining the articles in question, or that the plaintiff is not possessed of them must be specially pleaded. \*\*Richards or Richardson v. Frankum, 6 M. & W. 420; 8 D. P. C. 346; 9 L. J., Ex. 162.

#### b. For Goods.

[The Police (Property) Act, 1897, gives power to courts of summary jurisdiction to make orders for the disposal of property in the possession of the police in connection with any criminal charge.]

In Hands of Police Superintendent-Application to Magistrate as to Disposal of Goods—Adjournment of Hearing—Liability of Superintendent.]-The plaintiff was tried and acquitted on a charge of stealing a diamond ring and pin found on his person. A superintendent of police, into whose hands the goods had come in the ordinary course of proceedings, did not deliver the goods to the plaintiff, but within a reasonable time applied to a metropolitan police magistrate, under 2 & 3 Viet. c. 71, s. 29, for an order as to how he was to dispose of the goods. The magistrate, after hearing evidence, including that of the plaintiff, adjourned the hearing to a day not yet expired. In an action for the detention and conversion of the goods against the superintendent :- Held, that he, having within a reasonable time proceeded in accordance with the provisions of the act to place the matter in the hands of the magistrate, was not liable. Bullook v. Dinklep, 46 L. J., Ex. 150; 2 Ex. D. 48; 35 L. T. 633; 25 W. R. 98; 13 Cox. C. 5367. Affirmed on appeal, 36 L. T. 194; 13 Cox, C. C. 581; 25 W. R. 293-C. A.

Property by Finding—Title of Finder.]—Where an owner of land has the right to exercise a control over it and to prevent unauthorised interference, and some article (abandoned by its true owner) is found by a stranger, either upon or beneath the surface of the land, the presumption is that the right to possession of the article found is in the owner of the land, and not in the finder. The owner of the land can therefore maintain detinue against the finder. South Staffordshire Waterworks v. Sharman, 65 L. J., Q. B. 460; [1896] 2 Q. B. 44; 74 L. T. 761; 44 W. R. 653,

The place in which a lost article is found does not constitute any exception to the general rule of law that the finder is entitled to it as against all persons except the owner. Bridges v. Hawkesworth, 21 L. J., Q. B. 75; 15 Jur. 1079.

Bonâ-fide Sale to Third Parties before Action.] Detinue will lie though the defendant has boun tide sold the chattel before action. Jones v. Dorole, 1 D. (N.S.) 391; 9 M. & W. 19; 11 L. J.,

Possession of Goods of Intestate-Ceasing to hold them prior to Grant of Administration, But it cannot be maintained by an administrator against a person who has had possession of the goods of the intestate, but has ceased to hold them prior to the grant of administration. Crossfield v. Such, 8 Ex. 825; 22 L. J., Ex. 325; 1 W. R. 470.

Right of Person in Possession to Insist on Receipt.]-A person having in his possession the Palace Co., 2 F, & F, 443; 4 L, T, 403,

Delivered under Hiring Contract.]-Where goods are hired at a certain rate per month, and are to be returned whenever demanded, the owner may demand them back in the middle of a month, and, on refusal to return, may maintain detinue. Leader v. Rhys, 2 F. & F. 399.

Pawnbroker and Pledgor-Tender of Amount advanced. ]-The pledgee of goods does not by asserting that the transaction was an out and out sale divest himself of his special property in the goods, or relieve the pledgor from tendering the sum advanced. *Yungmann* v. *Briesmann*, 4 R. 119; 67 L. T. 642; 41 W. R. 148—C. A.

Repledging by Pledgee.]—If a pledgee re-pledges, the original pledgor cannot maintain detinue against the sub-pledgee without having paid, or being ready and willing to pay, the original debt, to seeme which the pledge was given. Domild v. Suckling, 7 B. & S. 783; 35 L. J., Q. B. 232; L. R. I Q. B. 585; 12 Jur. (N.S.) 795; 14 L. T. 772; 15 W. R. 18.

Joint Owners-Bankruptcy of One-Sale by Solvent Owner. ]-After the bankruptcy of one of two joint owners of goods, the solvent owner may authorise the sale of the goods, and the broker who sells pursuant to such authority may set it up as a defence in an action by the assignees of the owner who has become bankrupt under non detinet. Morgan v. Marquis, 9 Ex. 145; 2 C. L. R. 276; 23 L. J., Ex. 21.

Detention in Respect of Lien. ]-A. left a picture, which was his property, in the rooms of C., an auctioneer. B. was in company with A. when he went to Us rooms with the picture. B, owed C. Sl., and had advanced A. some mousy upon the picture. When A. wanted his picture back, and offered to pay for the warehouse room, C. said the cost of keeping the picture was 5s.; but that he would not deliver it up unless he was paid B.'s debt in addition to that sum :-Held, a waiver of the demand for warehouse room, and that detinue would lie by A. against C. for the picture, without an offer to pay for the cost of keeping it. Dirks v. Richards, Car. & M. 626; 5 Scott (N.R.) 534; 4 Man. & G. 574; 6 Jur. 562. C. employed T. to convey in his barge a quan-

tity of copper ore from Liverpool to Birkenhead, and to deliver the same to L., who had undertaken to indemnify C. from all risk in the transit. The barge having sunk owing to stress of weather, T. applied to C. to know whether he should raise the ore. The answer was that he must ask L. L. said, "I am insured, ask the Insurer," which he did, and received an order to raise it:—Held, that C. had done nothing to estop him from bringing detinue, and that as he never employed T. to raise the ore, the latter could have no lien upon it, neither could he recover as againt C. apon it, incliner could no recover as against C. for salvage or general average. Custellain v. Thompson, 13 C. B. (N.S.) 105; 32 L. J., C. P. 79; 7 L. T. 424; 11 W. R. 147.

A plea setting up a lien on the chattel detained, in respect of a guarantee entered into by the defendant, at the plaintiff's request, for a debt to be incurred by a third party, but not stating that of an invention gave the defenda the debt has been, or is about to be incurred, is share of the patent, and subseque

goods of another, whom he knows to be the good; and the plaintiff must shew, by way of owner, has no eight to detain them until he has answer, that the guarantee is terminated. \*Mechanytic receipt for them. \*Barnett v. Crystal leabaryh v. Gloya, 13 W. R. 201

#### c. For Deeds and Securities.

Deed Lost. |- In an action by a client against his attorney for detaining his title deed, which had come into his possession in his capacity of attorney to his client, it is no excuse for him to plead that he has lost the deed. Rever v. Palmer, 5 C. B. (x.s.) 91; 28 L. J., C. P. 168; 5 Jur. (x.s.) 916; 7 W. R. 325—Ex. Ch. S. P., Goodman v. Boycott, 2 B. & S. 1; 31 L. J., Q. B. 69; 8 Jur. (x.s.) 763; 6 L. T. 25.

Evidence of Possession of Documents.]—If, in detinue against an attorney for not delivering up papers to his client after his bill has been paid, he pleads non detinet, the plaintiff must prove that the papers were in the defendant's possession; but evidence that they were produced by his agent before the master, on the taxation of his bill, is sufficient proof of his possession.

Anderson v. Passman, 7 Car. & P. 193.

In detinue for papers, the jury must find the value of each paper separately; and it is the duty of the plaintiff to prove the value of the articlesfor which he sues. Ib.

Mortgage.]-L. conveyed to the plaintiff, by way of mortgage, land, and deposited with him an indenture conveying the land from G. to T., and also a document purporting to be an indenture, by which the land was conveyed by T. to L. This document was, in fact, a forgery. L. afterwards deposited with the defendant, by way of equitable mortgage, a document purporting to be the conveyance from G. to T., but which was, in fact, a forgery, and also the genuine indenture of conveyance from T. to L.:-Held, that the plaintiff might maintain detinue against the defendant for the recovery of the latter indenture. Newton v. Beck, 3 H. & N. 220; 27 L. J., Ex. 272; 4 Jur. (N.s.) 340; 6 W. R. 443.

- Verbal Gift.]-A private act of parliament enacted "that every transfer of Bristol and Exeter Railway mortgages shall be by deed duly stamped." A. having in his lifetime given, by word of mouth and delivery, to B. two such mortgages or debentures:—Held, that assuming the property in the mortgage debts did not pass by such gift, nevertheless that A.'s executor could not maintain detinue for the documents against B. Barton v. Gainer, 3 H. & N. 387; 27 L. J., Ex. 390; 4 Jur. (N.S.) 715; 6 W. R. 624.

Equitable Deposit of Title Deeds-Principal Sum not Repaid - Remedies of Mortgagor. Where there has been an equitable deposit of title deeds to secure repayment of a loan, an action of detinne cannot be maintained therefor prior to repayment. The remedy is by a suit for redemption, or by summary application for the deeds on terms of substituting for the security a sum of money equal to the amount secured with or noney equal to the amount securet with a proper margin. Bank of New South Wales v. O'Connor, 58 L. J., P. C. 82; 14 App. Cas. 273; 60 L. T. 467; 38 W. R. 465—P. C.

Letters Patent-Co-owners.]-T

him the letters patent to assist him in negotiating a sale thereof, but as he failed to do so within the time prescribed they desired him to return the letters patent, which, however, he declined to do :- Held, that when the projected sale of the patent failed, the defendant being owner of only one-third share in it, had no right to retain possession of the letters patent as against the plaintiffs, who owned the remaining two-third shares. Casey's Patents, In re, Stewart v. Casey, [1892] 1 Ch. 104; 65 L. T. 40.

Railway Scrip "lodged" with Defendant -Refusal to Re-deliver.]—Where a defendant, after signing an acknowledgement that certain railway scrip had been lodged in his hands by the plaintiff, and was to be re-delivered to him on request, wrongfully detained the scrip for a considerable time, so that its market value had been much diminished, and did not re-deliver it until after action :- Held, that the action was rightly brought in detinue, as the term "lodged" implied that the identical scrip was to be returned. Archer v. Williams, 2 Car. & K. 26.

Promissory Note - Payment of Value into Court. ]-A promissory note having been sued upon in a county court, and the money paid into court, and a demand made for the cancelled note after the holder had notice of the payment, but before he had had time to take the money out of court :-Held, that his refusal to give up the note did not constitute a detention. Norton v. Blackie, 13 W. R. 80.

Lease given as Security - Claim to retain Lease in respect of other Dealings.]-Brewers agreed to lend C., a publican, 1501. on his promissory note, payable on demand, with interest; C. depositing a lease of premises in his occupation as security for the repayment of the 1501, and interest; the brewers agreeing not to call for repayment of the money for two years. on condition that the interest and the rent of the premises were duly paid, and all beer consumed or sold on the premises be bought of them, and paid for regularly; and in case of any of the conditions remaining unperformed after fourteen days' notice, the brewers to be at liberty immediately to put the note in force, and if not paid, with costs and any interest due, to sell the lease ; the expenses of the sale and the principal and interest to be deducted from the proceeds, as also any account due and owing for beer :- Held, that, on tender of the amount of the note and interest, C. was entitled to have the lease returned to him, and that the brewers had no right to retain the lease on account of any sum due for beer supplied since the agreement, the lease being deposited under the agreement as a security for the 150% and interest only. Chilton v. Curring-ton, 15 C. B. 95; 3 C. L. R. 138; 24 L. J., C. P. 10; 1 Jur. (N.S.) 89; 3 W. R. 17.

- Delivery of to Stakeholder. ]-Detinue does not lie against the maker of a promissory note after he has delivered it to a properly constituted stakeholder, though he may have forbidden the stakeholder to hand it over to the person claiming it, and in whose favour it was drawn. Latter v. White, 41 L. J., Q. B. 342; L. R. 5 H. L. 578.

The trustee of a composition deed holding the bills or notes of the debtor or of his snrety, for

Life Policy-Delivery of by Assured-Intestacy of Assured -Action by Administrator. A son insured his life and gave the policy to his mother, without making a valid assignment to her of the interest in the money secured. He afterwards died intestate, and his administratrix brought detinne and trover against the mother's solicitor and the mother, to recover possession of the policy:—Held, that the action could not be maintained. Runmensv. Hare, 46 L. J., Ex. 30; 1 Ex. D. 169; 34 L. T. 407; 24 W. R. 385—

### d. For Letters.

A person who receives a letter addressed to him, has such a property therein as entitles him to bring detinue against the writer in case by any means it has got back into the latter's hands, Oliver v. Oliver, II C. B. (N.S.) 139; 31 L. J., C. P. 4; 8 Jur. (N.S.) 512; 5 L. T. 287; 10 W. R. 18.

#### 2. ON DISTRESSES.

An action lies for detaining goods taken under a distress for rent, after a sufficient tender made a distress for rent, factor a sometime tenace mane before impounding. Loring v. Warburton, El. Bl. & El. 507; 28 L. J., Q. B. 31; 4 Jur. (N.S.) 634; 6 W. R. 602.

But detinue will not lie on a refusal to deliver up cattle distrained damage feasant, where the tender of amends is after the impounding. Singleton v. Williamson, 7 H. & N. 747; 31 L. J., Ex. 287; 8 Jur. (N.S.) 157; 5 L. T. 645; 10 W. R. 301.

### 3. PARTIES TO SUE,

Owner of Goods Pledged without Authority.]-If A., without the authority of B., pledges his property with C., a joint action of detinue is maintainable by B. against both A. and C. Garth v. Howard, 5 Car. & P. 346.

Bailment - Delivery to Bailor - Owner of Chattels. ]-To a bill against a bailee, for redelivery of jewels, persons entitled to a part of them are not necessary parties. Saville v. Tancred, 3 Swanst. 141.

Cestui que trust-Delivery of Deed by Trustee to Bailee.]—A cestui que trust cannot maintain detinne for the deed under which he claims against a bailee of the trustee. Foster v. Crubb, 12 C. B. 186; 21 L. J., C. P. 189; 16 Jur. 835.

Administrator-Person in Possession of Intestate's Goods, but has parted with them Prior to Grant of Administration. ]-An administrator cannot maintain detinue against a person who has had possession of the goods of the intestate, but has ceased to hold them prior to the grant of administration. Crossfield v. Such, 8 Ex. 825; 22 L. J., Ex. 325; 1 W. R. 470.

Joint-Owners of Chattel—Agreement that one should have Possession—Pledge of Chattel by the Other. ]-N. the owner of a chattel, sold a half share in it to F., it being agreed that N. should retain possession of it until it was sold. After a time N. gave it to F. to take to an anction-room to be sold. F., instead of so doing, pledged it with a creditor as security for a debt:

—Held, that N. had a special property in the chattel and a right of immediate possession the benefit of creditors, is such a stakeholder. Ib. arising out of it, and could maintain an action

— Joint Deposit — Demand by One.] — Where two or more who are jointly interested in a chattel deposit it with a stranger, a demand by one in his name only, and not on behalf of all, will not entitle such one to maintain detinne for it. Atwood v. Ernest, 13 C. B. 881; 1 C. L. R. 738; 22 L. J., C. P. 225; 17 Jur. 603; 1 W. R.

Joint Interest in Deed-Right to retain Possession. ]-Where several have an interest in a deed, the title to the possession of it is ambulatory, and any of the parties interested having possession may retain it against the other. Foster v. Crabb, supra.

Grant of Arms-Right to Possession of. ]-A. obtained from the Heralds' College a grant of arms to be borne by him and the descendants of his brother. His brother had two sons, the elder of whom was heir-at-law of A., and the younger his executor with another person. A. bequeathed all his household goods and effects to his wife, and she took possession of the grant of arms :-Held, that the two nephews of A, had not such an exclusive interest in the grant of arms as to enable them to maintain detinue for it against the wife of A. Stubbs v. Stubbs, 1 H. & C. 257; 31 L. J., Ex. 510.

Tenants in Common-Bankruptcy of One-Title of Trustee.]-One of two tenants in common of goods committed an act of bankruptcy, and by the direction of his co-tenant sold the goods :- Held, that the assignees of the bankrupt could not maintain detinne, nor recover the proceeds of the sale as money had and received. Morgan v. Marquis, 9 Ex. 145; 2 C. L. R. 276; 23 L. J., Ex. 21.

Agent-Right of against Employer-Doou-ments entrusted by Court to Agent.]-A party to a suit having obtained from his own attorney or agent documents in a cause, in enstedy of a court and by the court intrusted to the agent, on his undertaking to return them :- Held, that the agent was entitled to maintain detinne against his employer to recover them. Craig v. Shedden, 1 F. & F. 553.

#### 4. STATUTE OF LIMITATIONS.

When Cause of Action accrues. ]-Title-deeds of the plaintiffs were fraudulently taken from them and deposited by a third person, without their knowledge, with the defendant in 1859, who held them without knowledge of the fraud to secure the repayment of a loan. The plaintiffs, on discovering the loss of the deeds in 1882. demanded them of the defendant, and upon his refusal to give them up brought an action to recover them, to which the defendant pleaded the Statute of Limitations :- Held, that until demand and refusal to give up the deeds to the real owners they had no right of action against which the statute would run. Spackman v. Foster, 52 L. J., Q. B. 418; 11 Q. B. D. 99; 48 L. T. 670; 31 W. R. 548; 47 J. P. 455.

When a person, intrusted with a chattel for

of detinue against the pledgee, Nylnerg v. a demand, the Statute of Limitations is no bar to Handelaar, 61 L. J., Q. B. 709; [1892] 2 Q. B. such action if brought within six years after the 202; 67 L. 7361; 40 W. B. 545; 56 J. F. 694— [demand and refresh, although more than bix years have elapsed since the person so intrusted with the article has wrongfully parted with the or a ritier has wronging parted with the possession of it. Wilkinson v. Verity, 40 L. J., C. P. 141; L. R. 6 C. P. 206; 24 L. T. 32; 19 W. R. 604.

The plaintiff's son, without his father's know-

ledge, in 1881 wrongfully obtained possession of a lease of certain premises of which his father was in possession, and deposited it with B. to secure a loan from B, to him. In 1889 B, became bankrupt, and his trustee in bankruptcy transferred the lease to the defendant. The plaintiff having subsequently discovered his loss, demanded the return of the lease from the defendant, and being refused, brought an action for conversion, to which the defendant pleaded the Statute of Limitations :- Held, that the plaintiff's cause of action against the defendant did not accrue until the demand and refusal to give up the lease, and that the Statute of Limitations was therefore no bar to the action. Wilkinson v. Verity, supra, explained. Miller v. Dell, 60 L. J., Q. B. 404; [1891] 1 Q. B. 468; 63 L. T. 693; 39 W. R. 342-C. A.

#### 5. STAYING PROCEEDINGS.

In an action of detinue, alleging no special damage, the court will compel a plaintiff to elect whether he will stay all proceedings on delivery of the chattel in dispute, on payment by the defendant of nominal damages, and all the costs of the action, or will proceed for greater damages at the risk of all costs. Lyons v. Keller, 15 Ir. C. L. R., App. 1.

### 6. Damages and Costs.

Measure of Damages-Illegal Claim Made to Detain Goods.]-Where goods are detained under an illegal claim to a sum of money in respect of them upon payment of which the owner might recover possession of his property, the measure of damages is not necessarily that sum; but the circumstance that the owner might by paying the sum have obtained the goods is an element for the consideration of the jury in assessing the damages. Daris v. L. & N. W. Ry., 4 Jur. (N.S.) 1303: 7 W. R. 105.

Return of Goods after Action in damaged Condition. |- In detinue, if the defendant pleads the return and acceptance of the goods after action brought, evidence on the part of the plaintiff to shew their damaged state after the commencement of the action is admissible. M'Grath v. Bourne, 10 Ir. R., C. L. 160.

Effect of Consent Order as to Possession—Appointment of Receiver. ]—D. commenced an action against the P. company claiming delivery of eleven cargoes of guano then on their way to Europe and an injunction to restrain the company from dealing with such cargoes. The company denied D.'s title to the cargoes. In April, 1880, at which time only two of the cargoes had been actually received by the company, an order was made by consent under which the company were to retain possession of safe custody to be restored to the owner when the cargoes without prejudice to any question required, is sued in detinue for detaining it after between the parties, on their undertaking to keep proper accounts, and to abide by any order of the court. In December, 1880, an order was made for the appointment of a receiver, and in February, 1881, a receiver was appointed. It was ultimately held by the court that the cargos were the property of D., and an inquiry as to damages was ordered:—Held, that the effect of the consent order of April, 1880, was not to make the detention after that date lawful, and that the period of illegal detention, with respect to which the company were liable in damages, was to be computed from the arrival of each cargo in Europe up to the date of the order for the appointment of a receiver after which the property was in the hands of the court. Pervicus Gusuo Co. v. Dregles, 61 L. J., Ch. 749; [1892] App. Gas. 165; 66 L. T., 536; 7 Asp. M. C. 225—H. L. (E)

Stock—Injunction to Restrain Dealing with— Depreciation—Damages.]—The plaintiffs having instructed their brokers to sell stock, the latter fraudulently deposited the certificate with the C. Bank. The plaintiffs commenced an action for an injunction to restrain the transfer of the stock, and for damages for the unlawful detention. On a motion for an interlocatory injunction, an order by consent was taken by which the bank undertook not to sell or deal with the stock until the trial or futher order, and, the plaintiff under-taking in the usual form to abide by any order as to damages in case the bank had sustained any by entering into their undertaking, the company in which the stock was were restrained from permitting a transfer without the consent of the plaintiffs. The order was made without prejudice to any question. The action went on for some months, after which the bank gave up their claim to the stock, but declined to pay more than nominal damages. The plaintiffs accordingly brought the action on for trial on the question of damages:—Held, that the plaintiffs were entitled to substantial damages on account of the fall in the stock, the order having been obtained to prevent a wrongful sale by the bank. Williams v. Poel River Land Co., 55 L. T. 689 -C A

Railway Scrip—Valnation.]—In detinue for railway scrip, which has been delivered up to the plaintiff after action under a judge's order, the plaintiff after action under a judge's order, the judge is warranted in directing the jury at the trial, that in estimating damages they may take into consideration the difference in value of the scrip at the time of the demand and at the time of its delivery to the plaintiff under the judge's order. Williams v. Arrher. 5 C. B. 318; 5 Railw. Cas. 289; 17 L. J., C. P. 28—28. Ch.

Inasmuch as the scrip had already been redelivered, the verdict and judgment were properly confined to an assessment of damages for the detention, by analogy to the case of the re-delivery of charters being rendered impossible by reason of their having been burnt. Ib.

Betention subsequent to Writ.]—Damages are only recoverable for the detention prior to the issuing of the writ. Any subsequent detention must be made the subject of a second action, Leader v. Khys, 2 F, & F, 399.

Delivery after Action brought—Effect of on Judgment.]—In detinue for goods, if all or any are delivered up after action brought, the plaintiff cannot have judgment to recover the goods so delivered to him, or their value, but may have

keep proper accounts, and to abide by any order judgment to recover for their detention if he has of the court. In December, 1880, an order was sustained any damage; and judgment to recover made for the appointment of a receiver, and in February, 1881, a receiver was appointed. It was ultimately held by the court that the cargoes was the property of D, and an inquiry as to damages for their detention. Crossfield v. Such, mately held by the court that the cargoes was Phillips v. Hagward, ante, col. 679.

Costs—Goods exceeding £50 in value.]—Where an action is brought for the detention of goods exceeding the value of 50%, the jurisdiction of the county court is ousted, and the plaintiff is entitled to his costs although, in consequence of the goods being returned in the course of the cause, he obtains a verdier for only nominal damages. Leader v. Rhys, 10 C. B. (N.S.) 359; 30 L. J., C. P. 345; 7 Jur. (N.S.) 1199; 4 L. T. 380; 9 W. R. 704.

— Tort.]—Detinue is founded on tort, within the County Courts Act as to costs. Bryant v. Herbert, 47 L. J., C. P. 670; 3 C. P. D. 389; 39 L. T. 17; 26 W. R. 898—C. A.

But such an action cannot be said to be brought merely to recover damages for a wrong. Danby v. Lomb, 11 C. B. (N.S.) 423; 31 L. J., C. P. 17; 5 L. T. 353; 10 W. R. 43.

#### 7. JUDGMENT AND EXECUTION.

Ascertaining Value of Goods.]—A judgment in detinue should ascertain the value of the goods or give means for ascertaining same. Phillips v. Jones, 15 Q. B. 859; 19 L. J., Q. B. 874; 14 Jur. 1065—Ex. Ch.

Effect on Property in Goods, —The property in goods, in respect of which judgment has been recovered in an action of dethine, remains in the plaintiff until execution is issued on the judgment. South, Expurte, Eventh, Inv. 44 L. J., Bk. 29; L. R. 10 Ch. 234; 31 L. T. 737; 23 W. R. 153.

Therefore in the liquidation of the affairs of the defendant before execution has issued, the plaintiff cannot prove for the value of the goods.

— When Defendant is Bankrupt,]—Where a plaintiff in an action of detinue has recovered judgment, the property in the goods obtained by the wrongdoer remains, antil the judgment is satisfied, in the plaintiff, and the bankruptcy of the defendant will not vest it in the trustee. Pracke, Experte, Ware, Enr., 24 ft. J., Br. 105; 5 Ch. D. 866; 36 L. T. 677; 25 W. R. 641—C. A. Cp. Brissmead V. Harrisan, 34 L. J., C. P. 190; L. R. 7 C. P. 547; 27 L. T. 99; 20 W. R. 784—Ex. Ch.

The proper course, however, for the plaintiff to pursue is to apply to the court of bankruptey for an order directing the trustee to deliver up the goods, and if instead of this he takes forcible possession, he will be deprived of his costs. 12.

C. COMPELLING DELIVERY OF CHAT-TELS OR GOODS DETAINED.

use be made the subject of a second action, order v. Rhys, 2 R. & F. 399.

Delivery after Action brought—Effect of on degment.]—In detine for goods, if all or any palely send un after action becomes the subject of the delivery of a specific chattle title defound in the option of retaining some upon or delivered un after action becomes the subject of the delivery of a specific chattle chatter.

tiff cannot have judgment to recover the goods Judge's Discretion.]—The discretion of a judge so delivered to him, or their value, but may have to make an order in an action of detinue for the

delivery up of chattels, detained, is subject to appeal. Chilton v. Chrrington, 15 C. B. 730; 3 C. L. R. 392; 24 L. J., C. P. 78; 1 Jun. (x.s.)

See ESTATE—HEIR-AT-LAW. 477; 3 W. R. 248.

Power of County Court to Order Return of Chattel.]—In an action of detinue brought in the county court, the county court judge has jurisdiction to make an order for the delivery by the defendant of the specific chattel wrongfully detained, without giving him the option of paying its assessed value as an alternative. Win-field v. Boothroyd, 54 L. T. 574; 34 W. R. 501.

In Equity—When Damages a Remedy.]—A court of equity has jurisdiction to order the court of equity has jurisdiction to order the delivery up to an artist of a picture painted by himself, as having a special value, the legal remely being inadequate. But where, by the terms of an agreement, an artist seeking the restitution of a picture had, in effect, put a fixed price upon it, and as damages would be an adequate remedy, there was no jurisdiction in a court of equity to interfere. *Dowling v. Beljemann*, 2 Johns. & H. 544; 8 Jur. (N.S.) 538; 6 L. T. 512; 10 W. R. 574.

— Articles of Special Value.]—Where a chattel, from being used in business or otherwise, has a peculiar value, the court will entertain a bill for an injunction to restrain its sale or detention. North v. G. N. Ry., 2 Giff, 64; 29 L. J., Ch. 301; 6 Jur. (N.S.) 244; 1 L. T. 510.

A bill lies to compel the delivery of an altarpiece, or other enricity in specie. Somerset v. Cookson, 3 P. W. 390.

Or of chattels personal, especially in the nature of heirlooms. Macelesfield (Earl) v. Davis, 3 Ves. & B. 16.

The court will order delivery of a specific chattel, the value of which is not to be estimated by damages. Nathrown v. Thornton, 10 Ves. 163. S. P., Lloyd v. Lvaring, 6 Ves. 773; Fells v. Rvad, 3 Ves. 70; Lowther v. Lowther, 13 Ves. 95.

There is nothing in the character or nature of the certificate of registry of a ship which excludes it from the jurisdiction of the court to decree its

to Home the jurisdection of the Court to decree its delivery as against a party unlawfully detaining it. Gibson v. Ingo, 6 Hare, 112.

A bill will lie for specific performance of an agreement to purchase stock, where it also seeks deliverance of mutilities of the better that the court of th delivery up of certificates which give the legal title to the stock. Doloret v. Rothschild, 2 L. J., Ch. (O.S.) 125; 1 Sim. & S. 590.

Where Chattels obtained through abuse of Fiduciary Relation. ]-The jurisdiction of the court by injunction to protect the possession, and to decree the delivery up, of specific chattels, is not nerely as to such the loss or injury to which would not be adequately compensated by damages, but extends to all cases where the possession has been acquired through an alleged abuse of power on the part of one standing in a fiduciary relation to the plaintiff. Wood v. Roweliffe, 2 Ph. 382; 17 L. J., Ch. 83; 11 Jur. 915. And see S. C., 6 Hare, 187.

J. S. H.

# DEVASTAVIT.

See EXECUTOR AND ADMINISTRATOR.

### DILAPIDATIONS.

Ecclesiastical. - See ECCLESIASTICAL LAW. Tenants. - See LANDLORD AND TENANT.

# DIRECTOR.

See COMPANY.

# DISCLAIMER.

In Bankruptcy. - See BANKRUPTCY. In Specification. ]-See PATENT.

# DISCONTINUANCE.

See PRACTICE.

# DISCOVERY.

[By J. RITCHIE.]

### A. DOCUMENTS.

- I. THE PRESENT PRACTICE.
- A. DISCOVERY.
  - 1. General Rule, 693.
  - 2. Order, 694.
  - 3. In what Mutters, 695. 4. Who Compelled to Make, 697.
  - 5. At What Time, 702.
  - 6. Affidavit of Documents, 705.
  - 7. What Documents, 713.
  - 8. The Deposit, 716.

### B. PRODUCTION.

- 1. Possession or Power.
  - a. Joint Possession or Interest Generally,
  - b. Of Partner, 720.
  - e. Of Officer or Representative of Com-
  - pany, 722.
  - d. Of Agent, 723. e. Of Solicitor, 725.
  - f. Of Executors and Administrators, 726.
  - g. Private and Confidential Letters, 728.
    h. Documents in Pawn or Subject to
  - Lien, 728.
  - Documents Abroad, 728.
  - h. Documents in Custody of Court, 729.
  - Admission of Possession, 729.
- 2. Privilege, 730.
- 3. Practice, 730.

# C. INSPECTION.

- - 1. Bu Whom, 731.
- 2. What Documents, 734.
- 3. Place for, Generally, 736. 4. Deposit in Court for, 738.
- 5. Delivery out of Court, after, 740.
- 6. Scaling-up Part, 742.
- 7. Improper Use of Documents Inspected, 746.
- 8, Right to take Copies, 747.
- 9. Costs, 747.
- D. NON-COMPLIANCE WITH ORDER, EFFECT OF,
  - II BEFORE THE JUDICATURE ACTS.

#### A. IN CHANCERY.

- 1. By What Parties, 750.
- 2. On Application of Defendant, 752.
- 3. In What Actions, 757.
- 4. Production of Documents Referred to in the Pleadings, 760.
- 5. Affidavit or Answer, 765.
- 6. Order for.
  - a. Discretion of Court, 773.
    - b. Application, 773. c. Amending Bill, Effect of, 776.

    - d. Privilege, How claimed, 777. e. Consequences of Non-Compliance, 778.
      f. Effect of Delay in Application, 779.

#### B. AT LAW.

- 1. At Common Law, 779.
- 2. Under 14 & 15 Vict. c. 99, s. 6.
  - a. Effect of Statute, 781.
  - b. In What Actions, 786.c. Affidavit, 787.
  - d. Costs, 788.
  - e. Order to Produce and Inspect, 788.
- 3. Under 17 & 18 Viet. c. 125, s. 50, 789.
- III. PRIVATE DOCUMENTS IN WHICH APPLICANT HAS AN INTEREST, 790.

#### IV. PUBLIC DOCUMENTS.

- 1. Parish and County Books, 793.
- 2. Court Rolls of Manor, 794.
- 3. Corporation Books and Records, 797.
- 4. Books of Corporations and Companies, 799.
- 5. Other Public Books, 803.

#### B. INTERROGATORIES.

#### I. THE PRESENT PRACTICE.

- - 1. Order for, 804.
  - 2. In What Matters, 805.
  - 3. By and to what Persons, 806.
  - 4. To Corporations, 807.

  - 5. At What Time, 808.
  - 6. What Admissible, 810.
  - 7. Striking Out, 827.
  - 8. The Answer, 828.
  - 9. Further Answer, 831.
  - 10. The Deposit, 832.

### II. BEFORE THE JUDICATURE ACTS.

- In Chancery.
   a. To Plaintiff, 833.
   b. To Defendant under 15 & 16 Vict. c. 86, 835.

### 2. At Common Law.

- a. Parties Examinable, 845. b. Principles for Allowance or Disallowance, 846.
- c. In Particular Cases, 853.
- d. Form, 858. e. Affidavit to Obtain, 859.
- f. At what Stage of Suit Obtainable, 860.
- g. Answer, 861.h. Using, 864.
- i. Costs, 864.

# C. ACTION FOR DISCOVERY.

- 1. Discovery only, 865.
- 2. Discovery and Relief, 870.
- 3. Discovery in Aid, 874.

## D. OBJECTIONS TO DISCLOSURE.

### I. IRRELEVANCY OR IMMATERIALITY.

- 1. Generally.
  - a. Questions, 882.b. Documents, 884.

  - 2. Where Materiality Depends upon Result of Other Issues, 885,

## II. INJURY OR OPPRESSION, 889.

#### III. TENDENCY TO CRIMINATE.

- 1. General Principles, 894.
- 2. Criminal Charge or Prosecution, 896.
- 3. Forfeitures, 899.
- 4. Penalties.
  - a, Generally, 901.
    - b. In Various Cases, 902.
  - c. Ecclesiastical, 904.
  - d. Under Stock-Jobbing Acts, 905.
  - e. Gaming, 907.
     f. Under Regulations of Companies, 907.
- g. Lapse of Time, Effect of, 908.
- 5. Illegal Transactions, 908.
- 6. Maintenance and Pretended Titles, 910.

# IV. LEGAL PROFESSIONAL CONFIDENCE.

- 1. Generally, 910.
- 2. Documents submitted to or received from Counsel.
  - a. Cases and Opinions, 912.
  - b. Briefs, 917.
     c. Drafts, 917.
- 3. Communications between Solicitor and Client.
- a. Direct, 918. b. Through Agents, 923.
- Documents or Information Prepared or Obtained by Solicitor.
  - a. Documents Prepared by Solicitor,

- b. Information through Agents, 925.
- Communications between Solicitor and Third Party, 925. d. Communications at Instance of Soli-
- 5. Documents or Information Prepared or
- Obtained by Client.
  a. Reports, 926.
  - b. Correspondence with Agents, 930. c. Correspondence with Co-Defendant,
  - d. Documents Prepared as Evidence, 934
  - e. Shorthand Notes, 935. f. Other Documents, 936.

citor, 926.

- g. Models, 937.
- 6. Documents Prepared by Third Parties. 927
- 7. Communications Between the Legal Advisers, 938.
- Solicitor Acting for Particular Persons. a. Married Women, 938.
  - b. Trustees, 939.
  - Two Clients, 939,
  - d. Several Parties Claiming under Client, 940.
- 9. Solicitor Ceasing to Act or Practise, 940.
- 10. Solicitor and Client Co-Defendants, 941.
- 11. Information from Colluteral Sources, 941.
- 12. Solicitor not Acting as such, 942.
- 13. Fraud, Effect of, 943.
- 14. Privilege in Subsequent Action, 947.
- 15. Loss of Privilege, 948.
- V. EVIDENCE OF PARTY'S CASE OR TITTE.
  - 1. Generally.
    - a. Discovery and Production of Docu-ments, 949.
    - b. Interrogatories, 958.
  - In Action for Recovery of Land.
     a. Discovery by Plaintiff, 960.
     b. Discovery by Defendant, 965.
- VI. PUBLIC POLICY, 967.

### A. DOCUMENTS.

### I, THE PRESENT PRACTICE.

See Ord. XXXI.

A. DISCOVERY.

1. GENERAL RULE.

Chancery Practice prevails.] — Under the Judicature Acts, the right to discovery is regulated by the rules previously existing in the court of chancery. Anderson v. Bunk of British (Olumbia, 2 Ch. D. 644; 45 L. J., Ch. 449; 35 L. T. 76; 24 W. R. 624—C. A.

As to the question discussed, viz., whether under the Judicature Act and Rules, the right to discovery is or is not more extensive than it formerly was in courts of equity; it was put thus:—The Judicature Act is an act to regulate procedure, and not to affect established rights, and if there was no right to discovery before the passing of the Judicature Act there is no right to interrogate now. On these propositions I refrain from expressing any opinion, save that refrain from expressing any opinion, save that they are stated too broadly, for there can be no in ordering affidavit of documents. See per

doubt that the Judicature Act, in carrying into effect the object stated in the preamble, "the with and alter rights. It seems to me also not to be very clear that an increased power to exhibit interrogatorics and enforce discovery as to the plaintiff's title, or vice versa, is an interference with the right of the party interrogated. or is more than alteration of procedure. Lyell v. Kennedy, 8 App. Cas. 217—Per Fitzgerald (Lord).

#### 2. ORDER.

Application for—Affidavit in Support.]—Upon an application for discovery under Ord. XXXI. r. 12, the judge has power to demand an affidavit by the party applying of his belief that the party from whom discovery is sought has documents in his possession to the discovery of which he is entitled, and it is entirely within the judge's discretion whether such an affidavit shall be made or not. Johnson v. Smith, 36 L. T. 741; 25 W. R. 539. And see Philipps v. Philipps, post, col. 702.

Grounds for-What may be Considered.]-Ord. XXXI. r. 12, was not intended entirely to alter the principles as to production of documents, but to give the court a discretion to refuse the discovery of them when there was no reasonable prospect of its being of any use. On an application for an affidavit of documents. evidence ought not to be entered into; the court will form its conclusion from the pleadings, but any other proceedings in the action as, e.g. evidence used on a former occasion, may be looked at. Downing v. Fulmouth United Soverage Board, 57 L. J., Ch. 234; 37 Ch. D. 234; 58 L. T. 296; 36 W. R. 437—C. A.

In an action to restrain a nuisance from sewerage works, the plaintiffs, after notice of trial, applied for an affidavit as to documents in the possession of the defendants relating to the matters in question in the action. The application was refused on the ground that it was not to be presumed that the defendants had docu-ments in their possession which would be material on the question whether there was a nnisance or not. The plaintiffs appealed, and gave notice to read the affidavits filed on an application for an interim injunction, which were about thirty in number. From three of these affidavits it appeared that there had been resolutions passed by the defendants bearing on the question of nuisance, and a correspondence between them and the Local Government Board on their proposing an alteration in their system of sewcrage:—Held, that the court was right in refusing the general order asked for, but that these affidavits could be looked at on the question whether there was sufficient reason to suppose that there were no documents the production of which would be of any use, and an order was made for an affidavit limited to resolutions of the defendants, and correspondence between them and the Local Government Board; that the plaintiffs ought not to have given notice to read all the affidavits, but ought to have pointed out the parts on which they meant to rely, and they were, therefore, ordered to pay the costs occasioned by the notice. Ib,

Lindley, L.J., in Wills' Trade Marks, In re, probates of such wills:—Held, that such plain-[1892] 3 Ch. 201, 207. tiff was not entitled to an order for an affidavit

Right to Discovery not Determined by.]—Semble, that Ord. XXXI. r. 20, is not to be construed so narrowly as to mean that the right to discovery or inspection is determined by the making of the common order, or that the court is by the order for discovery or inspection made in the com-mon form rendered powerless to make a subsequent order for questions of law to be determined before inspection. De Curteret v. Land Securities Co., 7 R. 16; 70 L. T. 323; 42 W. R. 104—C. A.

#### 3. IN WHAT MATTERS.

Petition of Right.]—In a potition of right the suppliant cannot obtain a discovery of documents. Thomas v. Rep. 44 L. J., Q. B. 17; L. R. 10 Q. B. 44; 23 W. R. 345. But the Crown can obtain discovery from him. Tomline v. Rep. 48 L. J., Ex. 453; 4 Ex. D. 252; 40 L. T. 542; 27 W. R. 651—C. A.

Mandamus.]—A mandamus, the object of which is to enforce a civil right, is a proceeding in aid of which, under 14 & 15 Vict. c. 99, s. 6, a judge may grant an order for the inspection of documents by either of the litigant parties when Ambengate Ry, 17 Q. B. 957; 16 Jur. 777. See also Reg. v. London and St. Katharine's Ducks Co., 44 L. J. Q. B. 4; 31 L. T. 588; 23 W. R. 186; post, col. 799.

In Interpleader. ]-Discovery may be ordered in interpleader though there are no pleadings. Philipps v. Philipps, 40 L. T. 815; 27 W. R.

Reference to Arbitrator.]—An order was taken by consent in an action referring the action and all matters in difference to the award of an arbitrator named in the order. The order provided that the parties should produce before the arbitrator all documents in their or either of arbitrator an documents in their or eather or their custody or power relating to the matter in difference; also that the party in whose favour the award should be made should be at liberty, after the service of a copy of the award on the other party, to apply for final judgment in accordance with the award. The plaintiff having during the pendency of the arbitration applied by summons in the action under Rules of Court, 1875, Ord. XXXI. r. 12, for an affidavit of documents, the application was dismissed on the ground, (1) That in consequence of the order of reference the court had no jurisdiction to grant the application, not having beforeit "any matter in question in the action" within the meaning of the rule; and (2) That under the order the whole jurisdiction as to discovery was in the hands of the arbitrator. Penrice v. Williams, 52 L. J., Ch. 593; 23 Ch. D. 353; 48 L. T. 868; 31 W. R. 496.

### Action for Penalties. ]-See post, D. III. 4.

Action for Recovery of Land. ]-A plaintiff in an action in the nature of an ejectment action claiming by a purely legal title cannot obtain discovery from the defendants unless before the Judicature Act a bill for discovery in aid of such action could have been sustained. Where, therein his statement of claim only wills and the under Ord. XXXI, rr. 11, 12, Judicature Act,

tiff was not entitled to an order for an affidavit of documents in the defendant's possession, following Lyell v. Kennedy, in C. A. (20 Ch. D. 484); Daniel v. Ford, 47 L. T. 575. But Lyell v. Kennedy (20 Ch. D. 484), was reversed, 52 L. J., Ch. 385; 8 App. Cas. 217; 48 L. T. 585; 31 W. R. 618—H. L. (E.) In an action for the recovery of land the

defendant may be compelled to make an affidavit of documents in his possession relating to the matter in question. Wrentmore v. Hagley,

46 L. T. 741.

Action to recover Possession of Documents. ]-Where the object of an action is to obtain delivery up of documents in the possession of the defendants, the court will not order them to be detiered up upon an interlocutory application before the defendant has put in his defence. Republic of Costa Rica v. Stronskerg, 11 Ch. D. 323; 40 L. T. 401; 27 W. R. 512—C. A.

Trespass to Several Fishery-No Affidavit in Support. - In action for trespass to a several fishery in portion of the non-tidal waters of the river S., where the the plaintiff was not a riparian proprietor, and did not claim the soil and bed of the locus in quo; the defendants in their statement of defence, upon which issue was joined, traversed the plaintiff's alleged title to a several fishery in the river; and an affidavit was made by them stating that various riparian proprietors, whom they named, had always allowed them and the public generally to fish in the river, and had always denied the existence of a several fishery therein, and that, in fact, the right of fishing in the part of the river in question had been enjoyed by the public from time immemorial. The defendants applied for discovery of documents by the plaintiff under General Order XXXI, r. 11. There was no affidavit in support of the application showing that there were documents in existence, and in the possession of the plaintiff, relating to matters in question in the action:—Held, per Palles, C.B. (Fitzgerald, B., dub.), that the nature of the property claimed raised a presumption that there were documents in existence and in the possession of the plaintiff relating to matters in question in the action; that the motion should be granted, and that the right of the defendants to the inspection or production of any such documents was a matter to be determined, not upon an application under the 11th rule, but upon an application to compel production or inspection after the affidavit as to documents had been made. Per Palles, C.B.:—As a general rule the order for discovery should not be made where there are any reasonable grounds for believing it would be illusory by reason of there being no documents in existence. But if there be prima facie evidence of the existence of documents, one party is entitled to appeal to the oath of the other as to such documents being in his possession or power. Johnson v. Smith (36 L. T. 741; 25 W. R. 589) and Healy v. Smith, (4 L. R., Ir. 72) commented on. Powell v. Heffernan, 4 L. R., Ir. 703.

Proceedings under the Companies Act. ]-When proceedings are taken under the Comfore, a plaintiff claiming possession through an panies Act, 1862, the court has jurisdiction to helr-at-law and subsequent devises had pleaded make an order for an affidavit of documents parties. National Funds Assurance Co., In re, 24 W. R. 774—C. A.

### 4. Who Compelled to Make.

Person Suing in Name of Another. - Where the agent of a principal resident abroad brings an action in his own name, and on a contract made with him as agent the defendant is entitled to discovery to the same extent as if the principal were a party to the action, and to have the action stayed till such discovery is made. Willis v. Baddeley, 61 L. J., Q. B. 769 : [1892] 2 Q. B. 324 : 67 L. T. 206 : 40 W. R. 577—C. A.

Goods shipped by R. & Co. having been lost at sea, the underwriters, who had insured the cargo, paid R. & Co. for a total loss, and then commenced an action against the shipowners in the name of R. & Co. to recover the value of the goods. An order having been made by consent that the plaintiffs should make an affidavit stating what documents were in their possession relating to the matters in question in the action, and a further order having been made by the master in chambers that both members of the firm of R. & Co. should put in a further and better affidavit, the solicitor of the underwriters deposed that the members of the firm of R. & Co. were abroad, and would not give any further discovery, and that the real plaintiffs had done all they could do to comply with the order :- Held, that the case must be treated as if the nominal plaintiffs on the record were suing for their own benefit, and that the making a further affidavit could not be dispensed with. Wilson v. Raffalorich, 7 Q. B. D. 553-C. A.

Party Abroad. |-The court will grant an order for discovery of documents on the owner of a foreign ship who has appeared to defend an admiralty action in rem, but will allow a reasonable time, according to the circumstances of each case, for the affidavit in answer to be prepared. The Emma, 34 L. T. 742; 24 W. R. 587. And see Wilson v. Raffalovich, supra.

Co-plaintiff. |- Discovery by way of production of documents may be allowed to a plaintiff from a co-plaintiff in cases in which there may be rights to be adjusted between them respectively. Shaw v. Smith, 56 L. J., Q. B. 174; 18 Q. B. D. 193; 56 L. T. 40; 35 W. R. 188—C. A.

Co-defendant.]—Discovery by way of production of documents may be allowed to a defendant from a co-defendant, in cases in which there may be rights to be adjusted between them respectively. Ib.

Discovery cannot be allowed to a defendant from a co-defendant with a view to show that the co-defendant and not the defendant is liable to the plaintiff, as where a defendant, sued for subsidence under the plaintiff's land, proposes to inspect the mines of a co-defendant in adjoining land. Brown v. Wathins (16 Q. B. D. 125) explained. Ib.

The plaintiff made in the same action claims against two defendants, the claim against one defendant being in respect of the alleged breach of a certain stipulation of a contract, and the claim against the other defendant being an alternative claim for negligence by him as agent in effecting a contract without such stipulation

though no action was in progress between the defendants could not obtain discovery of documents in the action from the other, Ord. XXXI. r. 12, only providing for discovery between opposite parties. Brown v. Wathins, 55 L. J., Q. B. 126; 16 Q. B. D. 125; 53 L. T. 726; 34 W. R. 293.

A railway company brought an action against contractors, the contractors putting in a counterclaim with their defence, to which they made an insurance corporation defendants, and in which they alleged that the company had obtained a guarantee from the corporation which was enforceable against them, and that the company were trustees of this guarantee for the contractors, and payment of the amount thereof was claimed. The corporation put in a defence that the guarantee had been released and satisfied. and the company in reply repudiated any collusion between them and the corporation. the event of the contractors being successful in obtaining a declaration that the company were trustees of this guarantee and endeavouring to enforce the guarantee, the defence of the cor-poration would be that the company had released their liability, but this would not preclude the ease, because the contractors would reply that that release was not binding as against them. The corporation having taken out a summons for discovery under Ord. XXXI. r. 12, against the company, their co-defendants :- Held, in these circumstances, that there was "some right between these parties to be adjusted in the action." namely, whether or not the liability of the corporation under the guarantee was good, and that the case fell, therefore, within the rule. Alony and Gandia Ry. v. Greenhill, 74 L. T. 345.

Where a company is made a defendant in an action by a shareholder, on behalf of himself and the other shareholders, against the direcand the other snarehousers, against the circu-tors of the company, to recover for the com-pany damages sustained by the company in consequence of the fraud of the directors, the court has jurisdiction under Ord. XXXI. r. 12, upon the application of the plaintiff, to order the company to make discovery of documents. Spokes v. Groscenor and West-End Hotel Co., 66 L. J., Q. B. 572; [1897] 2 Q. B. 124; 76 L. T. 679; 45 W. R. 546—C. A.

One defendant may obtain an affidavit from another defendant as to the documents in his possession relating to the question in the suit. Kennedy v. Wahefeld, 30 L. J., Ch. 827; 22 L. T. 645; 18 W. R. 884.

Third Party brought in by Notice. ]-Where a third party, upon whom notice has been served by a defendant to an action, enters an appearance in the action pursuant to Ord. XIV. r. 20, R. S. C., 1876, such third party is a party within the meaning of Ord. XXXI. r. 12, and liable to the meaning of Ord. ASAA1.1.2, and more to make discovery of documents according to the terms of that rule, Mallister v. Ruchester (Bishop), 49 L. J., C. P. 443; 5 C. P. D. 194; 42 L. T. 481; 28 W. R. 584. And see Edden v. Weardale Iron and Chal. Ca., 56 L. J., Ch. 400; 35 Ch. D. 287; 56 L. T. 464; 35 W. R. 507.

Party for Purpose of Discovery.]-The court will not allow the joinder of solicitors or others as defendants against whom no further relief is as detendants against whom do interior Frier is sought beyond discovery or payment of costs. Burstall v. Beyfus, 53 L. J., Ch. 565; 26 Ch. D. 35; 50 L. T. 542; 32 W. R. 418—C. A.

In an action against a corporation, where an contrary to instructions :—Held, that one of such officer of the corporation against whom no relief is claimed is made a defendant for the purpose of discover; — Held, that, inasmuch as under Ord. XXXI. r. 5, such discovery could be obtained by an ovder to deliver to him interrogatories, he was improperly joined as a defendant, and that his name should be struck out. B74son v. Church, 9 Ch. D. 552; 39 L. T. 413; 25 W. R. 733.

Stranger to Action.]—In an action upon a policy of marthe insurance, the defendant is not entitled to have the proceedings stayed until the plaintiff has obtained an affidavit of documents from a person who is not a party to the action and is not within the jurisdiction of the court, and is not under the plaintiff southol; and it is not material that the plaintiff security; and it is not material that the plaintiff security; and it is not material that the plaintiff derives his title to the subject-matter of insurance through the person from whom the affidavit is sought. Fraser v. Furrows, 46 L. J., Q. B. 501; 2 Q. B. D. 624.

The court has no jurisdiction to make an order for discovery against persons not parties to the action. Burchard v. Macfarlane, 60 L.J., Q B. 587; [1891] 2 Q. B. 241; 65 L. T. 282; 39 W. R. 694.

The Crown.]—The Crown has the same right of discovery against a subject as one subject has against another, but cannot be compelled to give discovery to a subject. Att.-Gen. v. Neucoattrappa.-Type Corporation, 66 L. J., Q. B. 593; [1887] 2 Q. B. 594; T7 L. T. 203.—C. A. The fact that on an information the defendence of the control of

The fact that on an information the defendants answer has not been excepted to within six weeks does not preclude the Crown from obtaining discovery in the usual way. Ib.

Foreign States.]—A foreign prince who sues a court of law in this country, becomes subject, as to all matters connected with that suit, to the jurisdiction of the courts of equity; and consequently is bound to give a discovery necessary to the plaintiffs defence at law. Rottschild v. Porrhyal (Queen), 3 Y. & Coll. 594.

A bill for a discovery in aid of a defence at an law cannot be sustained against a person for whose benefit the action is brought, if he is no IT party to the record at law, and his name does not appear thereon. Purkaya (Queuy), v. Glym, Swarea, I. Y. & Coll. 644; 5 L. J., Ex. Eq. 49. And see Glyn v. Sourea, 3 Myl. & K. 450.

A foreign prince, admitted to sue in the name of an agent in a court of law in this country, cannot therefore be called upon to answer a bill for a discovery, in aid of the defence at law. Th.

The processings in an original sait by a foreign government were stayed until the plain-tiff in that sait had given the name or names of persons who could be made defondant or defendants in a cross-suit by the same parties against the foreign government, for the purpose of making upon oath the discovery required. Peru (Republic) v. Wepuelia, 44 L. J., Ch. S83; L. R. 20 Eq. 140; 32 L. T. 426; 23 W. R. 776.

A sovereign power or corporate body, whether amenable to the jurisdiction of the court or not, and whether capable of deposing on earl or not, if it commences proceedings for relief in a court of equity, must conform to the practice and regulations for the administration of justice laid down by the court. Prileaw v. United States, L. R. 2 Eg. 689 ; 41 L. T. 700.

The United States of America, saing in a court of this country, and thereby submitting themselves to the jurisliction, stand in the same position as a foreign sovereign, and can only obtain relief subject to the control of the court in which they sue, and pursant to its rules of practice; according to which every person sued in this court, whether by an individual, by a foreign sovereign, or by a corporate body, is entitled to discovery upon outh touching the matters upon which is such, and to file a cross-full the search discovery upon outh to the a cross-full the search discovery upon outh to the a cross-full the search discovery upon outh to the a cross-full the search discovery.

bill for such discovery. Ib. Where, therefore, the United States commenced proceedings against British subjects for relief with respect to the sale of certain shipments of cotton, and they had filed a cross-bill praying discovery against the United States by its Preadent, and the defendants to the cross-bill had not filed any answer:—Held, that the proceedings in the original suit should be stayed until the defendants in the cross-suit had put in a sufficient answer to the cross-suil of dis-

covery. Ib.

Held, also, that the President was improperly made a defendant. Ib.

Demurrer allowed to a bill filed by the United States of America, on the ground that a foreign savereign state is not entitled to sue in the courts of equity in this country without putting forward some public officer wite cau be called upon to give discovery upon a cross-bill. But, on appeal, held, that the owner of property is the only proper planniff in a suit for its recovery, whether such owner is an individual or a sovereign state; and that it is no ground of demurrer to a bill filed by a foreign republic in its own name simply, that discovery cannot be compelled from it on a cross-bill. Ditack States of America v. Waquer, 36 L. J., Ch. 62½; 16 L. T. 464; 15 W. R. 1020. Reversing L. R. L. T. 645; 15 W. R. 1020. Reversing L. R.

3 Eq. 724.
Semble, that a defendant wishing to obtain discovery should, after filing a cross-bill, apply that the foreign state may name some person from whom the discovery may be obtained, and that the court would stay proceedings in the original suit to enforce such discovery.

A defendant to a suit brought by a sovereign state or corporation has no right to a stay of proceedings in the original suit until a person selected by him for the purpose of discovery, and made a co-defendant to a cross-suit, appears to such cross-suit. Costa Rica (Republic) v. Erlanger, 45 L. J., Ch. 145; 1 Ch. D. 171; 33 L. T. 632; 24 W. R. 151—C. A.

Semble, that where a defendant has a right to discovery, the court will stay proceedings in a suit brought by a sovereign state or corporation until such state or corporation has bond fide named a proper person to give the discovery sought for. Ib.

When a bill is filed by a republican government, the defendant, having put in a sufficient answer, is entitled to the usual affidavit of documents, to be made by one or more of the ministers or officers of the government. Libera (Lepublic) v. Imperial Bank, 42 L. J., Ch. 574; L. R. 16 Eq. 179.

Husband and Wife.]—Where hisband and wife (suing in respect of her separate estate without a next friend) are co-plaintiffs, a defendant is entitled to an order for an affidavit of documents by them in the same form as against any other

co-plaintiffs, that is to say, "whether they or either of them . . . . in the possession of them or either of them." See Fendall v. O'Connell, 54 L. J., Ch. 756; 29 Ch. D. 899; 33 W. R. 619. And see Hartley v. Owen, 34 L. T. 752.

Infant.]—An infant party to an action cannot be compelled to make discovery of documents. Curtis v. Mundy, [1892] 2 Q. B. 178; 40 W. R.

ordered to make an affidavit in reference to documents in their possession relating to the matters in the suit was refused. Hardwick v. Wright, 11 Jur. (N.S.) 297: 12 L. T. 138: 13 W. R.

A motion by the defendant that the next friend of the jufant plaintiff might be ordered to make an affidavit in reference to documents in his possession relating to matters in the suit, was granted. Crowe v. Bank of Ireland, 19 W. R. 910; Ir. R. 5 Eq. 578-C. A

When plaintiffs were infants suing by their next friend, the court made an order directing the production of documents under the Chancery (Ireland) Act. 1867 (30 & 31 Vict. c. 44), on the outh of the next friend. Ib.

Form of order in such a case.

Where a plaintiff of unsound mind sues by a next friend, the defendant is entitled to an affidavit of documents made by the next friend, or by some one acquainted with the facts. *Higginson* v. *Hall*, 48 L. J., Ch. 250; 10 Ch. D. 235; 39 L. T. 603; 27 W. R. 469.

The next friend of an infant plaintiff is not "party to the action" within the meaning of the Rules of Court, 1875, Ord. XXXI, r. 12, and therefore cannot be compelled to make discovery as to documents in his possession or power re-lating to the matters in question in the action. Corsellis, In re. Lauton v. Elwes, 52 L. J., Ch. 899; 48 L. T. 425; 31 W. R. 414. And see Scott v. Consolidated Bank, W. N. (1893) 56.

The court refused either to order the next

friend of an infant plaintiff to make an affidavit as to documents, or stay the action till he made as to tocuments, or stay the action this he made such affidavit. Higginson v. Hall, (supra), dissented from. Dyke v. Stephens, 55 L. J., Ch. 41; 30 Ch. D. 189; 53 L. T. 561; 33 W. R.

Guardian ad Litem-Interrogatories. ]-See Ingram v. Little, 11 Q. B. D. 251. Post, INTER-ROGATORIES.

One Member of Firm. |-There is no rule plainer than that a person, whether a partner or not, must discover all books which relate to the matters in question, whether he is accountable alone or with others. Swanston v. Lishman, 45 L. T. 360; 4 Asp. M. C. 450.

In an action against the managing owner of ships for an account, he cannot protect himself against setting out books and documents relating to the ship's accounts in his affidavit of documents, or in answer to interrogatories, by alleg-ing that the accounts and books are kept by a firm of which he is a member, and that the action is brought against him in his individual capacity only, but he must discover all documents, whether in his possession or in that of his firm. Ib. And see cases infra, col. 720.

Officer or Liquidator of Company. - See cases infra, cols, 722 and 802.

Before the Judicature Acts-In Chancery. |-See infra, col. 750.

- At Law. ] - See infra, cols. 779 et seq.

### 5. AT WHAT TIME.

Next Friend.]—A motion by a defendant that the next friend of the plaintiff, and that the has a county court and afterwards transferred to ordered to make an atthetic from the recovery of land commenced by plaint in band of the plaintiff (co-defendant), might be the chancery division of the latest transferred to ordered to make an atthetic from the chancery division of the latest transferred to ceedings after transfer will be conducted according to the practice of the high court, so that the plaintiff is not entitled to discovery and production until he has delivered his statement of claim in the action. Davies v. Williams, 49 L. J., Ch. 352; 13 Ch. D. 550; 42 L. T. 469; 28 W. R. 223.

A plaintiff will not in general be allowed production from a defendant until he has delivered a statement of claim. Cashin v. Craddock, 2 Ch. D. 140 : 34 L. T. 52.

The court will not, as a general rule, make an order for discovery of documents under Ord. XXXI. r. 12, before the plaintiff has delivered his statement of claim. In order to support an application for such an order in an action of ejectment, the plaintiff's affidavits must shew some matter on which to found a title to turn the defendant out of possession. But, semble, that in some eases, as in interpleader, discovery may be ordered although there are no pleadings. Philipps v. Philipps, 40 L. T. 815; 27 W. R.

Before Defence. |-- In an action for redemption against a mortgagee in possession, an order for production of documents made before the defence was delivered, and without any special case for production being made was affirmed. Union Bank of London v. Manby, 49 L. J., Ch. 106; 13 Ch. D. 239; 41 L. T. 393; 28 W. R. 23—

Although a plaintiff is not entitled, as a matter of right, to discovery from the defendant, immediately after delivery of his statement of claim, and the court has the power to decline to make an order for discovery at that stage, unless special reasons are given, shewing the necessity for it at that time, nevertheless in an action in which there can be no dispute as to what the "matters in question" are, the plaintiff is entitled to discovery before the statement of defence is delivered. Huncock v. Guerin (4 Ex. Hancock v. Guerin (4 Ex. D. 3) considered. Ib.

Formerly under no circumstances was a defendant entitled to an order for production of documents by the plaintiff before he had put in his answer. Smith v Lay, Fairbairn v. Lay, 22

L. T. 785: 18 W. R. 915.

The defendants, before putting in their statement of defence, moved for the production by the plaintiffs of the conveyance under which they held their land, in order to ascertain whether it contained a reservation of minerals :-Held., that, the land having been conveyed to the plaintiffs in fee-simple, they were prima facieentitled to the land down to the centre of the earth, and unless the defendants could shew that they were not so entitled the plaintiffs could not be compelled to produce their title deeds. Egre-mont Burial Board v. Egremont Iron Ore Co.,

28 W. R. 594.

A plaintiff, after delivering a statement of is not, as a general rule, entitled. under Ord, XXXI. r. 12, of the Rules of the Supreme Court, to an order for discovery of documents before a statement of defence is delivered bebefore a statement of defence is characteristic cause until that happens it is impossible to say what the matters "in question in the action" are. Hancock v. Guerin. 4 Ex. D. 3; 27 W. R. S. P., Cleary v. Fitzgerald, 1 L. R., Ir. 112. 492.

A defendant may obtain discovery of documents, under Ord. XXXI, r. 11, before a statement of defence has been delivered, when such discovery is necessary for the purpose of ascertaining what damage the plaintiff has actually suffered, with a view to paying mouey into court with the defence. Megaw v. M. Diarmid, 10

L. R., Ir. 376. The court has discretionary power to make an order for discovery and production of documents at any time after the writ is issued, although the issues have not been defined by the pleadings. The statement of claim in an action was delivered on the 1st March, and on the 16th April the plaintiff obtained an order for discovery and production of documents, no objection being taken on the part of the defendant that the defence had not been delivered. The defence was delivered on the 2nd May, and on the 4th May the defendant served notice of motion to discharge the order, the objection being that the order when made was irregular, the matter in question in the action not being then so defined as to shew what documents were material :-Held, that the order was within the jurisdiction of the court, and ought not to be disturbed.

Mellor v. Thompson, 49 L. T. 222—C. A.

The court has a discretion in ordering discovery, and there is no absolute rule that a defendant should not be ordered to make an affidavit of documents before the delivery of a defence. Edelston v. Russell, 57 L. T. 927.

The court will as a rule refuse discovery of documents before the defence is delivered, notwithstanding the wide expressions contained in Ord. XXXI. r. 14. British and Foreign Contract Co. v. Wright, 32 W. R. 413.

Document referred to in Pleadings. ]-A plainon which his title depended and declined to produce it to the defendant before statement of defence was put in, was held to have "sufficient cause for not complying with the notice" to produce under Ord. XXXI, r. 14 of the Rules of

Court, 1875. Webster v. Whereall, 49 L. J., Ch. 704; 15 Ch. D. 120; 42 L. T. 868; 28 W. R. 951.

The plaintiff by his statement of claim referred to certain entries in his own books, to two letters written to himself, and to two letters written by himself. The defendant, as soon as the statement of claim was delivered, applied for production of the books, of the letters written to the plaintiff, and of copies of the letters written by the plaintiff. The plaintiff's solicitors refused to produce any of them, as the defendant had not delivered statement of defence. The defendant then applied to the court for production :- Held, by Chitty, J., that production ought not to be ordered till a statement of defence had been delivered. But held, on appeal, that production must be ordered at once of documents referred.

49 L. J., Ch. 623; 14 Ch. D. 158; 42 L. T. 179; against it can be shewn, and that the plaintiff must produce his books, with the usual liberty to seal up the parts other than the entries, and must also produce the letters written to himself, but that he could not be ordered to produce copies of letters written by himself, there being no reference to such copies in the statement of claim. Webster v. Whewall (15 Ch. D. 120) observed upon. Quilter v. Heatly, 23 Ch. D. 42; 48 L. T. 373; 31 W. R. 331—C. A.

This rule applies not only as between the plaintiff and the defendant but as between codefendants. Ib.

- Action for Delivery up of Documents.] Where the object of an action is to obtain delivery up of documents in the possession of the defendants, the court will not order them to be delivered up upon an interlocutory application before the defendant has put in his defence. Costa Rica (Republic) v. Strousberg, 11 Ch. D. 323 ; 27 W. R. 512 ; 40 L. T. 401-C. A.

Before Particulars given. - The plaintiffs employed the defendants to purchase goods, as their agents, at the lowest possible prices. plaintiffs sued for an account, and in their statement of claim alleged that the defendants had purchased goods at prices higher than the current prices, and had secretly received from the vendors allowances or commissions. charges against the defendants were stated in general terms, no particulars being mentioned. The defendants denied the charges, and pleaded a settled account. The plaintiffs applied for production of documents :- Held, by Cotton, L.J. (diss., Fry, L.J.), that the plaintiffs were not bound to give particulars of fruud under orl. XIX. r. 6. before obtaining discovery of documents. Whyte v. Ahrens, 54 L. J., Ch. 145, 26 Ch. D. 717; 50 L. T. 344; 32 W. R. 649—C. A. Held, by Fry, L.J., that the allegations of

frand in the pleadings not being sufficient to enable the plaintiffs to open a settled account, discovery ought to be refused until the allegations had been made sufficient. 1b.

Precedence of Orders. ]-There is no rule as to the class of cases in which the delivery of par-ticulars should be ordered before discovery, or discovery be ordered before the delivery of par-ticulars. The order of the judge or court will depend upon the circumstances of each case. Waynes Merthyr Co. v. Radford, 65 L. J., Ch. 140; [1896] I Ch. 29; 73 L. T. 624; 44 W. R. 103

In an action by a colliery company against coal merchants for fraudulent misrepresentation on the part of the defendants in selling coal falsely purporting to be the plaintiffs' coal, the plaintiffs by their statement of claim pleaded two particular instances of fraud, and also alleged generally divers other instances. defendants admitted the two particular instances as occurring through the fraud of a clerk, but offered to make an affidavit that they knew of no other instances :-- Held, that as the plaintiffs had made a substantial case, and the defendants had the means of ascertaining from their books whether further frands had been committed, the plaintiffs were entitled to discovery before delivering particulars. Ib.

After some Evidence taken-Application to to in the pleadings, unless some special reason Remove Trade Mark-Trade Labels-Limited Order.]—W. opposed an application by D. to An affidavit of documents made pursuant to register a trade mark under the Patents, Designs, Rules of the Supreme Court, 1875, Ord. XXXI. and Trade Marks Act, 1883. The application ir. 12, is conclusive against the party seeking was referred by the Board of Trade to the court. discovery, unless it can be shown either from the D. also applied to remove W.'s trade mark from the register. These applications were ordered to be heard together. After some of the evidence had been taken. D. applied for an order against W. to produce all documents in his possession or relating to the matters in question :-Held, by the court below that it would be oppressive in such a case to compel such discovery as would be ordered in an ordinary action, and that the discovery to be enforced in that class of applications must depend on the particular circumstances of each case. A limited order for discovery was therefore made, under which W. would not in the case of labels be bound to mention all the labels constituting a class, but that it should suffice as regarded each class to mention a specimen or specimens fairly representative of the whole. But held on appeal that the order was oppressive at that stage of the proceedings, and that it must be discharged without prejudice to any order as to production of documents at the trial. Wills's Trade Marks, In re, [1892] 3 Ch. 201; 67 L. T. 453—C. A. Reversing 61 L. J., Ch. 546.

Where Materiality depends upon decision of prior Issues. - See infra. D., I. 2.

When Appeal pending. - When a plaintiff, in an action for the infringement of a patent, has obtained the judgment of the court, he is entitled to an inspection of the defendant's books and to an account, although an appeal may be pending from that judgment. Saxby v. Easterbrook, 41 L. J., Ex. 113; L. R. 7 Ex. 207; 26 L. T. 439; 20 W. R. 751.

#### 6. THE AFFIDAVIT OF DOCUMENTS.

Test of Eufficiency.]-In equity, the test whether the form of sworn discovery is proper is: Can a definite issue for perjury be put to a jury, assuming the answer to be false? v. Daniell, 30 L. T. 357; 22 W. R. 595.

When Conclusive. ]-The defendants in an affidavit of documents made pursuant to Ord. XXXI. r. 12, stated as follows :- "We have in our possession or power certain documents numbered 101 to 110 inclusive, which are tied up in a bundle marked with the letter A., and initialled by the deponent," C. G.; "the said domments relate solely to the case of the defendants, and anot to the case of the plaintiff, nor do they tend to support it, and they do not, to the best of our knowledge, information, and belief, contain any-thing impeaching the case of the said defendants. wherefore we object to produce the same, and say they are privileged from production." A judge at chambers and the divisional court had refused to order, under Ord. XXXI. r. 11, the production of the documents which the defendants so objected to produce :- Held, that the affidavit sufficiently described such documents for the purpose of identification, and that as the affidavit was conclusive against the plaintiff seeking inspection, the judge and the divisional court rightly refused to order their production. Bewicke v. Graham, 50 L. J., Q. B. 396; 7 Q. B. D. 400; 44 L. T. 371; 29 W. R. 436-C. A.

VOL. V.

referred to, or from an admission in the pleading of the party swearing the affidavit, that other documents exist in his possession or power which are material and relevant to the action. In any of these instances, but not otherwise, a further affidavit may be ordered. Jones v. Monte Video Gas Co., 49 L. J., Q. B. 627; 5 Q. B. D. 556; 42 L. T. 639; 28 W. R. 758—C. A.

When an affidavit has been made in answer to an order for discovery of documents, a further order will not be granted unless there are facts or admissions shewing that documents are withheld. Welsh Steam Coul Collieries v. Gushell, 36 L. T. 352—C. A.

30 L. 1. 302—U. A. It is not enough for the party applying for further discovery to swear to a belief that docu-ments are in the other party's possession. Ib. A defendant obtained an order for discovery of

documents. The liquidator of the company made an affidavit, setting out certain documents, and stating that he had no others in his possession. The defendant applied for a further order for discovery on an affidavit, stating a belief that the liquidator had other documents :- Held, that the liquidator's affidavit was sufficient, and the defendant was not entitled to a further order. Ib.

The court will order a further affidavit as to documents to be made by a defendant, if it is satisfied from the admissions in the defendant's answer that material documents not mentioned in his affidavit may be in his possession, even although the answer does not in express terms

atthough the airwer does not in express terms admit the existence of such documents. Sault v. Browne, L. B. 17 Eq. 402.
When a defendant by his answer set out a long list of customers of a business carried on by him, but did not mention in his affidavit as to documents any books relating to such business :-Held, that the defendant must make a further affidavit. Ib.

Where a party claims privilege against the production of documents, on the ground that they support his own title, and do not relate to that of his opponent, his affidavit must be taken as conclusive, unless the court can see from the nature of the ease or of the documents, that the party has mismiderstood the effect of the documents. Att.-Gen. v. Emerson (10 Q. B. D. 191) distinguished. Ruberts v. Oppenheim, 53 L. J., Ch. 1148; 26 Ch. D. 724; 50 L. T. 729: 32 W. R. 654 -C. A.

The defendants in an affidavit of documents. made pursuant to Ord. XXXI. r. 12, disclosed a copy of an extract from a letter written by a person not a party to the action to one of the directors of the defendant company. The defendants refused to produce the same on the ground that it was a confidential letter from a person not a party to the action, and on a summons to inspect being taken out, filed an affidavit to the effect that the document related only to their case, and did not tend in any way to support the plaintiffs', or impeach their own case :- Held. that as there was nothing in the document itself to disclose the matter of its contents, the affidavit of the defendants was conclusive, and inspection must be refused. Att.-Gen. v. Emerson (10 Q. B. D. 191); distinguished. Bulman v. Young, 49 L.T. 736; 31 W.R. 766.

Where a discovery is sought of a correspon-

letters, and swear that those are the only parts ford Local Board, 27 L. T. 644; 21 W. R. 117. of the correspondence upon that subject, this is sufficient. Campbell v. French, 1 Anstr. 58; 6 Term Rep. 200; 3 R. R. 154.

Power of the Court to disregard the Affidavit.] The defendant in an affidavit of documents objected to produce certain documents described in a schedule, on the ground that they related solely to the defence of his title to the property in question in the action, and were communications between himself and his solicitors, their Loudon agents, and his counsel, in reference to the defence of his title aforesaid, and prepared or procured for the purposes, and in contemplation of such defence. The description of some of the documents as given in the schedule appeared not to agree with the above claim of privilege :- Held, that the defendant must make a further and better affidavit. Lyell v. Kennedy, 52 L. J., Ch. 385; 8 App. Cas. 217; 48 L. T. 585; 31 W. R. -H. L. (E.)

Although a defendant to an action swears that certain documents, which are in his possession. and are material to the matter in issue, form and support his own title, and do not contain anything which could form or support the plain-tiff's case or impeach the defence, the court will not act on such oath (at least in proceedings excepted by Ord, LXII, from the rules under the Judicature Act, 1875), but will order such doen-ments to be produced, if from the whole of the defendant's answer, or from the description of the documents given by the defendant, the court is reasonably certain that the defendant has erroneously represented or misconceived the nature of such documents. Att.-Gen.v. Emerson, 52 L. J., Q. B. 67; 10 Q. B. D. 191; 48 L.T. 18; 31 W. R. 191—C. A.

Documents are material to the matters in question in the action within the meaning of Ord. XXXI. r. 12, if it is not unreasonable to suppose that they may contain information directly or indirectly enabling the party seeking discovery, either to advance his own case, or to damage the case of his adversary. The plaintiff company sued the defendant company for breach of contract ; the defence to the action was that no contract had been concluded, and that only negotiations had taken place between the parties. The defendants having obtained an order for an affidavit of documents, the plaintiffs set out amongst others their minute-book, which referred to certain documents and letters; the entries as to these documents and letters were of a date subsequent to the date of the alleged breach of contract; the documents and letters were not set out by the plaintiffs in their affi-dayit. The defendants claimed a further and better affidavit from the plaintiffs, setting out the documents and letters above mentioned, on the ground that they might shew that after the alleged breach the parties were still negotiating, and might tend to disprove the plaintiffs' allegation that a contract had been concluded :- Held, that the plaintiffs were bound to make a further affidavit of documents. Compagnic Financière du Pacifique v. Perurian Guano Co., 52 L. J., Q. B. 181; 11 Q. B. D. 55; 48 L. T. 22; 31 W. R. 395 -C. A.

Inconsistency.]-When an affidavit of documents of the plaintiff is not inconsistent with

dence, if the defendants set forth extracts of require a further affidavit. Att.-Gen. v. Castle-

In a snit to restrain a corporation from permitting a river, which flowed through the relator's land, to be polluted, he made the usual affidavit of documents. In the course of the proceedings questions were raised as to his title to certain lands, and his agent filed an affidavit stating that he had in his possession rent-books and a deed of exchange which shewed the title to the lands in question. Upon a summons by the defendants that the plaintiff be ordered to file a full and sufficient affidavit, stating whether he had in his possession any other documents than those mentioned in his affidavit, particularly the rent-books and deed of exchange :- Held, that as there was no inconsistency on the face of the plaintiff's affidavit, the defendants were not entitled to any further affidavit of documents. Ib.

Unless the answer of a defendant as to the documents in his possession or power is inconsistent with the original affidavit made by him. he will not be required to make a further affidavit as to them. Westminster Brymbo Coal and Cohe Co. v. Cluyton, 3 N. R. 111; 9 L. T. 534; 12 W. R. 123.

But where there is inconsistency, the court will require a further affidavit as to particular documents inquired after. Ib.

A defendant, who has made an affidavit as to documents in his possession, may be required, under special circumstances, to make a further affidavit as to documents. Noel v. Noel, I De G. J. & Sm. 468; 2 N. R. 294; 32 L. J., Ch. 676; 9 Jur. (N.S.) 589; 8 L. T. 555; 11 W. R.

Where a case is made out, raising a reasonable suspicion that a defendant who has made an affidavit as to documents has in his possession other documents relating to the matters in onestion, and not disclosed by the first affidavit, the court may order him to make a further affidavit, although the first is sufficient in point of form.

A defendant who had filed an affidavit as to documents was ordered to file a further affidavit. After this order had been made, but before any further affidavit had been filed, he applied for an affidavit as to documents in the possession of the plaintiffs, the time for excepting to his answer having expired, and the plaintiffs were ordered to make such affidavit. Semble, that this order was correct. Ib.

A plaintiff having reasons to believe that a defendant has in his possession a particular class of documents not included in the schedule to his affidavit as to documents, may, by summons, require him to state on eath whether he has or ever had in his possession any and what documents coming within the class referred to. Willett v. Thiselton, 1 N. R. 42.

Upon a motion for discovery and inspection of documents, grounded on a defendant's answer, the court is not at liberty to disregard the statements in the answer, as to parts of the documents which are disclosed, however suspicious those statements may be; but if they are inconsistent with each other, the court will adopt the statement which is most favourable to the plaintiff; and if such parts of the documents as are disclosed contradict the answer as to the other parts. Bowes v. Fernie, 3 Myl. & C. 632.

Prolixity.]-An affidavit of documents unany material part of the suit, the court will not necessarily prolix, was ordered on motion to be

Although there is no rule of court specially giving power to the court to take pleadings or affidavits off the file for prolixity, yet the court has an inherent power to do so in order to prevent its records from being made the instruments of oppression. Where, however, an affidavit of documents was of oppressive length, but it appeared to the court that delay and expense would be caused by filing a fresh one, the court permitted it to remain on the file, but ordered the party filing it to pay the costs of it. Hill v. Hart-Davis, 53 L. J., Ch. 1012; 26 Ch. D. 470; 51 L. T. 279-C. A.

"Never have had."]—The omission of the words "and never have had" from an affidavit of documents is in itself a sufficient reason for ordering a further and better affidavit. Wagstuffe v. Anderson, 39 L. T. 332. See Jones v. Monte Video Gas Co., ante, col. 706.

"In possession of my Solicitor or Agent." Where, in an affidavit made by a defendant, on an order for production of documents, the words "or in possession, custody, or power of my solicitor or agent," are omitted, the court will not hold such affidavit insufficient, if a satisfactory reason is given for such omission, and will hold that it is a satisfactory reason that an exception involving documents in the hands of the defendant's solicitor has been overruled; the documents, such as books, diaries, &c., in the hands of a solicitor, not being documents of the client, although they may be liable to be produced. Woodhatch v. Freeland, 11 W. R. 398.

An affidavit as to documents should in terms negative possession by an agent. Ledwidge v. Mayne, Ir. R. 11 Eq. 463.

By Husband and Wife—Form,]—Where husband and wife were co-plaintiffs but had different interests, viz. successive life interests, and an order for an affidavit of documents was made against them in the form usual against co-plaintiffs, viz. "whether they or either of them . . . in the possession of them or either of them, and they put in an affidavit "we have not in our . . . we have not in our," the affidavit was held insufficient as not being in compliance with the order. Fendall v. O'Connell, 54 L. J., Ch. 756; 29 Ch. D. 899; 52 L. T. 553; 33 W. R. 15—C. A.

Omission of Documents in Custody of Solicitor. ]-Trustees in receipt of the rents and profits of real estate allowed them to be received by their solicitors, and all the accounts relating to them were kept by the solicitors in their general professional account books. The solicitors were also solicitors of the trustees in the suit. Upon a summons for the production of documents, the trustees, in making the usual affidavit as to what documents were in their possession, &c., or "in the possession, power, or custody of their solicitors," omitted to insert these books; upon adjourned summons as to the sufficiency of the affidavit :- Held, that these books were not andavit:—ricat that these books were not within the terms of the order for production Eglinton (Early v. Lumb, 35 L. J., Ch. 113; 12 Jur. (N.S.) 45; 13 L. T. 698; 14 W. R. 170.

Description of Documents. ]-An affidavit as

taken off the file, the costs to be paid by the deponent's possession with sufficient clearness offending party. Walker v. Poole, 51 L. J., Ch. to enable them to be identified. Ledwidge v. Mayne, supra.

Bundles.] — Where the documents of which a defendant is required to set forth a list are numerous, it is not necessary for him to specify each of them, but it is sufficient for him to describe them so as to enable the plaintiff to move for them; as, for instance, to say that they are contained in bundles or hogsheads, scaled up and marked A, B, &c. Christian v. Taylor, 11 Sim. 401; 10 L. J., Ch. 145.

The court will not order the production of a bundle of documents. Nicholl v. Jones, 2 H. & M. 588; 5 N. R. 361; 13 W. R. 451.

The plaintiff having obtained an order for the discovery of documents, the defendant, in his affidavit, objected to produce "certain documents, letters, and correspondence, which have passed between my legal advisers and myself, passed detween my legal acrisers and myself, and "erratain instructions to and opinions of counsel," which "are numbered 50 to 76 inclusive, and are tied up in a bundle marked with the letter A, and initialled by me":-Held, that the documents were sufficiently described, and that the plaintiff could not be compelled to further identify them. Tuylor v. Batten, 48 L. J., Q. B. 72; 4 Q. B. D. 85; 39 L. T. 408; 27 W. R. 106.

"Bundles of letters" is not a sufficient description of correspondence in an affidavit of documents. Hamilton v. Nott, 42 L. J., Ch. 512; L. R. 16 Eq. 112.

Letters may be described in an affidavit of documents by bundles, with sufficient references for identification. Walker v. Poole, 51 L. J., Ch. 840; 21 Ch. D. 835.

A defendant was in possession of real estate to which the plaintiff claimed to be entitled as heirat-law of his mother. The plaintiff filed a bill for discovery and production of documents in support of the defendant's title. The defendant, by her answer, stated her belief that a deed had been excented, of which she set out the dates, parties, and effect, whereby her father became seised absolutely of the property. She was the universal devisee of her father. She also filed an affidavit in support of her title, to which she appended a list of documents, and among them was "a bundle of deeds and papers relating exclusively to the title of me the above-named defendant to the premises mentioned and referred to in the plaintiff's bill." The plaintiff took out a summons for a further affidavit of documents :-Held, that the plaintiff was entitled to know whether the above-mentioned deed was in the defendant's possession, and to a further affidavit containing a list of each of the documents relating to her title. Fortesoue v. Fortesoue, 34 L. T. 847; 24 W. R. 945.

An affidavit of documents had been filed setting out the numbers and the dates, but not the parties to title-deeds, and a summons was taken out to have the names of the parties added :-Held, that as the deeds were privileged the courtwould not order the names of the parties to the deeds to be set out. Taylor v. Oliver, 45 L. J., Ch. 774; 34 L. T. 902.

When discovery of documents is made it is not enough to make them up in bundles and number the bundles, but the documents in the bundles must be described, and each document must be marked or numbered specially, so that any party to documents should refer to the documents in requiring a particular document may call for it,

An affidavit of documents is sufficient which states that the deponent has in his possession or power "certain documents" numbered 1 to 26 inclusive, which are tied up in a bundle marked "A," and initialled by him; the documents being sufficiently described to enable the court, if it thought fit, to enforce production. Tuylor v. Butten (supra) followed. Budden v. Wilkinson, 63 L. J., Q. B. 32; [1893] 2 Q. B. 432; 4 R. 525; 69 L. T. 427; 41 W. R. 657—C. A.

Verifying Privilege in.]—An affidavit as to documents by a party who objects to produce them is insufficient, if it merely states "that the documents are privileged:" it ought to state and verify the facts upon which the objection is grounded. Gardner v. Irvin, 48 L. J., Ex. 223; 4 Ex. D. 49; 40 L. T. 35; 27 W. R. 442—C. A.

Documents passing between the defendants or their agents and their solicitor ante litem motam, and stated in an affidavit as to documents to be "confidential communications between solicitor and client with reference to matters which are now in question in this cause," are described sufficiently to protect them from production. Macfarlane v. Rolt, 41 L. J., Ch. 649; L. R. 14 Eq. 580; 27 L. T. 305; 20 W. R. 945.

Copies of letters and telegrams sent by clients to their solicitors ante litem motam, are privi-

leged from production. Ib.

An affidavit of the plaintiff objecting to produce certain documents on the ground that they were "privileged as communications between herself and her solicitor" was insufficient in that it did not shew the communications to be of a pro-fessional and confidential character. O'Shea v. Wood, 60 L. J., P. 83; [1891] P. 286; 65 L. T. 30—C. A. Sec also Webb v. East, 49 L. J., Ex. 250; 5 Ex. D. 23; 41 L. T. 715; 28 W. R. 336-C. A. And Westinghouse v. Midland Ry., 48 L. T. 462-C. A.

- Shorthand Notes in previous Action. An action having been commenced to determine whether the defendant had or had not executed a certain agreement, the defendant, while the action was pending, commenced an action against other persons, whom he charged with a conspiracy to defraud him, and to utter the agreement as binding upon him, knowing it to be a forgery. After the commencement of the second action, the defendant caused shorthand notes to be taken of the evidence, speeches, and summing-up at the trial of the first action, as he deposed, for the purpose ["amongst others"], of his case in the second action :- Held, upon the above facts, that the shorthand notes were privileged from inspection in the second action, and that the affidavit need not shew that the notes came into existence exclusively for the purposes of such action. Nordon v. Defries, 51 L. J., Q. B. 415; 8 Q. B. D. 508; 30 W. R. 612; 46 J. P. 566.

— Documents relating solely to Case of Party claiming Privilege.]—Privilege was claimed in an aftidavit of documents on the ground that the documents related solely to the title or case of the plaintiff, and not to the case of the defendant, nor did they tend to support it :- Held, sufficient ; that the fact that the affidavit stated that the documents related to the "case" as well as to the "title" of the plaintiff, but omitted to state that the documents Assurance Co. v. Gilbert, 64 L. J., Q. B. 578;

Cooke v. Smith, 60 L. J., Ch. 573; [1891] I Ch. contained nothing impeaching the case or title 509; 64 L. T. 484; 39 W. R. 273—C. A. of the plaintiff, did not render the affidavit insufficient. Bewiehe v. Graham (7 Q. B. D. 400) McLean v. Jones (66 L. T. 653) not followed. followed. Budden v. Wilkinson, supra. col. 711.

- Former Practice as to. - See post, col.

Materiality. ]-The plaintiffs in a suit in which their title to a piece of land was in issue, made an affidavit of documents refusing to produce certain documents as being immaterial to the defendant's case. But amougst the documents produced was one of a kind similar to those sought to be protected, and this one contained entries throwing a doubt upon the accuracy of the allegation in the plaintiffs' affidavits, that the documents sought to be protected were immaterial: -Held, that they must make a further affidavit. Hastings Corporation v. Ivall, 42 L. J., Ch. 883;

L. R. 8 Ch. 1017; 21 W. R. 899.

The defendants who, by their answer, admitted that U. & Co. had acted as their solicitors till 17th October, 1865, in the schedule to their affidavit as to documents, set down certain correspondence between U. & Co., and their agents in Paris, of the 19th, 20th, and 21st of October, and in their affidavit denied that they had any other documents relating to the matters in onestion :- Held, that the correspondence bore strong internal evidence of being written when U. & Co. were not acting for the defendants, and that there was no such ground of suspicion disclosed as to entitle the plaintiffs to a further affidavit. Imperial Land Co. of Marseilles v. Masterman, 29 L. T. 559; 22 W. R. 66—L.JJ.

In a suit in which the genuineness of the signature of a testator to a document was one of the issues to be tried, the defendant was ordered to produce on affidavit any cheques in his possession signed by the testator between specified dates. The defendant produced a great number of cheques, stating in his affidavit that they were all the cheques in his possession signed by the testator, but that he had other cheques drawn on the testator's bankers, which he did not produce because they were forgeries :- Held, that the plaintiff was not entitled to any further particulars, or to production of the cheques alleged to be forged. Wilson v. Thornbury, 43 L. J., Ch. 356; L. R. 17 Eq. 517; 22 W. R. 509.

A railway company having been made defen-dants to a suit, an affidavit as to documents was made by their secretary, who was not a defen-The company answered, and the bill was re-amended, whereupon the secretary made a second and third affidavit as to documents. He was then examined by the plaintiffs, ex parte, on their behalf, before the examiner; and in the course of such examination deposed to the possession of certain documents not mentioned in his affidavit. Upon summons by the plaintiffs, that the company might be ordered to make a further affidavit accounting for the documents referred to by the secretary in his examination:—Held, that the application was irregular, and summons dismissed with costs. Alevek v. Gitl, 21 L. T. 704.

Requisites of an affidavit disclosing docu-

ments, but claiming that some parts of them are not material and are privileged from discovery, and effect of evidence that such parts are material, considered. Yorkshire Provident Life [1895] 2 Q. B. 148; 14 R. 411; 72 L. T. 445 which are material to the case of the plaintiff. And see D., I. (post, cols. 882 et seq.).

Further Discovery as to Particular Docu-ment.]—A plaintiff, seeking from a defendant who has made the ordinary affidavit as to documents, further discovery as to a particular document, cannot obtain, on summons, an order for a further affidavit, but must amend his bill and specify the document in question. Thorp v. Sutcliffe, 39 L. J., Ch. 712. But see now R. S. C., Ord. XXXI, r. 194.

Interrogatories upon. ]-Sec Jones v. Monte Video Gus Co., 5 Q. B. D. 556; Hall v. Truman, 29 Ch. D. 307; Nicholl v. Wheeler, 17 Q. B. D. 101; and Morris v. Edwards, 60 L. J., Q. B. 292; 15 App. Cas. 309; 63 L. T. 26-H. L. (E.) Infra,

B., I. 6 (post, col. 810).

When a defendant, after answer, has obtained an affidavit as to documents in the common form, if he finds that the inquiry in the common form is not sufficiently pointed to enable him to obtain discovery as to specific matters, his proper course is to file a concise statement of the specific matters, with respect to which he seeks discovery, with interrogatories, which it will be the duty of the plaintiff to answer fully; and it will be no answer to the defendant to say that some of the matters given in the specific statement were comprised in, or that they were all referred to in the answer, and that the first affidavit was sufficient. Newall v. Telegraph Construction Co., L. R. 2 Eq. 756; 14 W. R. 914.

A defendant, having filed a concise statement. with interrogatories, under the above circumstances, is not entitled, before the answer has come in, to take out a further summons for an affidavit of documents in the same special form as that in which he has interrogated; and such a summons will be dismissed as unnecessary. Ib.

Lost Documents. ]-A defendant, in his first answer, stated that certain papers in another suit referred to in the bill were in the possession of his solicitor, and being asked by the amended bill to set forth a schedule thereof, he stated that his solicitor had made diligent search for them, but they could not be found, having been misplaced or mislaid in the solicitor's office, and that therefore he could not set forth a schedule of them :-Held, that the answer was sufficient. Ellwand v. M. Donnell, 8 Beav. 14.

Document found after Affidavit Filed.]-It is the duty of a party in an action, who, after the dary of a party in an action, who, after filing an affidavit of documents, discovers a document of which his opponent has a right to have inspection, but which is not disclosed in the schedule, to inform his opponent of the discovery, either by supplementary affidavit or by notice. Mitchell v. Darley Main Colliery Co., 1 Cab. & E. 215.

### 7. WHAT DOCUMENTS.

General Rule.]-The rule as to discovery is the exact contrary to that of production. You

to discover all the facts within his knowledge, same; and he made and filed an affidavit setting

However disagreeable it may be to make the disclosure; however contrary to his personal interests; however fatal to his claims, he is compelled to set forth on oath all he knows, believes, or thinks, in relation to the matters in question. Flight v. Robinson, 8 Beav. 22; 13 L. J., Ch. 425; 8 Jur. 888.

Documents privileged from Inspection. -- A defendant, in an action for the recovery of land of which he is in possession, may be compelled by order to make an affidavit of his documents of title, although he may have a right to object to produce them, New British Mutual Investment Co. v. Peed, 3 C. P. D. 196; 26 W. R. 354.

In an action for an account in which the issue of settled accounts was raised, the defendant was compelled to make an affidavit of accounts and documents not pretended to be privileged or irrelevant to the matter of the action, but claimed to be covered by the alleged settled accounts. Dickson v. Harrison, 47 L. J., Ch. 686.

Documents Referred to in the Pleadings. See Webster v. Whewall, and Quilter v. Heatley, . supra, cols, 703, 704.

Marine Insurance-Ship's Papers. ]-In an action on a policy of marine insurance, underwriters are entitled to discovery of ship's papers, in accordance with the practice in force beforethe Judicature Acts, without an affidavit, and from all persons interested in the proceedings.

China Trans-Pacific Steamship Co. v. Commercial Union Assurance Co., 51 L. J., Q. B. 132; 8.Q. B. D. 142; 45 L. T. 647; 30 W. R. 224-

Risk not wholly Marine.]—In an action upon a policy of insurance, in which the risk was of a mixed nature, the transit being partly by sea and partly by land, and in which perils of 'transit or conveyance' had been substituted for "of the seas," the defendants had, before delivering their defence, applied for the usual order for discovery of "ship's papers" under the old practice —Held, that the peculiar practice of granting discovery of ship's papers was applicable to actions brought upon marine policies alone, and could not be extended. Henderson v. Underwriting Association, 60 L. J., Q. B. 406; [1891] 1 Q. B. 557; 64 L. T. 774; 39 W. R. 528.

Libel Action—Particulars of Justification.]—Where, in a libel action, the defendant justifies, and gives particulars of his justification, he is not entitled to discovery of anything more than the matters relating to those particulars, and an application for a general inspection of the documents disclosed by the plaintiff's affidavit of documents will be refused. Yorkshire Provident Life Assurance Co. v. Gilbert, 64 L. J., Q. B. 578; [1895] 2 Q. B. 148; 14 R. 411; 72 L. T. 445.

Possession or Power - Joint or Separate Custody. ]-A defendant was, by an order in the must set out every document you have in your common form, required to make and file a full possession, whether you are bound to produce them or not. Per Jessel, M.R., Scanston v. Lishmann, 45 L. T. 360; 4 Asp. M. C. 450—C. A. any, what, documents relating to the matters in The general rule is, that a defendant is bound the question in the suit, and accounting for the and to produce all documents in his possession forth that he had not in his actual custody any

produce, on the ground that they were not in his exclusive possession, but only in his possession jointly with another, who was not a party to the On motion by the plaintiff, the defendant was ordered to make and file an affidavit in conformity with the terms of the order, setting forth the number and particulars of the documents which he acknowledged to be in his joint possession, but claimed to be privileged. Luzurus v. Morley, 5 Jur. (N.S.) 1119; I L. T. 3.

A husband and wife sued as eo-plaintiffs in

respect of an alleged breach of trust by the trustees of their marriage settlement. The wife had a life estate for her separate use, and sued without a next friend. An order was made that the plaintiffs should file an affidavit stating "whether they or either of them" had in the possession or power "of them or either of them" any documents relating to the matters in question. They filed an affidavit admitting the possession of various documents, which they scheduled, and going on to say, "We have not now, and never had, in our possession, custody, or power, or in the possession, custody, or power of any other person or persons on our behalf, any deed, &c., other than and except the documents set forth in the said schedule" :- Held, that the plaintiffs must be ordered to file a further and better affidavit, for that an affidavit relating only to documents in the joint custody of the husband and wife did not comply with the order, and that the order was right in requiring them to answer as to documents in the Dossession of either of them. Fundall v. O'Connell, 54 L. J., Ch. 756; 29 Ch. D. 899; 52 L. T. 553; 33 W. R. 619—C. A.

Three executors, two of whom, together with other persons not parties to a suit, were members of a firm to which their testator had belonged. had for many years allowed part of his estate to remain in the firm. On a bill against the execu-tors for administration and to make them account for profits made by the use of his property :Held, that the executors were bound to include the books of the firm in the schedule to their affidavit of documents. Vyse v. Foster, L. R. 13 Eq. 602; 26 L. T. 282.

A partner of a foreign house, carrying on business abroad, he residing and carrying on business in England, on his own account, is not bound to know the transactions of the foreign partnership, although they are binding on him; and, consequently, he will not be required to set forth a schedule of books, &c., relating to, and in the custody of, the foreign house. Martineau v. Cow, 2 Y. & Coll. 638; 7 L. J., Ex. Eq. 18; 1 Jur. 818.

An Irish insurance company were enabled to sue and liable to be sued in the name of one of their members. An insurance was effected through A., their English agent, who was not a An insurance was effected member at the time, but afterwards became one. The insured filed a bill respecting the policy against A. while he was a member, which charged that he and the company had in their possession documents relating to the matters, &c., and required him to set forth a schedule thereof. A. afterwards transferred his shares and ceased to be a member, and shortly afterwards put in his answer, stating that he had not feature and a member and scattle that he had not feature that he had not feat

documents relating to the matters in question, whether they had any documents in their posses-except such entries as might be contained in the sion, or set forth a schedule thereof :—Held, that account books of his firm, which he objected to 8 Beav. 14.

> - Possession of Co-Defendants. ]-A decree was pronounced, for a sale of real estate, in a partition suit. The decree contained an inquiry of what real and personal estate the late father of the defendants, who were tenants in common of the property, died seised and possessed, and what had become thereof. Some documents relating to the estate were in the hands of some of the defendants, which they declined to produce at the request of the others. A summons was then taken out by those other defendants calling on their co-defendants to make an affidavit as to "all the documents relating to the matters in question in the suit" in their possession :-Held, that the affidavit must be made as asked, and that it was for the respondents to shew whether the affidavit should be limited in its terms. Kennedy v. Wakefield, 39 L. J., Ch. 827; 22 L. T. 645; 18 W. R. 884.

> Appeal on Disallowance of Application.]-When, by the consent of both parties, the documents in question are submitted to the judge, his decision cannot be questioned in a court of appeal. Bustres v. White, 45 L. J., Q. B. 642; 1 Q. B. D. 423; 34 L. T. 835; 24 W. R. 721—

> Privileged Documents.]-See post, D. OBJEC-TIONS TO DISCLOSURE.

Relevant and Material Documents. ]-See ibid. Public Documents. 1-See post, cols. 793 et seq.

### 8. THE DEPOSIT.

Discretion to Dispense with.]—A judge or master has under Ord. XXXI. r. 25, a discretion to dispense with the deposit for security for the costs of discovery, prescribed by rr. 25, 26 of the order. Newman v. L. & S. W. Ry., 59 L. J., Q. B. 341; 24 Q. B. D. 454; 62 L. T. 290; 38 W. R.

Application for further Sum—Time for Application.]—The power of the court under Ord. XXXI. r. 26, to order payment into court of an additional sum by way of security for costs of discovery in excess of the prescribed sum of 51., is not limited to the time when the order for discovery is made, but may be exercised at any time when the circumstances show that further Ch. 573; [1891] 1 Ch. 509; 64 L. T. 484; 39 W. R. 273—C. A.

Several Defendants-Different Solicitors. ]-On application for discovery, whether by means of interrogatories or otherwise, against several defendants who have severed in their defences and appeared by different solicitors, the plaintiff must pay into court separate sums of 51, in respect of each defendant. Liverpool Bread Co. v. Firth, 60 L. J., Ch. 153; [1891] 1 Ch. 367; 63 L. T. 677; 39 W. R. 269.

- Same Solicitor -- Amount of Deposit. ]-The plaintiff brought an action against two dethe two defendants:—Held, that upon the true construction of Ord. XXXI. r. 26, the defendants' right to a deposit was confined to the sum of 51, only, and that they could not insist upon a deposit of 5l. apiece. Joyce v. Beall, 60 L. J., Q. B. 242; [1891] 1 Q. B. 459; 64 L. T. 137; 39 W. R. 316 ; 55 J. P. 183.

Documents in which Parties have a Common Interest. -Order made that the plaintiff in an action of contract should have inspection of the written contract which was in the defendant's written contract when was in the definance passession without giving the security for costs required by Ord. XXXI. rr. 25, 26. The provisions of Ord. XXXI. rr. 25, 26, with regard to security for the costs of discovery do not apply to an application for production of a document in which both parties to the action have a com-Brown v. Liell, 55 L. J., Q. B. mon interest. 73: 16 Q. B. D. 229.

Documents disclosed in Answer to Interrogatories. ] - Documents specifically mentioned in answers to interrogatories are "documents referred to in an affidavit in the cause" within Ord, XXXI. r. 15, and must be produced for inspection without a further application for discovery or a further deposit of 5l. Moore v. Peuchey, [1891] 2 Q. B. 707; 65 L. T. 750; 39 W. R. 592. Sec further, infra, INTERROGATORIES.

### B. PRODUCTION.

### 1. Possession or Power.

### a. Joint Possession or Interest.

Production to Party Interested.]-Deed is made to two severally; possessor of deed bound to produce it for advantage of other. Anon.,

One member of a club, on behalf of himself and the rest, sued two other members, to recover back moneys belonging to the club. It having been determined that the other individual members were not necessary parties :-Held, that the defendants could not resist the production of the documents in their possession, on the ground that the other members had an interest in them. Richardson v. Hastings, 7 Beav. 354; 13 L. J., Ch. 416.

Production to Third Party.]-In an action for the seizure of the goods of the plaintiff, which was justified by the defendant under an alleged power of distress in a mortgage deed, the defendant stated in his affidavit of documents that he and one B., who was not a party to the action, jointly had in their possession or power certain documents specified in a schedule to such affidavit, and that they were the muniments of title of himself and the said B. as mortgagees, and that he, the defendant, objected to their production : Held, that such affidavit showed sufficient reason for not making an order for inspection of reason for not making an order for inspection of the documents, *Murray* v. *Walter* (Cr. & Ph. 114) followed, *Kearstey* v. *Philips*, 52 L.J., Q. B. 269; 10 Q. B. D. 465; 48 L. T. 468; 31 W. R. -C. A.

An appellant on a bill to perpetuate testimony under 5 & 6 Vict. c. 69, obtained from the Court of Chancery a subpoena duces tecum, directed to

deposited a single sum of 51. in court, applied the respondents. The appellant, being unable for an order for discovery of documents against to enforce this writ against the respondents, who were resident in Scotland, applied to the Court of Session, under 22 Vict. c. 20, to compel them to search for an exhibit to the documents men-tioned in the subpoena. The respondents stated, as a reason for non-search and non-production of the documents, that they were locked up in the muniment room at a certain castle, and that though they were, as trustees of the late owner of the castle, in possession of the key of the muniment room, yet they could not search that room, because there was a dispute between them and the present owner of the castle as to the right of the possession of the documents :-Held, that the respondents could not be compelled to produce the documents. Campbell v. Dalhousie.

produce the documents. *Campbell v. Dalkousie*, (*Eurl*), L. R. I Sc. App. 462; 22 L. T. 879—H. L. The defendant by his answer stated that certain documents, which he admitted to be in his possession, did not belong to him individually, but jointly with other parties, who acted as his agents, and against whom no equity was in this respect raised by the bill :—Held, that the ordinary rule of the court applied to this case, and that the plaintiff had no right to the production of the documents, either on the ground that they were in the actual possession of the defendant, or on the ground that the parties to whom they belonged in part acted as the agents of the defendant. Reid v. Langlois, I Mac. & G. 627; 2 Hall & Tw. 59; 19 L. J., Ch. 337; 14 Jur. 467.

A defendant admitted that certain documents were in the possession of himself and W. C., his co-executor, and that others were in the possession of their joint solicitor. W. C. not being a party to the suit :- Held, that an order for production could not be made against the defendant on such an admission. Morrell v. Wootten, 13 Beav. 105; 20 L. J., Ch. 81; 15 Jur. 319.

Two defendants admitted the possession of documents. One died :-Held, that a motion for production against the survivor, in the absence of the representatives of the deceased defendant, could not be maintained. Robertson v. Shewell, 16 Beav. 277.

Title deeds were in the custody of a solicitor of two tenants in common, A. and B .: - Held, that A. could not be ordered to produce the that A. comm not be ordered to produce the deeds in a suit to which B. was not a party. Edmonds v. Foley (Lord), 30 Beav. 282; 31 L. J. Ch. 384; 8 Jur. (N.S.) 552; 5 L. T. 709; 10 W. R. 210.

Production of deeds and documents will not be ordered where a defendant and another person, who is not a party to the suit, are severally interested in the estate and title-deeds. Th

Where a defendant has in his possession documents belonging to his cestui que trust, a production will not be ordered in their absence (per Sir L. Shadwell). But where an action at law is brought by a trustee, by the direction and for the benefit of the cestni que trust, such trustee is bound to produce all the documents to the same extent as if he had not only the legal but also the beneficial interest. Semble. Few v. Guppy, 13 Beav. 457.

Upon a motion on behalf of a defendant in a suit for production by the plaintiff of a document of which the plaintiff had obtained production by an order against his co-defendant, the court by an order against his co-determine, the court refused to make an order in the absence of the latter. Reynolds v. Godlee, 4 Kay & J. 88. But the mere circumstance of the plaintiff

having obtained the document for a specific and the defendants' negligence. A suit and cross limited purpose, would not have enritted him to suit had previously been commenced in the have it protected, on the ground of an implied [court of Admiralty between the owners of the confidence that it should not be used for any

other purpose. Ib.

One of several defendants, by his answer, admitted the possession of documents, but by an affidavit subsequently filed, stated that since his answer he had deposited them with one of his co-defendants. A motion for their production refused in the absence of the co-defendant. Burbidge v. Robinson, 2 Mac. & G. 244.

On a bill to set aside a deed filed by one plaintiff only, praying that, if necessary, it might be taken as on behalf of creditors, generally, it appeared that A., claiming under the deed, had a power of appointment, and that she had appointed under her power. The plaintiff moved for production of documents in the hands of the trustee of the deed offering to confirm the appointment of A. The appointees were not parties :- Held, that the production could not be enforced in the absence of those persons,

Ford v. Dolphin, 1 Drew. 222.

In a bill filed to sell the inheritance where it appeared on the face of the answer of the tenant for life, that the parties entitled to the remainder immediately expectant on the life estate were not before the court :- Held, that the court could not compel the tenant for life to produce the deed under which the absent parties held their estate; although as against the tenant for life the right of the plaintiff to inspection was complete. Dundas v. Blake, 9 Ir. Eq. R. 640; but this was varied on appeal by ordering both deeds to be produced, 10 Ir. Eq. R. 260.

Held, also, that it is not a valid objection to a motion by the plaintiffs for the production of documents of the defendants, to show that the bill is open to a demurrer for want of equity.

Where documents are admitted by some defendants to be in the joint possession of themselves and other defendants, a motion for the production of those documents cannot be made against some of the defendants only. Anon., 4 L. J. (o.s.) Ch. 170.

A. and B., by their joint answer, admit certain documents to be in the possession of A. B. must be served as well as A. with notice of production of them. Smith v. Sidney, 6 Jur. 432.

- Possession of Joint Agent.]-Order for production of documents in possession of the treasurer of the "Times" newspaper, refused, Murray v, Walter, 1 Cr. & Ph. 114; 3 Jur. 719.

An admission of the possession by an agent

on behalf of the defendant and other persons who are not parties to the cause of documents relating to the matters in question, does not entitle the plaintiff to an order for their production. Lopez v. Deacon, 6 Beav. 254.

A plaintiff is not entitled to the production of documents held by the solicitor of a defence association, to which the defendant belongs, relating to the constitution of the association; but he may call on the defendant to disclose the names of the persons composing such association. Boxill v. Cucan, 15 W. R. 608.

Compromise of former Action. - The

two vessels, and these suits were compromised by a private agreement in writing :-Held, that the plaintiffs were entitled to inspection of this agreement with an average statement attached to it; for that, without deciding that such an objection would be material, it did not appear that the owners of the H. objected to the inspection; and the document clearly related to the matter in question, as it might contain an admission of liability on the part of the defendants. Hutchinson v. Glover, 45 L. J., Q. B. 120; 1 Q. B. D. 138; 33 L. T. 605; 24 W. R. 185. Affirmed on appeal, 33 L. T. 834—C. A. A party to a suit cannot be required to pro-

duce documents relating to the compromise of a dispute between himself and a person not a party to the suit. Warrick v. Queen's College,

Octord, L. R. 4 Eq. 254.

- Undertaking not to Produce. - Production ordered of documents admitted by defendant to be in his possession subject to an undertaking to a third party not to part with the possession to any one else. Penkethman v. White, 2 W. R.

Sufficiency of Objection. ]-Where a party to a suit is required to make an affidavit as to documents in his possession, and alleges in his affidavit as a reason for not producing them that they were in the possession of himself and a third person as joint owners, he is bound to state the nature of the joint ownership. Bovill v. Cowan, 39 L. J., Ch. 768; L. R. 5 Ch. 495; 22 L. T. 503; 18 W. R. 533.

The defendants objected to produce documents on the ground that persons not parties to the suit were interested in them:—Held, that this was no ground for resisting production. Kettlewell v. Barstow, 40 L. J., Ch. 375. Affirmed, L. R. 7 Ch. 86: 27 L. T. 258: 20 W. R. 917.

When, in answer to interrogatories, the defendant admits that he has certain documents in his custody, possession, or power, it is not competent to him, upon an application for leave to inspect and take copies of them, to urge that others have an interest in them, and therefore he cannot produce them. Plant v. Kendrick, L. R. 10 C. P. 692,

#### h. Of Partner.

A sole defendant in a suit relating to transactions in which he had been engaged with the plaintiff, had made entries relating to these transactions in the books of a partnership firm of which he was a member:—Held, that no order could be made on him to produce the partnership books without the consent of his partner. Hadley v. McDouyall, 41 L. J., Ch. 504; L. R. 7 Ch. 312; 26 L. T. 379; 20 W. B. 393. Person accountable, whether as partner or not, must discover all books relating to the matters in question. Swanston v. Lishman, 45 L. T. 360; 4 Asp. M. C. 450.

A bill of discovery against a surviving partner, charged that he had lately or once in his possesplaintiffs were the owners of goods shipped on state of the board the defendant's vessel the B., and their case was, that the goods had been lost through a prayed that the defendant might set forth a collision between the R and the H cough a collision between the B. and the H., owing to schedule of such particulars as were in his custody, &c.; the defendant answered that after the death of his partner he had some books, &c., in his possession, which were delivered to the representatives of his partner, who would not allow him to inspect them; and, save as aforesaid. he denied that he had lately or once any books, &c. :-Held, that this answer was sufficient. Mackintosh v. Booker, 6 L. J., Ch. 233: 1 Jur.

The defendant by his answer stated that certain books relating to a concern in which the plaintiff claimed to be a partner with the defendant, were in the possession of the treasurer of the concern on behalf of the several shareholders in it, many of whom were not parties to the suit:-Held, that the defendant could not be Murray v. Walter,

ordered to produce them. Cr. & Ph. 114; 3 Jur. 719.

A defendant was, by an order in the common form, required to make and file a full and sufficient affidavit, stating whether he had, or had had, in his possession or power, any, and if any, what documents relating to the matters in ques tion in the suit, and accounting for the same ; and he made and filed an affidavit setting forth that he had not in his actual custody any documents relating to the matters in question, except such entries as might be contained in the accountbooks of his firm, which he objected to produce. on the ground that they were not in his exclusive possession, but only in his possession jointly with another, who was not a party to the snit. On motion by the plaintiff, the defendant was ordered to make and file an affidavit in conformity with the terms of the order, setting forth the number and particulars of the documents which he acknowledged to be in this joint possession, but claimed to be privileged. Lazarus v. Mozley, 5 Jur. (N.S.) 1119; 1 L. T. 3.

A witness a partner in a bank was required, by a subpcena duces tecum, to produce all books and accounts in his custody or power, containing any entries relating to 6,500l. consols, or to the dividends thereof, or the application or disposition thereof, or relating to the matters in question in the suit :- Held, that the witness was not compellable to produce any books, &c., because the language of the subpœna was too general, and because the books, &c., relating to the stock, were partnership property, and his co-partners would not consent to his producing them. Att.-Gen. v. Wilson, 9 Sim. 526; 8 L. J.,

Ch. 119.

A defendant, who was required to set forth in his answer to interrogatories certain entries in the books of a firm of which he was a member, stated in his anwer that he and his co-partners had given express directions to their agents, in whose custody the books were, not to produce them to any one, nor allow any stranger to inspect them, without the express authority of the defendant and his co-partners; that the books were not in the power of the defendant alone, but of the defendant and his co-partners; and that the defendant had no right or lawful power to produce them, nor to set forth their contents, without the consent of his co-partners :- Held. that the answer was insufficient, as the defendant did not state that his co-partners had refused to consent to his setting forth the entries. Stuart v. Bute (Lord), 11 Sim. 442. Affirmed,

12 L. J., Ch. 140; 7 Jur. 291. A., B. and C. had been co-partners in the

having been formed between C., D. and E., the plaintiff in a suit relating to the affairs of the late co-partnership, to which C was a party, served D and E and the agent of their firm (none of whom were parties to the suit) with a subpoena duees tecum, requiring them to produce certain books of the late firm; and also moved that C. might be ordered to concur with D. and E. in producing the books, or causing them to be produced, and to give or join in giving such direction to D. and E., and the agent, as should be necessary to enable or authorise them to obey the subpoena. The court refused the motion, with costs. S. C., 13 Sim. 453; 7 Jur. 225

Where a defendant is interrogated as to the contents of the books of a company in which he is a partner, and the question is one he is bound to answer if he can, it is no exense for not answering to say that the books are in the custody of the officer of the company, and that his partners will not allow him access to them. If he has a right to inspect the documents, he is bound to enforce that right, and the court will, if necessary, give him time for that purpose. Taylor v. Rundell, 1 Ph. 222; 13 L. J., Ch. 20; 7 Jur. 1073. Affirming, 1 Y. & Coll. C. C. 128.

#### c. Of Officer or Representative of Company.

The directors of a company are bound to make an affidavit as to doenments belonging to the company, as being in their possession, though the company is a party to the suit. Clinch v. Financial Corporation, L. R. 2 Eq. 271: 12 Jur. (N.S.) 484; 14 W. R. 685,

Motion for production of documents belonging to a company, against defendants, who had been, but were no longer trustees of the company, no other shareholders being parties. The answer admitted the documents to be in the office of the company, but not otherwise in the possession or custody of the defendants:—Held, that produc-tion could not be enforced. *Penny* v. *Goode*, 1 Drew. 474; 22 L. J., Ch. 371; 17 Jur. 82; 1 W. R. 120.

In a suit by a shareholder against a public officer of a joint-stock banking company, charging insolvency and praying a dissolution and an account, the defendant stated that the company was dissolved, and that the documents were not in his individual possession, but admitted them to be in the possession of the directors, and the solicitor to the company, and he set them forth in his schedule. On a motion to produce the same :-Held, that notwithstanding the dissolution, he still represented the company for the purposes of this motion, and was bound to produce the documents. Hall v. Connell, 3 Y. & Coll. 707; 9 L. J., Ex. Eq. 25.

In an action on a promissory note, made by the defendant as security for the repayment of moneys due to the plaintiffs from a limited company, the defendant objected to produce doeuments relating to the matters in question in the action, being the banker's pass book and directors' minute book of the company, on the ground that they were in his custody only as liquidator in the voluntary winding up of the company. The company had been dissolved before the applica-A. B. and C. had been co-partners in the working of certain colleries; the co-partnership is tion for the discovery of documents was made, but no resolution had been passed under the having determined, and a new co-partnership i Companies Act, 1862, s. 135, for the disposal of the documents belonging to it .—Held, that the in the bill, but said they held them as the agents plaintiffs were entitled to the inspection of the and on behalf of the persons who intrusted them

ing, 54 L. J., Q. B. 495; 33 W. R. 750.

shareholders to wind up its affairs, and for this holders, in respect of certain debentures issued by the company, the defendants thereupon filed a bill on behalf of themselves and the other shareholders to restrain the actions, and to obtain relief in respect of the debentures. The plaintiffs then filed a bill against the defendants for discovery in aid of the actions. From the answers of the defendants to this bill, it appeared that they had in their actual possession certain letters which had passed between the defendants and the directors and shareholders of the company and the agents in India. On a motion by the plaintiffs for the production of these letters, the defendants submitted that they were not bound to produce them, because they held them on behalf of themselves and also of the other shareholders of the company who were not parties to the suit :--Held, ordering the production, that the defendants sufficiently represented the whole body of shareholders for the purposes of the litigation, and that so far as the parties by or to whom the letters were sent were shareholders of the company, the letters were not privileged. Glyn v. Caulfeild, 3 Mac. & G. 463; 15 Jur. 807.

The covenant of a shareholder in the deed of

settlement, that he will not call for inspection of certain books of the company, will not be a bar to his moving for their production in a suit brought by him against the company. Hall v. Connell, 3 Y. & Coll. 707; 9 L. J., Ex. Eq. 25.

#### d. Of Agent.

Document Belonging to Principal. |-- Under what circumstances court will, on bill of discovery, direct search to be made in boxes of absent party, in hands of defendant as depositary.

Att.-Gen. v. Elliott, 1 Price, 377. See further, 2 Price, 48.

A defendant stated by his answer, that he had in his possession as depositary, certain boxes belonging to another defendant, containing documents, &c., which might relate to the matters in question in the suit, but he was not acquainted set out any schedule of those documents :- Held, that exceptions to the answer for insufficiency could not be sustained. Forman v. Nevill, 14

L. J., Ch. 33.

During a revolution in Sicily the revolutionary government scut two of the defendants, who were natives and inhabitants of Sicily, as envoys to this country, and afterwards remitted to them moneys which had been contributed by many thousands of the inhabitants of Sicily, with directions to purchase a steamship therewith, and the defendants applied the moneys accordingly. The lawful sovereign of Sicily, after he had re-estab-lished his authority, filed a bill, claiming the ship, which still remained in the port of London. The defendants, in their answer, admitted the relating to the manor. Winchester possession of documents relating to the matters Bowher, 29 Beav. 479; 9 W. R. 404. The defendants, in their answer, admitted the

documents, inasmuch as the defendant had them with the moneys, and submitted that, in the in his absolute control. London and Yorkshire absence of such persons, they ought not to be Bank v. Cooper, 15 Q. B. D. 473—C. A. Affirm: ordered to produce the documents. The court, however, made the order, because the plaintiff The defendants in a snit were shareholders in represented the contributors of the moneys; and a company, and had been authorised by the other the revolutionary government being at an end, the defendants had either ceased to be agents or purpose, among other things, to send out a agents to India. The plaintiffs in the suit having brught are to India. The plaintiffs in the suit having brught are too see a suit of the plaintiff. Theo Siellies Klub Drught are thought are the defendants as share. [Pi Mean, 1 Sim. (X-S.) 301; 20 L. J., Ch. 417; 15 Jur. 214.

Where books, &c., the joint property of the defendants and of persons not before the court, were admitted by the answer to be in the custody of a third party as the common agent of all, an order was made upon the agent to permit plaintiff to inspect against consent of those not before the court. Walburn v. Ingilby, 1 Myl. & K. 61; Coop. t. Brough, 270; 3 L. J., Ch. 21.

An agent, made defendant to a bill for discovery as to a title, may demur to it, and he is not compellable to produce the deeds. Staples, 2 Ken, 135,

Document Belonging to Agent.]—Bill filed against a steward for an account of moneys received in that capacity, and of the interest made by him of it. By his answer he admitted he received this money, and mixed it with his own, and used it accordingly. This admission will induce the court to direct a production of his banker's books, though they may contain many other private matters. Salisbury (Eurl) v. Cecil, 1 Cox, 277.

When executors and trustees, by their answer, admitted six books to be in custody or power of their agent in Scotland, where part of the testator's property was, and the agent, on a motion for production, deposed that he was agent for many other persons, and that his books related to the affairs of such other persons as well as to those in question in the cause :- Held, that the executors had not thereby so mixed the testator's accounts with others as to preclude them from insisting that the books were not in their power; and a motion for production was refused as to these books. Airey v. Hall, 2 De G. & Sm. 489; 12 Jur. 1043.

Production of maps, plans, and other docu-ments made by land agents in the course of their employment, and to facilitate them in letting the farms, and in computing the rents, and also the fines to be paid by copyhold tenants, will be ordered, though it is alleged that they were made question in the suit, but he was not acquainted for private use, and were not paid for the prin-with the purport of any of them, and he did not cipal, and that the cost was not covered by the poundage which it had been agreed the agents should receive. Beresford (Lady) v. Driver, 14 Beav. 387; 20 L. J., Ch. 476.

Land agents paid by commission will be directed to deliver up such maps, plans, and other documents relating to the estates as were made or collected by them in the course of their employment, even though it is alleged they were made for their own private use. Beresford (Lady) v. Drirer, 16 Beav. 134; 22 L. J., Ch. 407.

Indexes prepared by a deputy steward of a manor, but claimed to be his private property, ordered to be produced for inspection, in a suit by the lord for the delivery up of all documents relating to the manor. Winchester (Bishop) v.

#### e. Of Solicitor.

How far Possession of Client.]—Possession of defendant's attorney, of documents relative to plaintiff's title, is for that purpose possession of defendant. Bligh v. Bersun, 7 Price, 205.

Attorney submitting to produce title deeds of his client, in his possession, as the court shall direct, may be called upon to produce them, if the principal could himself have been called upon to do so. Fenvicky. Read, 1 Mer. 114.

Generally it is not necessary to make an attorney a party because he has title deeds in his possession, although it may become so under particular circumstances. Ib.

A charge in the bill that papers and documents are in the possession or power of the defendant or his solicitor, is not answered by a denial that they are in the possession or power of the defendant. Bond v. Northorer, 1 Y. & Coll. 221; 4 L. J. Ex. Eq. 60.

Motion to compel attorney to produce papers of his client, refused with costs. Wright v. Mayer, 6 Ves. 280.

No subpoena duces tecum npon attorney to produce papers of client. Ib.

Where Lien Claimed, —A defendant, shortly ratter filing an adhiavir as to documents, entered into liquidation of his affairs by arrangement. Some time afterwards he changed his solicitors. The plaintiff applied for production of documents, which the defendant resisted on the ground that they were in the possession of his former solicitors, who claimed a lien on them:—Held, that an order for production must be made, with liberty to apply in case the defendant found it impossible to produce the documents, the plaintiff not to attach the defendant without leave of the court. Vale v. Opport, 44 L. J., Ch. 579; L. R. 10 Ch. 340; 33 L. T. 41; 23 W. R. 780.

A solicitor cannot set up a lien acquired in a cause as against the right of other parties in the

cause to production. Ih.

Where an order for discovery has been made, it is no answer to a summons for production of documents that the documents are in the possession of former solicitors who claim a lieu on them for costs, and that the person resisting production is unwilling to discharge the lieu because he believes he has a good claim for negligence against such solicitors. The court, however, in making the order for production will give liberty to apply so as to provide for the contingency of the party called upon to produce documents finding a difficulty in obtaining them. Lewis v. Puccell, 66 L. J., Ch. 463; [1807] 1 Ch. 678; 76 L. T. 282; 45 W. R. 489.

A solicitor defendant cannot refuse to produce documents of his client on the ground that he has a lien for costs, even when plaintiffs claim under his client. Lockett v. Cury, 3 N. R. 405.

A solicitor has no lien upon the will of his client, and cannot refuse to produce a deed executed by the client in his favour, containing a reservation of a life interest, and a power of revocation. Baleh v. Symes, Turn. & R. 87; 23 R. R. 105

Not acquiring Document in that Character.]—A plaintiff is not cutified to production of documents admitted to be in the possession of the solicitor of the defendant, where such possession was not acquired in that character. \*\*Magg v. Owen, C. P. Cooper, 12. P. Cooper, 12.

Documents of Glient's Testator, —A defendant admitted that documents were in his solicitors! hands, having come to them as the representatives of the solicitors of the defendant's testator; but he said they were not in his possession or power, or under his control. The court refused to order a production. Palmer v. Wright, 10 Beav, 234.

Documents belonging to Solicitor.] — The solicitor for the plaintiff in a probate action had also acted for many years as solicitor to the testatrix, whose will was in dispute :—Held, that the plaintiff could not be ordered to produce for inspection the following documents in the possession of the solicitor: "diaries, extracts from diaries, cash ledgers, expense ledgers, eash books, disbursement books, and bankers' cash books, containing entries and memoranda relating to the deceased and her affains." O'Shea v. Wood.

60 L.J., P. 83; [1891] P. 286; 65 L. T. 30—O. A. Communications between the assignces and the Commissioner of the Insolvent Debtors' Court held not privileged; books, &c., relating to the matters in question in the possession, but the property of the defendant's solicitors, not ordered to be produced. Flight v. Robinson, 8 Beav. 22; 13 L. J., Ch. 425; 8 Jur. 842; 8 14.

A plaintiff excepted to the defendant's answer on the ground that he had not set forth a list of the books and doenments in the possession of his experiment of a runs testate :—Held, that as these books and doenments were the solicitor's private property, the defendant-was not bound to set them forth. Colyger v. Colyger, 30 L. J., Ch. 408; 4 L. T. 134; 9 W. R. 452.

Action against Solicitor.]—Where a defendant has in his possession documents belonging to his client, production will not be ordered in the absence of the latter. Few v. Guppy, 13 Beav, 457.

Documents belonging to other Glients.]—The solicitor to the defendants, being also clerk to the commissioners under an inclosure act, to an information admirs, on his examination, that he has in his possession the original award of the commissioners, which ought, according to the act, to have been deposited in the parish chest: though it is sworm, that the production of the original award at the hearing will afford material evidence for the relators, the court will not make an order on the solicitor for the production of the deed at the hearing. Att-Gen. v. Berkeley, 1 L. J. (O.S.) Ch. 33.

The court will not order the production of documents by defendants, which are in the possession of their solicitors, as solicitors for them and for other persons not before the court. Cridland v. De Mauley (Lord), 13 Jur.

### f. Of Executors and Administrators.

It is the bounden duty of an excentor to keep clear and distinct accounts of the property which he is bound to administer. If, therefore, he chooses to mix the account with those of his own trading concerns, he cannot thereby protect himself from producing the original books in which any part of those accounts may be inserted. Freeman v. Fairlie, 3 Mer. 43; 17 R. B. 7. An order for production cannot be made Ch. 521; 9 Jur. (N.S.) 240; 8 L. T. 100; 11 against an executor upon admissions in his W. R. 457. testator's answer. An order for the production of deeds, &c., will not be made against the has been previously made against the defendant | 3 Jur. 1119. himself, there being nothing to shew that they were in the possession of the administrator. Scott v. Wheeler, 12 Beav. 366; 19 L. J., Ch. 402.

The court refused to order an executor to produce certain drafts of his testator, which at the date of the application were in the possession of the bankers on whom they had been drawn. Bayley v. Cass, 10 W. R. 370.

The trustees and executors, defendants in an administration suit, admitted by their answer the possession of title-deeds of mortgage securitics, in which they had properly invested their testator's assets; but alleged that the mortgagors objected to the production of the deeds and would prefer to pay off their debts, and they objected to the production of the deeds in the suit in the absence of the mortgagors. On a motion for production :- Held, that the deeds must be produced. Gough v. Offley, 5 De G. & Sm. 653; 17 Jur. 61.

P., a defendant, who had been a partner with his father as solicitors for two years before the father's death, and was also his executor, was in possession of documents relating to the estate of the testator in the cause, of whom the father had been solicitor and agent in the management of the property, and of whose will the father was trustee and executor. New trustees had been appointed, and, there being an index of title-deeds in duplicate, one copy (with some other of the deeds and documents) was handed to the trustees, and the other (at the foot of which was written a receipt by the trustees for the deeds therein mentioned) was left with the defendant :- Held, that P. was bound, on the application by summons of the trustees, to make a full discovery of all the documents of every kind relating to the estate; and that the copy of the index in his possession must also be handed to the trustees, they giving him another receipt. Bowen v. Pearson, 9 Jur. (N.S.) 782; 8 L. T. 495; 11 W. R. 811.

In the course of an administration suit, certain estates in Venezuela were sold to one who was not a party to the suit. The contract of sale, which was approved by the court (the purchaser having appeared and submitted to any order that might be made), provided that, in case of any damage sustained by the purchaser by reason of adverse claims, the amount of such damage should, in case of disagreement, be settled as the judge should determine. Adverse claims were made, and proceedings taken in chambers to ascertain the amount of damage: -Held, that the purchaser was entitled, on summons in chambers, to require production by the vendors of all documents relating to the matters in dispute between him and them.

Dent v. Dent, 35 Beav. 126; 35 L. J., Ch. 112. A person having come in to prove as a creditor under a common decree for the administration of assets, and having produced prima facie evidence in support of his claim, an order was made upon his application directing the executors to file an affidavit as to their possession of

Executor claiming a debt from his testator, ordered to produce his private books, containing administrator of a deceased defendant, though the suit has been revived, and though an order son, 3 Y. & Coll, 692; 9 L. J., Ex. Eq. 10;

# g. Private and Confidential Letters.

Letters written to the defendant by a stranger to the suit, and marked "private and confidential," were in the possession of the defendant, who did not deny that they were material to the matters in issue in the suit, but objected to produce them, because the writer of the letters would not consent to their production :- Held, that the letters must be produced to the plaintiff, but that he must undertake not to use the information contained in them for any collateral purpose. Hopkinson v. Burghley (Lord), 36 L. J., Ch. 504; L. R. 2 Ch. 447; 15 W. R. 543.

Production ordered of documents admitted by the defendant to be in his possession but which were stated to have been delivered to him by a third party under an undertaking not to part with them to any one else. Penkethman v. White, 2 W. R. 380.

Where a party to an action sends letters marked "private and confidential" to the other party containing threats of committing a contempt of court, he cannot by so marking them impose on the other party, who had refused to hold any personal communication with him, any condition as to the way in which the letters might be used. Kitcat v. Sharp, 48 L. T. 64.

A letter written in answer to inquiries about the character of a servant is privileged in this sense only, that although it contains defamatory statements it will not support an action for libel unless malice is shown; but it is not privileged in the sense of being privileged from production. Wabb v. East, 49 L. J., Ex. 250; 5 Ex. D. 108; 41 L. T. 715; 28 W. R. 336; 44 J. P. 200—

# h. Documents in Pawn or Subject to Lien.

In Pawn.]-A defendant will not be ordered to produce letters, which, together with other goods in a portmanteau, have been pawned by him before the commencement of the suit. Liddell v. Norton, 1 Kay (App.) xi.; 2 Eq. Rep. 668; 23 L. J., Ch. 169.

Pawnee of a bailee must discover, so as to enable the owner to bring an action. Strode v. Blackburne, 3 Ves. 226.

Lien.]-A defendant was committed for the non-production of documents admitted by him to be in his possession or power. It afterwards appearing that prior to the suit they had been deposited with a third party, who claimed a lien thereon which the defendant was unable to satisfy, he was discharged from custody without producing them. North v. Huber, 29 Beav.

A solicitor had been ordered to deliver to his client all deeds, papers and documents belonging to her; he delivered some only, alleging that the rest were detained by counsel for unpaid fees, tors to file an affidavit as to their possession of and by other parties for money due, which the documents relating to the claim or to any item client had not advanced funds to meet. The documents reasons or the cannot rotatly used the first new more authorized links to more with the first the Tragal, Lare, WFreadt, v. Crault, solicitor was, for such non-complicace with the 1 De G. J. & Sm. 399; l N. R. 531; 32 L. J., order, committed to prison:—Held, that he must

be liberated. Williams, In re, 30 L. J., Ch. 610; 7 Jur. (N.S.) 323; 4 L. T. 103; 9 W. R. 393.

- Of Solicitor. ]-See supra, col. 725.

#### i. Documents Abroad.

Upon what terms a party is to be excused the production of books of account and papers which are out of the kingdom, and necessary to his business. Galbett v. Curendish, 3 Swanst. 2027.

Where a defendant admits books in the West Indies to be in his possession, enstady or power, the court will order him to bring them here within a reasonable time; and if they are not byought, will consider it the same as if he had them here in the first instance, and refused to produce them. \*\*Economics of Delphar, Turn. & B.

A defendant by his answer stated that he had handed over some documents relating to the matters in question to his agent in Jamaica, to enable hin to defend a suit there; that the agent had left the island; and that the documents had been taken possession of by a receiver appointed by the Court of Chancery there:—Held, that this admission entitled the plantifit on an order for production; but liberty was given to the defendant to relieve himself, if possible, by affiliarit from the effects of this admission. Morrice v. Seaby, 2 Bear, 500.

In a bill for an account the plaintiff charged fraud and wilful neglect against the defendants, who interrogated him as to invoices and other documents in his (the plaintiff's) possession. The plaintiff's naswer alleged that they were in New Orleans, and that he was unable to communicate with his clerks there, or to proceed rithere to fetch them. The defendant excepted to this answer:—Held, that such documents, which tended to establish or disprove the fraud charged, must be produced before the hearing, and were not fitting subjects of an inquiry in chambers; and that the plaintiff was bound to show that he has attempted to obtain the documents and failed in that attempt, a mere allegation that they are in a country where war is miging not being sufficient. The exceptions were therefore allowed. Mereas v. Haigh, 2 N. R. 284; 8 L. T. 561. S. C, 3 De G. J. & S. 528; 1 Johns, 785; 11 W. R. 792.

#### k. Documents in Custody of Court.

Documents of Lunatic.]—In an action of the committee of a lunatic whose title-deads are in the committee of a lunatic whose title-deads are in the enstody of the court having jurisdiction in lunacy, an order on the defendant to produce the documents for hispection ought not to be made, as they are not in his possession or control. Virelan v. Little, 52 L. J., B. 771; 11 Q. B. D. 370; 48 L. T. 793; 31 W. R. 891; 47 J. P. 566.

— Application by a Person claiming under a Deceased Lunatie.]—According to the practice in lunacy the court will order production of all documents in the castody of the master or registrar relating to the estate of a deceased lunation the application of a person claiming under him. But he must make out a primh facie title to the estate. Shufth. In r.e, 15 Ch. D. 286; 43 L. T. 234; 28 W. R. 925—C. A.

#### 2. PRIVILEGE.

See infra, D. OBJECTIONS TO DISCLOSURE.

#### 3. PRACTICE.

Discretion of Judge.]—Under Ord. XXXI. a judge has no discretion as to refusing to allow, at the instance of one party to an action, the production of documents in the possession of another party relating to the matter in question, provided the documents are not privileged. Bustraw. v. Withe, 45 L. J., Q. B. 642; 1 Q. B. D. 423; 34 L. T. 865; 24 W. R. 721—C. A.

No Jurisdiction in Official Referee to order.]
—The official referees have no jurisdiction to make an order for the production of documents, the proper course being to take out a summor for the purpose in the chambers of the judge to whom the action is attached. Danvillier v. Myers, 17 Ch. D. 346; 29 W. R. 535.

order on Solicitor of Party.]—It is not consistent with the practice of the court to make an order for production of documents on the solicitor of a party against whom discovery is sought. Cashin v. Craddock, 2 Ch. D. 140; 34 L. T. 52.

A plaintiff issued a writ of summons against several defendants, the indorsement of claim comprising a great variety of seemingly unconnected matters; and then, before delivering a statement of claim, took out a summons for the production, by the solicitor of the defendants and others named in a schedule to an affidavit of even date, of certain documents specified in the schedule; starting by the affidavit that the specified documents were in the possession of the persons named, and that the whole of the documents related to the action and were essential to establish the plaintiff's case:—Held, that the plaintiff was not entitled to the production asked. Ib.

Extension of Time, 1—A defendant having been ordered to produce documents within six weeks from 25th July, 1873, obtained, from time to time, orders extending the time up to the 13th March, 1874. The last application was opposed by the plaintiff, and he appealed from it:—Held, that the appeal was not one which ought to be entertained. Peru (Republic) v. Ruzo, 30 L. T. 190; 22 W. R. 588.

Examination of Document by Court.]—The court will examine decuments claimed to be privileged, to see whether they establish a case of privilege. Votter v. Schreiher, 53 J. P. 39.
Observations on Ord. XXXI. r. 19A, sub-r. 2,

Observations on Ord. XXXI. r. 19A, sub-r. 2, empowering a judge to inspect documents "for the purpose of deciding as to the validity of the claim of privilege." Williams v. Opebrada Hy, Land and Copper Co., 65 L. J., Ch. 68; [1895] 2 Ch. 751; 78 L. T. 397; 44 W. R. 76.

Costs.]—When an order is made in an action in the Chancery Division for the production of documents at the office of the production grary's solicitor, that party if ultimately successful in the action, is not entitled, as between party and party, to his solicitor's costs of the production. Brown v. Sewell, 16 Ch. D. 517; 44 L. T. 41; 28 W. R. 295—C. A.

Where a bill has been dismissed with costs, the

plaintiff is entitled to the costs of a motion for believing these documents to be forged, applied the production of documents, which had been rendered necessary by the default of the defendant. Lovell v. Yates, 11 L. J., Ch. 158; 6 Jur.

Non-Compliance with Order, Effect of.]-See post, cols. 748 et seq., and col. 778.

# C. INSPECTION.

## 1. BY WHOM.

Relative.]-An order gave liberty to the "plaintiff, his solicitors or agents," to inspect documents in the defendant's possession :-Held, that this did not authorise the inspection by a non-professional relative of the plaintiff, though alleged to be the only person conversant with the accounts. The court also refused to make a special order, permitting the inspection by such party. Sumerfield v. Pritchard, 17 Beav. 9; 10 Hare (App.) Ivilii; 22 L. J., Ch. 528; 17 Jur. 361; 1 W. R. 270.

Another Defendant.]-A plaintiff having an order for himself, his solicitors, and agents to inspect a defendant's documents, will not be permitted to take with him another defendant to assist him in inspecting the documents. Bartley v. Bartley, 1 Drew. 233; 9 Harc (App.) xlix. n.; 10 Hare (App.) lxxvi.; 22 L. J., Ch. 47; 16 Jur. 1062; 1 W. R. 48.

Solicitor.]-An undertaking to produce documents to the plaintiff means to him, his solicitors and agents. Williams v. Prince of Wates Life Insurance Co., 23 Beav. 338; 3 Jur. (N.S.) 55.

Where an undertaking to produce is given in a cause, the meaning of the undertaking is, to produce to the solicitor or agent of the party seeking production, as well as to the party himself, unless specially provided against. Ib.
And see Groves v. Groves, infra.

Solicitor's Clerk.]-An order having been made that B., his solicitors or agents, be at liberty to inspect documents, with the assistance of L. as his accountant. L. and a clerk of B.'s solicitors' firm went to the place of inspection, and L. was refused to be allowed to inspect, except in the presence of B., or one of the principals of his firm of solicitors :-Held, that L., if accompanied by a duly-authorised clerk of B.'s solicitors' firm, was at liberty to inspect. Lindsay v. Gladstone, L. R. 9 Eq. 132.

Scientific Expert. - A suit was instituted to restrain proceedings at law to recover for work and labour in constructing a sewer, on the ground of fraud on the part of the defendant in equity, in improperly obtaining possession of an estimate in writing, and by chemical process removing the figures indicating the price. The document in question having been deposited with the clerk of records in pursuance of an order for production, the plaintiff moved for liberty to subject it to chemical tests for the purpose of the trial at law, upon an undertaking by the defendant to produce it to be stamped at the trial at law. The court refused to make any order. Twenty-man v. Barnes, 2 De G. & Sm. 225; 12 Jur. 743.

Under a decree in an administration suit, a creditor supported his claim in chambers by the

to have them deposited with the chief clerk, and for liberty to have them produced to be examined by scientific persons, to test their genuineness, and the application was granted, the creditor's solicitor being allowed to be present at such examination. Groves v. Groves, 1 Kay (App.) xix.; 23 L. J., Ch. 199; 2 W. R. 86.

Where defendants did not by their answer deny the gennineness of a deed, but merely stated that they did not know whether they had executed it, and after an ordinary inspection applied for an order allowing inspection of it by expert witnesses, which application was not supported by any affidavit as to the deed being forged, but only by an affidavit of the defendant's solicitor, to the effect that he was advised and believed that it was necessary to his clients' case that the deed should be so inspected by witnesses :- Held, that an order for inspection by witnesses ought not to be made. Boyd v. Petrie, L. R. 3 Ch. 818.

Accountant.]—Under the common order for production and inspection of documents, the term "agent" does not include a professional accountant, appointed pro re nata. Bonnardet v. Taylor, 1 John. & H. 383; 30 L. J., Ch. 523; 7 Jur. (N.S.) 328; 3 L. T. 384; 9 W. R. 452.

But a proper case having been made, a special order was made for inspection by a professional

The common order to inspect documents had been obtained by a plaintiff, in pursuance of which order his solicitor inspected the docu-ments, but took with him to the inspection a Mr. A., a professional accountant, who was also an anditor of a railway company, a rival com-pany to the defendants'. On this circumstance being ascertained by the defendants, they refused to allow the inspection to proceed. The plaintiff afterwards moved for an order to amend the common order to inspect, by inserting in it the common order to inspect, by inserting in it the words "accountant" or "Mr. A." Stuart, V.-C., refused to make any order on that motion, but expressed his opinion that A. was not an objectionable assessment was weeken and was also are controlled. tionable person, and was also an agent within the terms of the common order to inspect. The plaintiff and A. subsequently attended to con-tinue the inspection, when the defendants again objected to its being taken by A. The plaintiff then moved for an order to commit the defendants' scoretary for contempt of the common order to inspect documents, when an order was made for his committal, and for payment by him of 100. costs. On an appeal from that order:
Held, that it must be discharged. Turner, L.J.,
thought that the word "solicitor" in the order thought that the word "solicitor in the cause"; and the word "agent," some person connected with the suit, and not a special agent appointed with the suit, and not a special agent appointed for the particular purpose. Draper v. Manchester, Skeffield, and Lincolnshire Ry, 30 L. J., Ch. 286; 7 Jur. (N.S. 86; 3 L. T. 68; 30 W. R. 215. Varying 3 De G. F. & J. 28; 9 W. R. 215. Varying 3 De G. F. & J. 28; 90 W. R. 117—L.JJ.

Where it is not made to appear that a party is not competent to make the inspection by himself or his agents in the usual way, an accountant will not be appointed as a special agent for that purpose. Coleman v. West Hartlepool Harbour Co., 5 L. T. 467.

L., a partner in an Indian firm now dissolved, production of certain documents. The plaintiff, had, in a suit against his former partners, obtained an order for production of the books, with leave person from whom he received his instructions in to inspect. He became bankrupt, and B., his the suit, though Y, was the person named in the assignee, revived the suit. Upon application by B, to have the benefit of the order, it appearing that the books were very voluminous, and that the accounts were kept in Indian currency : -Held, that he was entitled to the benefit of the order to inspect, and to take in an accountant; and it appearing that L. was conversant with accounts, and had himself kept some of the books, that B. was entitled to take in L. as such accountant. Lindsay v. Gladstone, L. R. 9 Eq. 132.

A shareholder in a joint-stock company brought an action to have his name removed from the register on the ground of fraudulent misrepresentation in the prospectus issued by the company, and applied for leave to inspect, by an accountant, books of account disclosed in the affidavit of documents made by the secretary of the company :-- Held, that under the special circumstances of the case, and to save expense, such an order might be made. Bonnardet v. Taylor, supra, followed. Gibney v. Clayton, 27 L. R., Ir. 75.

In the case of a company winding up, where the debts are large and the transactions of the company have been complicated, the court will allow an inspection of the accounts by a proper person on behalf of the shareholders, without any special fact being stated as a reason for the order. Joint Stock Discount Co., In re, Buchanan, Exparte, 15 L. T. 261; 15 W. R. 99.

Surveyor. - Where some of the schednled documents to the affidavit of documents consisted of plans which the defendant stated it to be useless for him to inspect alone, the common order was extended so as to allow the plans to be in-Swansea Vale Ry. v. Budd, 35 L. J., Ch. 631; L. R. 2 Eq. 274; 12 Jur. (N.S.) 561; 14 W. R.

Witness.]—An application before decree to have documents produced for inspection to intended witnesses is a special application, and only to be made on special grounds. Where defendants did not by their answer deny the genuineness of a deed, but merely stated that they did not know whether they had executed it, and after an ordinary inspection applied for an order allowing inspection of it by witnesses, which application was not supported by any affidavit as to the deed being forged, but only by an affidavit of the defendants' solicitor to the effect that he was advised and believed that it was necessary to his clients' case that the deed should be so inspected by witnesses :-Held, that an order for inspection by witnesses ought not to be made. Boyd v. Petriv, L. R. 3 Ch. 818.

Land Agent. - Under the common order for the inspection of documents made in a suit for restraining a nuisance, the plaintiff has a right to have the documents inspected by his land agent although he is a witness in the suit. Att.-Gen. v. Whitwood Local Board, 40 L. J., Ch. 592; 19 W. R. 1107.

Agent of Foreign Government.]-Under an order for production of documents to the plaintiffs, their solicitors or agents, the plaintiffs, a foreign republic, required the defendants to produce the documents to S., who was stated in an affidavit made by the plaintiffs' solicitor to be the duly-appointed agent of the plaintiffs, and the documents were made exhibits for the purpose of

bill as the agent in this country of the republic. The defendants having refused to produce the documents to S. :-Held, that S. was the dulyauthorised agent of the plaintiffs within the meaning of the order. Costa Rica Republic v. Erlanger, 44 L. J., Ch. 402; 23 W. R. 462, Affirming, L. R. 19 Eq. 33; 31 L. T. 635.

Several Inspectors-Documents Numerous and Voluminous. - Where the documents in defendant's possession relating to the matters in question in the suit were very numerous and voluminous the court ordered inspection to be permitted to any twelve persons the plaintiffs might name, the names and addresses of the proposed inspectors being furnished to the defendants. Peru Republic v. Weguelin, 41 L. J., Ch. 165.

Inspector appointed by Principal resident Abroad.]—Dadswell v. Jacobs, 56 L. J., Ch. 233; 34 Ch. D. 278; 55 L. T. 857; 35 W. R. 261—C. A.

#### 2. WHAT DOCUMENTS.

Document referred to in Pleadings. ]-In am action for an injunction to restrain a defendant, his servants, agents, and workmen, from selling any whisky other than that made by the plaintiff as "Glenlivet" whisky, and from using the term or trade-mark, "Glenlivet," or any other name colourably like the word "Glenlivet," the court was moved by the plaintiff to discharge an order made in chambers on the application of the defendant under Rules of Court, 1875, Ord. XXXI. rr. 16, 17, for the production of all invoices, letters, bill-heads and brands referred to in the plaintiff's statement of claim, which had the word "Glenlivet" written on them, and the easks on which the word was branded :-Held, that the motion must be refused; that "any document" in the order mentioned must mean any document to which reference is made; and that, although the order must be varied by striking out "casks with brands on them" for convenience' sake, the alteration was so slight that the defendant would have the costs of this. motion in any event, Smith v. Harris, 48 L. T. 869. See also Quilter v. Heatley, 23 Ch. D. 42; 48 L. T. 373; 31 W. R. 331.

Documents referred to in Affidavit-Affidavit: not Filed. ]-A motion to set aside an award on the ground of misconduct on the part of an arbitrator is "a cause or matter" within the meaning of Ord. XXXI. r. 15, and the court has jurisdiction under r. 18 to order inspection of documents referred to in an affidavit made by the arbitrator for the purpose of being used at the hearing, by the party resisting the motion, although the affidavit has not been filed. Former and Lord, In re, 66 L. J., Q. B. 498; [1897] 1 Q. B. 667; 76 L. T. 376; 45 W. R. 486—O. A.

Exhibits to Affidavits. ]—The plaintiff having marked judgment by default in an action brought to recover damages for trespass to and flooding the plaintiff's lauds, the defendants applied to set aside the judgment. In support of this application an affidavit was filed on behalf of the defendants by their solicitor, setting out their defence to the action, and in that affidavit

substantiating the defence alleged. The inter-other party may have previously made an affilocutory judgment was set aside on the 11th July, 1890, after which no further steps were taken in the action, owing to proposals for a compromise being made. On the 21st January, 1891, the plaintiff applied to the defendants for inspection of the documents made exhibits in the affidavit :- Held, that the plaintiff was entitled to inspection. Tebbutt v. Amber (7 Dowl, 674), followed. Hunter v. Dublin, Wicklow, and Wexford Ry., 28 L. R., Ir. 489-C. A.

An exhibit is part of an affidavit, and any person entitled to see the affidavit is entitled to see the exhibit. Hincheliffe, In re. [1895] 1 Ch.

Disclosed in Answer to Interrogatories. ]-A plaintiff sued upon an agreement, and in answering interrogatories stated that the agreement was contained in three specific documents:-Held, that the defendant was entitled to an order for inspection under Ord. XXXI. rr. 15-18, on the ground that these were "documents referred to in an affidavit in the cause," and that of firther application for discovery with a further deposit of 5l. was not necessary. Moore v. Peachey, [1891] 2 Q. B. 707; 65 L. T. 750; 39 W. R. 592.

Documents of Lunatic in Custody of Court. ]-See Virian v. Little, and South, In re, supra, .col. 729.

Documents deposited by Lunatic. |-Before a committee had been appointed of a lunatic's estate the court made an order for the official solicitor to inspect the securities and other documents which the lunatic had deposited with a company for safe custody. Compbell, In re, 13 °Ch. D. 823; 42 L. T. 108; 28 W. R. 480—C. A.

Affidavits Filed in Lunacy Proceedings. See Strachan, In rc, 64 L. J., Ch. 321; [1895] 1 «Gh. 489; 72 L. T. 175; 43 W. R. 369; 60 J. P. .86-C. A.

Examination of Witness under s. 115 of the Qompanies Act, 1862. - The liquidator of a company commenced an action in the name of the company to set aside a contract; he afterwards obtained an order under s. 115 of the Companies Act, 1862, for the examination of certain persons. A commission was then issued in the action, the witnesses examined on behalf of the defendants were cross-examined upon the depositions taken under s. 115, certain portions of which were read to them :-Held, that the defendants were not entitled to inspection of the depositions. North Australian Territory Co. v. Goldsborough, 62 L. J., Ch. 603; [1893] 2 Ch. 381; 2 R. 397; 69 L. T. 4; 41 W. R. 501—C. A.

Inspection of Models. ]-See PRACTICE (IN-SPECTION OF PROPERTY).

Jurisdiction to Order Inspection-Document not disclosed in Affidavit of Documents. ]-Where a party applying for inspection of a specific document under Ord. XXXI. r. 18, makes an affidavit specifying such document. and stating that he believes the document to contain entries which he would be entitled to inspect, and that it is in the possession or power

davit of documents under rule 13 omitting to disclose such document, and concluding with the general averment that, save as therein disclosed, he has not in his possession or power "any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document or any other document whatsoever relating to the matters in question in the action." Wiedeman Walpole, 24 Q. B. D. 537. See S. C., 24 Q. B. D. 626-C. A.

Manuscript of Libel in Newspaper-Admission of Publication and Liability. ]-Where, in an action against the proprietors for a libel published in a newspaper, the publication and the responsibility for the libel are admitted. the court as a general rule will not order the original manuscript of the libel to be produced for inspection. *Hope* v. *Brash*, 66 L. J., Q. B. 653; [1897] 2 Q. B. 188; 76 L. T. 823; 45 W. R. 659-C. A.

Public Documents, 1-See post, cols, 793 et seg.

### 3. PLACE FOR GENERALLY.

Place of Business.]—When a defendant, by his answer, admits the possession of books and papers relating to the matters in question, but states that they are in constant use in his business, and necessary for that purpose, the court only orders, in the first instance, that they shall be produced to the plaintiff at the place of business at which they are stated to be in use; leaving it open to the plaintiff, if he does not obtain a satisfactory inspection of them there, to apply to the court for a further order. Grane v. Cooper, 4 Myl. & C. 263.

It is a matter of course to allow a defendant's books in use for daily business to be produced at the place where the trade is carried on, instead of being deposited at the record and writ clerk's office; this indulgence may be refused where there is ground for a suspicion that the books will be tampered with; but the fact of alterations alleged to be fraudulent having been made:— Held, not to be a sufficient ground for such refusal where the alterations were discovered by the plaintiff a year and a half before any attempt to have the books removed from the defendant's custody. Mertens v. Huigh, 1 Johns, 735; 3 De G. J. & S. 528; 11 W. R. 792.

Form of special order for production of books at the place of business. Ib.

Motion for a defendant to produce documents belonging to him jointly with another person, not a party to the cause, and whom he stated, in his answer, to be averse to the production, refused. But leave was given to inspect the documents on the premises. Skey v. Bennett, 6 Jur. 981.

Solicitor's Office. ]-A married woman and her husband put in a joint answer, whereby she claimed to be entitled, to her separate use, to the premises sought to be recovered by the bill, and admitted possession of certain deeds relating to the title of the premises. On motion by the plaintiff for an order for the husband and wife, or one of them, to produce the deeds, the court of the other party, the court may order inspec-tion of such document, notwithstanding that the for inspection, and at the hearing, and the husband to permit her to do so. Cincdery v. at Constantinople to any person plaintiff would Way, 7 Jur. 987.

the suit, which were in the defendant's custody, and sworn before the consul or ambassador to be deposited with the clerk in court, directed abroad; plaintiff to be at liberty to take copies at an inspection at the office of the defendant's his own expense. Hornby v. Pemberton, Mos. 57. solicitor, Roberts v. Lloud, 7 L. J., Ch. 115.

Where documents have been once ordered to be produced at the office of a solicitor, the same course will, in making a subsequent order for production, in the absence of special circumstances, be followed. Graces v. Graces, 1 Kay (App.) xix.; 23 L. J., Ch. 199; 2 W. R. 86.

Deeds and documents admitted by the answer, being very numerous, the usual order for their production may be qualified by a direction that they may be inspected, &c., at the office of the defendant's attorney. Crease v. Peuprase, 2 Y. & Coll. 527; 7 L. J., Ex. Eq. 8; 1 Jur. 840.

Purchasers of an estate, sold in several lots under decree, requiring to compare with the original deeds lodged in the Master's office, for the purposes of the sale, the copies furnished to them with the abstract of title, the court ordered that the deeds should be handed over to the plaintiff's solicitor, he undertaking to relodge them after the comparison should be made; and that the plaintiff's solicitor should produce them in his office to the solicitors for the several purchasers, and permit them to compare the said deeds with the copies furnished, or to be furnished, to them. Reynolds v. Reynolds, 6 Ir. Eq. R. 75.

Room specially Hired — Where Documents Numerous and Voluminous.]—When the documents in the defendants' possession relating to the matters in question in a suit were so numerous that they could not all be contained in the room in which the defendants offered inspection of them, the court gave leave to the plaintiffs to hire a room, and provide proper safeguards, and ordered the defendants to produce the books to them there. Under the same circumstances the court ordered inspection to be permitted to any twelve persons the plaintiffs might name, the names and addresses of the proposed inspectors being furnished to the defendants. Peru Republic v. Weguelin, 41 L. J., Ch. 165,

Before Steward of Manor-Court Rolls. ]-The usual order was made for the deposit by the defendant of all documents in his possession. Some of them consisted of the court rolls of a manor, of which the defendant acted as steward, but his right to that office was contested. The court released the defendant from the necessity of depositing them in court, and ordered the production at the steward's. Carew v. Daris, 21 Beav. 213.

In London-Grounds for Refusal.]-It is not sufficient, in order to avoid production in London, to state that books are in constant use, without stating that they cannot be removed without inconvenience. Hooper v. Gumm, 2 John. & H. 602; 10 W. R. 644. Talbot v. Marshfield, 13 L. T. 424.

Abroad. ]-Parties' documents allowed to be inspected at Beyrout and Alexandria. Bustros v. Bustros, 30 W. R. 374—C. A. Order for production of documents in Japan. Whyte v. Abreus, 32 W. R. 649.

Plaintiff filed a bill for discovery and account against defendant, who lived at Constantinople. Defeudant set forth the particulars of all the books, accounts, &c., and offered to produce them

appoint. On exceptions to the answer, this was The plaintiff being a pauper, the court, instead held sufficient, defendant to produce the book, of ordering the papers relating to the matters of &c., upon an affidavit to be settled by the Master,

> - Duplicates in England. ]-Motion that plaintiff might be at liberty to inspect the books of the East India Company at Bombay, in relation to a transaction respecting certain bills, and that the factor might produce them on oath; (the company had put in answer, alleging that the related to the transaction, as they were informed by their factor; but this was not satisfaction enough to plaintiff, as companies do not answer upon outh, nor did the factor swear that these were all the entries). Motion refused, first, because duplicates of the books had been transmitted to England, and the motion should have been to inspect the entries here; secondly, because the books contained other matters besides those relating to private trade, and plaintiff had not named particularly in his notice what particular entries or papers were to be examined; and thirdly, because plaintiff might have made some of the members of the company defendants, and got their answer on oath. Steward v. East India Co., 9 Mod. 387.

> Discretion of Judge.]—When a judge of first instance in ordering production of documents directs them to be produced at a particular place, he is exercising a discretion with which the Court of Appeal will not interfere. Bustros v. Bustros,

Changing Place of Inspection. |-- In an action against a municipal corporation, the plaintiffs obtained from Hall, V.-C., the usual order for inspection of documents at the office of the defendants' London solicitors. Pearson, J., to whose court the action was subsequently attached, made an order which, as drawn up, directed that the order of Hall, V.-C., should be "varied, and as varied," should be "as follows," and then went on to direct inspection at the muniment office of the Corporation of Colchester, giving liberty to the plaintiffs to apply at the trial, whether successful or unsuccessful, for any additional costs. incurred by the inspection not being in London : —Held, on appeal (1), that the order of Pearson, J., was wrong in form in purporting to vary the order of Hall, V.-C., and should, instead, have given the new directions "notwithstanding" the order of Hall, V.-C.; (2) that Pearson, J., had jurisdiction, in his discretion, to change the placeof inspection; (3) that the order should give the hispecton; (a) that the order smooth any particular documents in London; (4) that the defendants must undertake to pay such additional costs as the judge at the hearing might hold to have been reasonably incurred by reason of the inspection being at Colchester instead of in London. Prestucy v. Colchester Corporation, 52 L. J., Ch. 877; 24 Ch. D. 376; 48 L. T. 749; 31 W. R. 757—C. A.

### 4. DEPOSIT IN COURT FOR.

Documents, such as court rolls or merchant's account books, are ordered to be produced for inspection only, and not to be deposited in court. Carew v. Davis, 21 Beav. 213.

The minute book of a local board will, in a proper case, be ordered to be deposited in the record and writ clerk's office for inspection, notwithstanding that it is in constant use by the board. Att.-Gen. v. Whitwood Local Board, 40

L. J., Ch. 592: 19 W. R. 1107.

The defendant, by his answer, denied the plaintiff's title to certain money deposited with a bank, but admitted the possession of a document which gave him, the defendant, control over that money :- Held, on a motion for the production of the document, that the plaintiffs were only entitled to inspect it and take copies, and not to deprive the defendant of his control over the money by having the document deposited in the usual way. Berwick Corporation v. Murray, 1 Mac. & G. 530; 1 Hall & Tw. 452; 13 Jun. 1063.

Under an order for production and inspection, it is not sufficient to leave the box containing the deeds in the hands of the clerk in court locked, but the key must also be left, though party undertakes to attend with key when called

Preston v. Carr, M'Clel. & Y. 457. The common direction that a party shall produce before the Master all books and papers relating to the matters in question, as the Master shall direct, entitles the Master to require, by his warrant, that all such books and papers generally shall be left in his office; and a refusal to leave them, in pursuance of such a warrant, is a disobedience to the order of the court which

has directed their production. Shirley v. Ferrers, 1 Myl. & Cr. 304; 5 L. J., Ch. 293.

Court will not order plaintiffs (where cause has been referred to commissioners) to produce and leave documents, &c., in their possession in the hands of their clerk in court for inspection of defendants. Shrewsbury School Governors v.

Muddock, 7 Price, 655. The object of a bill being to set aside deeds, the court will not, on motion, go beyond the usual liberty to inspect, &c., and for production at the hearing, by an order to deposit them with the Master for safe custody, without a special case establishing danger, that they may not be produced; therefore, where most of the circumstances relied upon, viz., variations in two deeds, appeared upon the answer, the order was limited to production at the hearing. Beckford v. Wildman, 16 Ves. 438.

The court leaves it to the discretion of the Master to determine, under the usual order for production of books, whether they are to be merely produced from time to time or to be deposited with the Master. Henna v. Dunn, 6 Madd. 340.

A party ordered to produce books, &c., before the Master, is bound to leave them if the Master thinks fit so to direct. Sidden v. Liddiard. 1

Sim. 388.

Where books, papers and writings mentioned in a schedule to the defendant's answer, are deposited by the defendant with his clerk in court for the inspection and examination of the plaintiff, under the usual order for that purpose, the defendant is entitled to have them restored to him so soon as such inspection and examination have taken place; and the plaintiff is not entitled to have them retained in the custody of the clerk in court, notwithstanding it may be necessary that they should be produced before the Master in taking the accounts directed by the decree, or on the hearing of an appeal from the decree. Small v. Attwood, 1 Y. & Coll. 37. See Clark, En parte, Jacob 589; 23 R. R. 150.

Defendant, admitting by his answer that he had in his possession a promissory note on which he had commenced an action against the plaintiff, but which the plaintiff by his bill alleged to have been long since paid, was ordered to deposit the same with his clerk in court for the inspection of the plaintiff, although an injunction to restrain the action had been dissolved. Pilking-ton v. Himsworth, 1 Y. & Coll. 617; 5 L. J., Ex. Eq. 95.

On a motion for the production of documents, the defendant was permitted to shew by affidavit that they could not be left in the office without great inconvenience : but as the ground for this indulgence was not stated by the answer, he was ordered to pay the costs. Gardner v. Dangerfield,

5 Beav. 389.

Documents were directed to be deposited with the clerk of records and writs, after an order allowing the plaintiff or his solicitors to inspect and take copies thereof, at the office of the defendant's solicitors; the solicitors not agreeing by whom the copies were to be made. Prentice v.

Phillips, 2 Hare, 152.

A defendant voluntarily permitted the plaintiff to inspect documents, &c., admitted by his answer to be in his possession. The plaintiff availed himself of that permission, and afterwards moved that they should be left with the clerk in court. The Master of the Rolls refused the application, with costs, on the defendant undertaking to allow further inspection. Chapman v. Serern, 5 L. J., Ch. 11.

Motion in a supplemental suit to deposit documents with the Master, in whose office other documents had been deposited in the original suit, instead of with the writ clerks, though unopposed, was refused. Alcock v. Sloper, 7 Beav.

A party in possession of documents cannot, except by consent, be compelled to produce them for inspection elsewhere than before an officer of the court. Maund v. Allies, 4 Myl, & Cr. 503; 3 Jur. 309.

Appeal. ]-A defendant, having been ordered to deposit documents in court, and having appealed from that order, an order was made, that, pending the appeal, the plaintiff should not be at liberty to inspect the documents. Kelly v. Hutton, 15 W. R. 916.

### 5. DELIVERY OUT OF COURT AFTER.

Person not party in cause may petition to have deeds belonging to him, and which had been brought into Master's office under decree, delivered out to him. Marriott v. White, 1 Sim.

& S. 17.

Where deeds had been brought into Master's office, under an order of reference in a suit for pecific performance of two contracts relating to different parts of lands of the parties, one for exchange, the other for purchase, referring it to Master to settle a conveyance from the defendant to a purchaser (a third person) of the exchanged lands, upon whose report so much of the bill as related to that contract was ordered to be dismissed with costs :- Held that plaintiff could not take his deeds out of court, the defendant shewing that they were still of service there, and necessary to him in defending the same suit as to the other contract. Bowyer v. Green, 13 Price, 250.

to deliver them up to any other person for the 3 Eq. Rep. 129.

purpose of their being produced in court, or at Where a suit instituted on behalf of an infant the assizes, without consent of all parties, and payment of clerk in court's fees. Harris v. Bodenham, 1 Sim. & S. 283,

A party, on his examination before the commissioners of bankruptey, was compelled by them to produce a book which was lawfully in his possession, and which on being produced, the assignees laid their hands on, and refused to return. The court without entering into the for the infant plaintiff in the suit, put in by the question as to who had the legal title to the book, next friend and his solicitor. Ib. sourcest it to be delivered up to the party who had the lawful possession of it when it was produced before the commissioners. *Gilbard*, *Ex-parte*, *Matachy*, *In re*, 3 Denc. 488; 8 L. J., Bk, 17. ordered it to be delivered up to the party who

When upon motion by defendant for re-tion of a document is privileged and the rest new, delivery of document, after inspection, it was delivered, by plaintiff, that he was advised to legel portion covered up. Forshure v. Lewis, 10 is a shaded two ceedings against defendant in Ex. 712; 1 Jnr. (N.S.) 236. respect of such documents, they were retained in court, to see whether he would do so. Walker v. Corke, 3 Y. & Coll. 277; 8 L. J., Ex.

Eq. 56.
Papers and documents produced by the defendant for the plaintiff's inspection, ordered, upon motion, before hearing, to be re-delivered to the defendant, the plaintiff having had full oppor-tunity to inspect them. Jowes v. Thomas, 2 Y. & Coll. 312; 6 L. J., Ex. Eq. 81. Where the title deeds of a lunatic's estate

have been deposited in the Master's office, the court will not direct them to be delivered out to the committee, unless circumstances are stated on affidavit, shewing that the due administration of the estates requires that they should be placed in the custody of the committee. Cooper, In re, 1 Myl. & Cr. 33.

Re-delivery of documents deposited in the Master's office ordered, on petition, in an abated suit. Alderman v. Bunnister, 9 Beav. 516. Deed brought into court by the executor,

under the common order for production of documents made in a creditor's suit, will, after the debts are paid, be ordered to be delivered out to the party by whom they were deposited, and the court refused to order such deeds to be delivered to the plaintiff in the cause, although he was the tenant for life of the estate comprised in the deeds. Plunkett v. Lewis, 6

In a suit on behalf of an infant plaintiff by his next friend, deeds relating to the plaintiff's title were, upon admissions in the defendant's answer, deposited, by order, in court, for the purpose of discovery, and before the hearing the plaintiff, having attained his majority, repudiated the suit; whereupon, upon application by the defendant to the Vice-Chancellor, the deeds were ordered to be delivered back to the defendant, notwithstanding the opposition of the next friend, who claimed to have them retained in court till the cost incurred on behalf of the plaintiff while an infant had been answered. Upon an appeal from this order being made, supported by affidavit, shewing that since the Vice-Chancellor's order the deeds had been delivered to the defendant, and by him handed over to the plaintiff, by whom they had been deposited with other persons by way of mortgage for value, the court documents produced, (2) something in the refused the appeal motion, with costs, to be paid by the next friend. Dunn v. Dunn, 24 L. J., of the party making discovery, or (4) necessarily. persons by way of mortgage for value, the court

Court never orders clerk in court with whom Ch. 581; 1 Jur. (N.S.) 122; 3 W. R. 199. exhibits have been deposited under usual order, Affirming 7 De G. M. & G. 635; 3 Drew. 17;

by his next friend, is repudiated before the hearing, by the infant, on his attaining his majority, the repudiation has relation to the commencement of the suit, and deeds deposited in court for inspection, by an order in the suit, will be ordered to be returned to the party by whom they were deposited, notwithstanding the existence of a claim of lien for costs incurred

### 6. SEALING UP PART,

Mode of. - A party who has obtained an order for the production and inspection of the business books of his opponent in litigation is not entitled to insist that the parts of the books containing entries not relevant to the matters in question shall be kept actually scaled up during the whole litigation, or that they shall be only unscaled and rescaled on oath from time to time as the books are required in the business, when, if that were done, the business of the opponent would be in-terfered with. It is sufficient in such a case if the irrelevant entries are covered up during the inspection, and the person who produces the books makes an affidavit that nothing material has been covered up during the inspection.

Grahum v. Sutton, Curden & Co., 66 L. J.,
Ch. 320; [1897] 1 Ch. 761; 76 L. T. 369— C. A.

Application. - Where a defendant has made an affidavit of documents in his possession, upon summons in chambers, he is entitled to make a substantive application for the protection of any part of them. Tulbot v. Murshfield, 11 Jur. (N.S.) 901; 13 L. T. 424; 13 W. R. 885.

Form of Affidavit. ]-In an affidavit of sealing up irrelevant matter, it is not necessary for the deponent to state positively that no sealed-up portion relates to the matters in question. Per Fry, L.J.: The affidavit onght to state what has been done, and upon whose investigation the deponent is relying, and, if he has not conducted the investigation himself, he ought to pledge his oath to the belief that nothing sealed up is relevant to the matter. Jones v. Andrews, 58 L. T. 601-C. A.

Conclusiveness of Affidavit. |- The mere fact that the sealing up, or affidavit of sealing up, has not been done without carelessness is not a sufficient ground for ordering a general unsealing. In such cases, as in ordinary cases of discovery of documents, the person seeking discovery is bound by the oath of the party making discovery, unless the court is satisfied, not on a conflict of evidence, but from (1) the

the denial upon oath of the relevancy of concealed passages will not be sufficient; and upon the court itself ascertaining that they might possibly refer to the questions at issue, an order was made upon the defendant for the production of the concealed passages, with costs. Lewis, 22 L. J., Ch. 946: 1 W. R. 118.

An affidavit in support of a claim to seal up certain passages in a book not being sufficiently explicit, the court inspected the disputed passages in order to determine their right to protection. Lafone v. Falkland Islands Co., 4 Kay & J. 34;

27 L. J., Ch. 25: 6 W. R. 4.

A defendant was ordered to produce the whole of an agreement, although in his affidavit as to documents he had set out two clauses of the agreement, and sworn that those two clauses alone assisted the plaintiff's case, or related to the matters in question in the cause. Luscombe v. Steer, 37 L. J., Ch. 119; 17 L. T. 370.

Irrelevant Matter.]-Upon a motion for the production of documents described in a schedule to the answer, and admitted to be in the defendant's possession, liberty will be given to the defeudant to file an affidavit as a ground for qualifying the order for production, by permitting him to conceal such parts of the documents as do not relate to the subject of the suit. Curd v. Curd, I Hare, 274. Affirmed 6 Jur. 307.

A bill of discovery insisted on the invalidity of a patent, on the ground that it had been assigned to more than five persons, and prayed a production of the documents, &c., "relating to the matters aforesaid":—Held, that the defendants were bound to produce those documents only which related to that point, and were entitled to seal up such parts as related to other matters. Semble, Few v. Guppy, 13 Beav. 457.

An agent, defendant to a bill for an account

by his principal, ordered, on motion, to leave with his clerk in court documents in his possession, containing entries relating to the cause, sealing up entries on other subjects, and making affidavit that he has scaled such entries only. Gerurd v. Penswich, 1 Swanst, 533; 1 Wils, 222.

- In Letters. ]-To a bill of discovery praying, amongst other things, a discovery of the correspondence between the parties, defendants in the schedules to their answer set forth a list of all letters, &c., in their possession, and also extracts from the correspondence, stating in the body of the answer that such extracts were the only parts which related to the matters in question, and that many of such letters related also to other matters; on a motion for the production of such letters, the court refused the application, the plaintiff might read the extracts from the schedules, without reference to the body of the answer. Campbell v. French, 2 Cox, 286; 3 Ves. 321; 4 R. R. 5.

In Trade Books. ]-The bill set up custom, that all corn grown and flour sold in a particular district, in which the defendant ocenpied a farm, should be ground at the plaintiffs' ancient mill, and alleged that the defendant had infringed that custom, by selling corn and flour grown upon his farm which had been ground at other mills. The defendant, a corn merchant parcels. Ib.

from the elementstances of the case, that the and flour dealer, by his answer, denied the affidiavit as to documents or scaling does not truly state what it ought to state. Ib.

Under an order for production of documents, ness; and by his affidavit stated, that the quantity of corn and flour grown and sold by him within the district did not exceed oneeightieth part of the corn and flour mentioned in such entries. An order was made, upon motion by the plaintiffs, for the production of the books, the defendant having liberty to file affidavits to enable him to seal up such entries as did not relate to corn and flour grown and sold within the district. Ord v. Fawcett, 19 L. J., Ch. 487: 14 Jur. 456.

— In Partnership Books.]—The defendant and W. P. were partners, W. P. died and appointed the defendant his executor. In an action by a person interested under W. P.'s will against the defendant a decree was made for administration of W. P.'s estate, and for taking accounts of the partnership as between the defendant as surviving partner and W. P.'s estate. An order having been made for the production of the partnership books by the defendant, he claimed to seal up such entries as related to his own private affairs :- Held, that inasmuch as the plaintiff and defendant were both interested in the partnership property, the defendant was not entitled to the ordinary power to seal up such entries as he might swear to be irrelevant to the matters at issue in the action, but only to seal up entries which related to certain specified private re, Pickering v. Pickering, 53 L. J., Ch. 550; 25 Ch. D. 247; 50 L. T. 131; 32 W. R. 511—

Where a defendant by affidavit admitted documents to relate to the matters in the snit, but denied that they tended to prove the plaintiff's case (an alleged partnership), or that the plain-tiff's name appeared in them: production-ordered, with liberty to seal up money items in the accounts. Mansell v. Frency, 2 John. & H. 320: 4 L. T. 437: 9 W. R. 610.

In Court Rolls. |- In a suit by the freehold tenants of a manor with respect to right of common and estover, they are entitled to see the court rolls. The lord of the manor may not seal up such parts as he swears do not relate to the matters in dispute. Warwiek v. Queen's College, 36 L. J., Ch. 505; L. R. 3 Eq. 683.

- In Maps, &c. ]-A party was ordered to produce so much of a map in his possession as produce so futer of a map in its possession as-related to certain property; and allowed to with-hold such parts of the same map as related to other property. Fazakerly v. Gillibrand, 8 L. J.; Ch. 248.

Where an issue is, whether a piece of land called O, is or is not identical with or part of land called F., the plaintiff averring the negative is entitled to production of whatever documents may aid him in establishing his negative averment, notwithstanding such documents may alsoevidence the defendant's title. Earp v. Lloyd, 3 Kay & J. 549.

Therefore, in a case of this description the defendant was ordered to produce all maps, plans and terriers, and all deeds and other documents relating to the matters at issue, but with liberty to seal up such parts of the deeds and other documents as did not describe or relate to-

- Memoranda, the production of which the plaintiff was entitled to, were entered in the same book with other matters, to a discovery of which the plaintiff was not entitled, and they could not be separated or sealed up :-Held, that the defendant must suffer the inconvenience of his own act, and produce the whole. Carere v. White, 5 Beav, 172

Where production was sought of so much as consisted of copies of, or extracts from, or reference to, documents or records in a public registry of a report made by a third person at the instance of the defendant's solicitor, for the purpose of his advising the defendant, and which report itself, it was admitted, was protected, the court refused to order production, on the ground that the extracts or copies were so mixed up with the protected parts of the report, that it would an processor parts of the report that it would be difficult, and almost impracticable, to exhibit the one portion without disclosing the other portion. Charton v. Freezen, 2 Dr. & Sm. 394; 12 L. T. 105; 13 W. R. 490.

Application for Unsealing.]—In an action by principal against his agents the plaintiff claimed an account of all sums received and paid by the defendants as his agents. The plaintiff subsequently obtained an order for an affidavit of documents. The defendants then obtained liberty to seal up such portions of the documents as were irrelevant, and they scaled up more than 10,000 passages contained in nearly 5,000 books and documents. The plaintiff then applied for an order on the defendants to unseal all books and documents, and all portions thereof, which had been scaled up under the order, or such portions thereof as the court should direct. The court held that the application that everything scaled up should be unscaled could not be acceded to, and that it was necessary for the plaintiff to establish by particular instances his right to compel the defendants to unseal. A list of particular documents was then prepared and brought before the judge, who directed certain scheduled items to be unscaled, but refused the rest of the application :- Held, on appeal, that the plaintiff was not entitled to a general unsealing of the documents. Jones v. Andrews, 58 L. T. 601-C. A.

Under the usual order for the production of books, &c., with liberty to seal up on affidavit such parts as did not relate to the matters in question, the defendants had produced a book with certain pages scaled up, and had made the required affidavit. The plaintiff afterwards, in an affidavit of facts, leading strongly to the inference that one of the pages scaled up did relate to the question in dispute, moved that the defendants might produce the book unscaled, but the motion was refused, although the defendants declined to answer the affidavit. Sheffield Canal Co. v. Sheffield and Rotherham Ry., 1 Ph. 484; 3 Rail. Ca. 133; 12 L. J., Ch. 376. See also Leigh, In re, 6 Ch. D. 256,

Jurisdiction of Court to Unseal-Irrelevancy of Entries.]—The word "privilege" in Ord. XXXI. r. 19A, sub-r. 2, is not used in a narrow sense, but extends to every case in which inspection is sought to be resisted on any ground whatsoever, and consequently the Court has jurisdiction to unseal documents in respect of which the irrelevancy, in order to determine whether the acquainted with matters which should be kept

When Relevant and Irrelevant Matters In- objection is well founded. Ehrmann v. Ehrmann, 65 L. J., Ch. 889; [1896] 2 Ch. 826; 75 L. T. 243.

Where the plaintiffs scaled up certain docu-ments and objected to the inspection by the defendant of such sealed parts, on the ground that they were irrelevant to the matters in question in the action, the Judge unsealed one of such parts, but, having examined it, refused to make an order for inspection, as he was not satisfied that the plaintiff's affidavit was untrue. Ih.

Removing Part of Document. ]-When a party is ordered to produce documents, and claims privilege as to some, forming parts of others, although he is entitled to seal up those portions (with the sanction of the Court), he must produce all in their integrity, and cannot remove or mutilate them; if he does he must pay the costs of a motion to produce. Agres v. Leny, 19 L. T. 8.

Between the date of an order for the production of a trust cash-book and its production, eighteen leaves had been abstracted; In answer to an amended bill, charging the mutilation, the defendant (a trustee) acknowledged that they were taken ont by his son, with his sanction, as containing entries relating to his private affairs only. An order was made to produce these eighteen leaves, notwithstanding, by his answer and by affidavit, the trustee denied that they had ever been in his possession since, or that he had ever seen them; and notwithstanding the plaintiffs might have proceeded by process of contempt for nonperformance of the original order. Furrer v. Hutchinson, 3 Y. & Coll. 692; 9 L. J., Ex. Eq. 10; 3 Jur. 1119.

#### 7. IMPROPER USE OF DOCUMENTS INSPECTED.

A plaintiff ought not to use for any collateral purpose documents ordered by the Court to be produced for the purpose of the suit. Richardson v. Hastings, 7 Beav. 354; 13 L. J., Ch. 416.

Where a plaintiff obtains an order for production and inspection of documents, he does so upon an express undertaking not to make public any information so obtained, or to communicate it to persons strangers to the suit. Williams v. Prince of Wales Life Insurance Co., 23 Beav. 338; 3 Jur. (N.s.) 55.

Order against.]-On motion for production of deeds, the defendant asked that the plaintiff might be prevented using them for any collateral purposes, alleging that they were proceedings at law pending. The court, however, declined so to restrict the order. Tagg v. South

Deron Ry., 12 Beav. 151.

A plaintiff obtaining information from the production of documents in the defendant's possession is not at liberty to make it public, andan injunction will, if necessary, be granted to restrain him. A plaintiff, having published statements relative to the matters in question, was, as a condition for making an order for production of documents, required to undertake not to make public, or communicate to any stranger, the contents of such documents. Th. Williams v. Prince of Wales Life Insurance Co., 23 Beav. 338; 3 Jur. (N.S.) 55.

The books and papers of a company are the property of its shareholders, who are entitled to inspect them, though there is a secrecy clause in the articles of an association, and though objection to discovery is based on the ground of in the course of inspection they will become

secret. But it is their duty not to divulge such the cause. information so acquired; and a court of equity will restrain them by injunction from so doing, and will punish them should they offend. Brinsley, Ex parte, 36 L. J., Ch. 150.

#### 8. RIGHT TO TAKE COPIES.

Who has. ]-Any party having a right to the production and inspection of documents has also a right to take copies of them. Lockett v. Carey (10 Jur. (N.S.) 144) not followed on this point. Pratt v. Pratt, 51 L. J., Ch. 838; 47 L. T. 249; 30 W. R. 837.

When a party establishes his right to inspect books in the adverse party's possession, it is of course to grant the order for inspection, with liberty to take copies. Hyde v. Holmes, 2 Moll. 372.

A party who has obtained an order for the inspection of documents has a right to inspect, take notes and make copies of all such parts as shall not have been scaled up under the terms of the order. Coleman v. West Hartlepool Harbour and Ry., 5 L. T. (O.S.) 467.

- Opposite Party-Same Solicitor.]-It would appear to be a settled practice, that where the same solicitor acts for both the plaintiff and the defendant in a cause, not to allow copies to be taken by one party of documents brought into chambers by the other. Sharp v. Wright, L. R. 1 Eq. 684; 14 L. T. 246; 14 W. R. 552.

- Under Companies Act, 1863.]-The right of inspection and perusal of the register of of Inspection and periods to the register of debenture stockholders, which by s. 28 of the Com-panies Clauses Act, 1863, is given to mortgagees, bondholders, debenture stockholders, shareholders and stockholders of the company, includes the right to take copies. Matter v. Eustern and Midland Ry., 57 L. J., Ch. 615; 38 Ch. D. 92; 59 L. T. 117; 36 W. R. 401—C. A.

Party Depositing Document in Court-Office Fees. - Defendant saed as executor, admitted to have certain accounts, &c., in his hands, which he was ordered to deposit for plaintiff's inspection. Afterwards a reference was directed for taking the accounts, to make out which, defendant applied to be allowed to take copies of the account, which was refused at the office, nuless he would pay for office copies :- Held, on motion, that he was entitled to this liberty as his right. Gabbit v. Carendish, 2 Anstr. 547; 3 R. R. 627.

Defeudant ordered to deposit books in the hands of the deputy remembrancer for inspection of other party, and afterwards ordered to account, in doing which he must refer to these books, is not obliged to pay the fees of the office in taking copies. Ib.

Costs of. ]-See SOLICITOR (TAXATION).

Photographs of Documents.]-The Court has power to allow a party to an action to take photographs of documents in the possession of the other party. Lewisv. Londesborough (Earl), 62 L, J., Q. B. 452; [1893] 2 Q. B. 191; 69 L. T. 358

#### 9. Costs.

Not Between Party and Party.]—The general it. 4, applied, and that the notice of motion was rule with regard to the inspection of documents irregular. Litthfield v. Jones, 25 Ch. D. 64; is that the costs of inspection must be paid by 32 W. R. 288. is that the costs of inspection must be paid by the party inspecting, though, under exceptional

the cause. Peru Republic v. Weguelin, 41 L. J., C. P. 144; L. R. 7 C. P. 352; 27 L. T. 123; 20 W. R. 745.

Where an order is made in an action in the Chancery Division for the production of documents at the office of the producing party's solicitor, that party if ultimately successful in an action is not entitled, as between party and party, to his own costs of inspecting the documents of the other party. Brown v. Sewell, 16 Ch. D. 517; 44 L. T. 41: 29 W. R. 295—C.A.

As between party and party, no costs can be allowed in respect of notices to inspect documents, or of attendance for the purpose of inspecting documents, at the office of the solicitor to whose client the documents belong. The discretion given to the taxing-master by Ord. LXV. r. 27 (17)repeated from Rules of Supreme Court, 1875 (Costs), schedule, r. 15-only applies to taxation of costs as between solicitor and client. Wicksteed v. Biggs, 54 L. J., Ch. 967; 52 L. T. 428.

Solicitor Cannot Charge Opposite Party.]-Where documents which a defendant is ordered to produce are permitted to remain in his solici-'s office for the plaintiff's inspection, the solicitor is not entitled to charge the plaintiff for inspecting them, although the clerk in court would have been entitled to demand Gs, 8d, per Woodroffe v. Daniel, 10 Sim, 126,

Where the inspection of documents on either side is ordered to take place at the office of the solicitor, instead of at the record and writelerk's office, the solicitor at whose office the inspection takes place is not entitled to charge the other side for attendances during the inspection. Flockton v. Peake, 4 N. R. 456; 12 W. R. 1023.

Of Production on Examination of Witness. The defendants were ordered to deposit certain documents with their clerk in court for the usual purposes, and to give an inspection of the remainder at their office, and produce them at the examination of witnesses and at the hearing :-Held, that the production on the examination of witnesses in town and at the hearing should be at the expense of the defendants, but the production on the examination of witnesses in the country at the expense of the plaintiff. Daries v. Harford, 3 Beay, 118.

#### D. NON-COMPLIANCE WITH ORDER, EFFECT OF.

Attachment—In what Cases.]—An applicaa fourth insufficient affidavit of documents. See-Thomas v. Palin, 21 Ch. D. 360.

Where a party is shewn not to be in a condition to make an affidavit of documents, the court will not order him to be attached. Per Cotton, L.J., Wilson v. Raffalovitch, 7 Q. B. D. 553, 561.

- Irregular Notice of Motion for. ]-On giving notice of motion to commit a defendant in contempt for disobeying an order for discovery, plaintiffs omitted to serve with the notice of motion a copy of an affidavit which they stated in the notice that they should read in support of the motion. Held, that Ord. 52,

But held, that the motion should not be at eircumstances, such costs may be made costs in once dismissed, but should be ordered to stand defendant for further time. Th.

was issued against the defendant in an action for his contempt in not complying with an order of the court to make and file an affidavit of documents relating to the matters in question in the action. After the issue of the writ of attachment, but before it was enforced, the order was duly complied with by the defendant, and immediate notice of such compliance was given to the plaintiffs' solicitors. The defendant was nevertheless arrested and imprisoned:—Held, that the arrest was altogether irregular; and that it was the duty of the plaintiffs' solicitors to have staved the enforcement of the writ of attachment. Guy v. Hancock, 56 L. T. 726.

Where a party ordered to be attached for default in making an affidavit of documents, put in an affidavit and obtained an ex parte order for discharge, the court holding the affidavit insufficient, discharged the ex parte order, but directed that the attachment should not issue for a fortnight. Price v. Price, 48 L. J., Ch. 215.

- Where Order Served on Solicitor. ]-In an action for the specific performance of an agreement by the defendant to sell two leasehold houses to the plaintiff, judgment for specific performance was given, and an order was afterwards made that the defendant should, within four days after service of the order, produce to the plaintiff "the abstract, and at the same time produce upon oath for inspection all deeds and writings in his possession or power" relating to the property:—Held, that under r. 21 of Ord, XXXI., service of this order on the defendant's solicitors was sufficient service to found an application to attach the defendant for disobethence of the order. Joy v. Hadley, 52 L. J., Ch. 471; 22 Ch. D. 571; 47 L. T. 615; 13 W. R. 519.

See further infra. II. A. 6, e; and tit. ATTACH-MENT.

Staying Proceedings. ]-The Court of Chancery has not only full power to stay all pro-ceedings in a suit till the plaintiff has made a discovery which it has called upon him to make, but, if not satisfied that its order has been properly obeyed, may dismiss the suit itself ; and where money has been paid into court, may direct the payment of that money out of court to the party entitled to it. Liberia Republic v. Roye, 45 L. J., Ch. 297; 1 App. Cas. 139; 34 L. T. 145; 24 W. R. 967—H. L. (E.)

Where a plaintiff, after an order for the production of documents, persisted in not filing a sufficient affidavit as to documents, the court fixed a time at which the bill should, in default of a sufficient affidavit, stand dismissed, and the money in court be repaid to the defendant who had paid it in. Ib.

Dismissal of Action.]—Ord. XXXI. r. 20, of the Rules of Court, 1875, does not make it imperative on the court to dismiss the action of a plaintiff who has failed to comply with an order for the production of documents. Hartley v. Owen, 34 L. T. 752,

Incapacity arising after Writ - Leave

over until after the hearing of a summons by the plaintiff became incapable of transacting business, and his brother, on his behalf, made an affidavit of documents, and answered interro-Compliance with Order after Issue of Writ gatories, the defendant took out a summons to but before Enforcement. - A writ of attachment dismiss the action for non-compliance with orders to make an affidavit of documents, and to answer interrogatories; the plaintiff then took out a summons for leave to amend by adding a next friend :-Held, that the defendant auding a next friend:—Head, that the determination was not entitled, under r. 21 of Ord. XXXI. of the Rules of Court, 1888, to have the action dismissed. The action still subsisted, and the plaintiff must have leave to amend by adding paintiff must have leave to amend by adding a next friend; the plaintiff to pay the costs of both summonses. *Cardwell (Lord)* v. *Tomlinson*, 54 L. J., Ch. 957; 52 L. T. 746; 33 W. R. 814.

> Inadmissibility of Document in Evidence.] -The penalty for non-production of documents is that they cannot afterwards be used in evidence. Roberts v. Oppenheim, 53 L. J., Ch. 1148; 26 Ch. D. 724; 50 L. T. 729; 32 W. R. 651-C. A.

### II. BEFORE THE JUDICATURE ACTS.

# A. IN CHANCERY.

### 1. BY WHAT PARTIES

Person Denying Interest. ]-C., a registered judgment creditor of a legatee, files a bill against the executors, one of whom carries on the testuthe executors, one or whom carries on the testa-tor's banking business in partnership with N., testator's partner, to establish an equitable charge against testator's assets. By supplemental, bill N. is made a party, the plaintiff charging that he and the other defendants, or one of them, carries on testator's business with his assets, and that he claims an interest in the subject-matter of the suit :—Held, that N., who denied that he claimed any interest, and was thus precluded from demurring, was not bound to answer as to the banking books, the plaintiff having shewn no title by the averments upon his bill to the discovery sought by him against N. Chaffers v. Day, 3 W. R. 263.

Co-defendant.]—Defendants put in separate answers; one of them moved that the other might leave with his clerk in court certain deeds mentioned in his answer, for the inspection of the defendant who moved. Motion refused, with costs. Dassaux v. Sheppard, 2 Fowl. Exch. Pr. 60.

A defendant is entitled, after decree, to obtain an order at chambers for the production of documents by a co-defendant. Hart v. Monteflore, 30 Beav. 280; 31 L. J., Ch. 333; 8 Jur. (N.S.) 350; 5 L. T. 441; 10 W. R. 97.

Arbitrators.]—Arbitrators or their umpire will not be compelled to answer to interrogatories tending to disclose the materials upon which their award was founded; nor produce papers and calculations taken by them for their own guidance. Ponsford v. Swayne, I John. & H. 433; 4 L. T. 15.

Nor will they be compelled to produce the submission to arbitration, nor their award, nor such papers, &c., until their fees are paid. Ih. A bill, filed against an arbitrator, charged fraud and collusion between the arbitrator and one of the parties to the award, and alleged certain specific facts in support of this charge :-Held, that the arbitrator could not, by denying to add next Friend. |-Where, after writ issued, the fraud generally, protect himself from the

specific facts. Padley v. Lincoln Waterworks this fit, answer on oath, and that a Master settle (i., 2 Mac, & G.68; 2 Hall & Tw. 295; 19 L.J., the oath. Anon., 1 Vent. 117. Ch. 436; 14 Jur. 299.

An arbitrator is not bound to discover upon what ground he made his award. Anon., 3 Atk. 6:44

action to explain his award. Buvelench (Duke)
v. Metropolitan Board of Works, 41 L. J., Ex. 187;
L. R. 5 H. L. 418; 27 L. T. 1. S. P., Rhys and Dare Valley Ry., In re, 37 L. J., Ch. 719; L. R. 6 Eq. 429.

He may be asked questions as to what passed before him, and as to what matters were presented to him for consideration. Ib.

But no questions can be put to him as to what passed in his own mind when exercising his discretionary power on the matters submitted to

Bankrupts.]—A bill prayed discovery of a sole defendant. The discovery sought was in respect of moneys received by him as manager and secretary to an association. He pleaded his bankruptey:-Plea overruled, on the ground that he was bound to give the discovery sought. Popper v. Henzell, 2 H. & M. 486; 13 L. T. 63; 13 W. R. 962.

Bill against bankrupt and assignees charging a fraudulent bankruptcy to defeat the plaintiff's execution, and stating, that under an agreement with the assignces for an arbitration, the plaintiff deposited the goods for sale, the produce to be in trust, according to the award, -that he had lost his copy, and the assignees had obtained the original from the person with whom it was deposited for the benefit of all parties, and refused inspection, prayed a discovery and injunction; a demurrer by bankrupt disallowed. King v. Martin, 2 Ves. J. 641.

Married Woman.]-On a bill for specific performance of agreement to purchase, against husband and wife, in which there was a statement, that wife had separate estate, &c., with an interrogatory in support of statement as to the fact. Demurrer by her allowed to such discovery. Francis v. Wigzell, 1 Madd. 258.

Demurrer by a married woman to a bill praying discovery only against her, and relief against her husband, as to contracts, &c., by her, as agent for her husband; alleging the vouchers, &c., to be in her possession:—Allowed upon the objection to making a mere agent a party. Le Terier x Auspach (Margrarine), 15 Ves. 159. And see S. C., 5 Ves. 322.

Demurrer of a married woman to a bill of discovery against her and her husband, in aid of an action for a debt on her account, allowed. Barron v. Grillard, 3 Vcs. & B. 165.

Next Friend of ]- A motion by a defendant, that the husband of the plaintiff (a codefendant), might be ordered to make an affidavit in reference to documents in possession relating to the matters in the suit, was refused, Hardwich v. Wright, 11 Jur. (N.S.) 297; 12 L. T. 138; 13 W. R. 560.

Corporation or Company. ]-A bill against a corporation to discover writings. The defendants answer under their common seal, and so being 2 Str. 764 not sworm will answer nothing in their own preudice. Ordered that the clerk of the company

obligation to answer the interrogatories as to the and such principal members as the plaintiff shall

Whether a company or corporation answering under their common seal is a defendant against whom an order may be made under the 18th section of the 15 & 16 Viet. c. 86. Quere. Law An arbitrator may be called as a witness in an v. London Indisputable Life Policy Co., 10 Hare (App.) xxxi.

> Officer of. ]-A defendant at law may file a bill of discovery, not only to sustain his defence to the action, but to rebut the evidence in support The rule that officers of a corporation may be made co-defendants to a bill against the corporation, applies to a bill of discovery as well as to a bill for relief, and members of the corporation may be joined with the officers. Glascott v. Copper Miners Co. of England, 12 Sim. 305; 10 L. J., Ch. 30; 5 Jur. 264.

> A person properly made a party for discovery, as secretary to a company, cannot evade making such discovery simply by resigning his situation after the filing of the bill. Acomb v. Landed Estates Co., 14 L. T. 57; 14 W. R. 387.

> Production of documents upon oath cannot be obtained from the secretary of a company who has not been made a party to a suit against the company. Att. Gen. v. East Dercham Corn Exchange Co., 5 W. R. 486.

The clerk to a city company or other corporate body will be compelled to disclose on oath the particulars of the deeds, documents and papers admitted by the answer of such company to be in their possession for the usual purposes of the Att.-Gen. v. Mercers' Co., 3 L. T. 438; snit 9 W. R. 83.

Where a railway company were the sole defendants to a suit, the court, upon an application by the plaintiff, nnder the 18th section of the 15 & 16 Vict. c. 86, for an order for the production upon oath of documents in their possession, ordered the company, on or before a day named, to file a full and sufficient affidavit, to be made by one or more of their proper officers, stating whether they had in their possession or power any, and if any what, documents relating to the matters in question in the suit, unless the company should in the meantime satisfy the court, by sufficient evidence, that they could not procure such officer or officers to make such affidavit. Ranger v. G. W. Ry., 4 De G. & J. 74; 28 L. J., Ch. 741; 5 Jur. (N.S.) 1191; 7 W. R. 426.

The mayor or other individual member of a corporation, trustee of a rent-charge out of the estate of such member, for a charitable use, must answer not only with the rest under their common scal, but also individually, a charge of having destroyed or cancelled the deed. Dummer v. Chippenham Corporation, 14 Ves. 254.

### 2. On Application of Defendant.

Plaintiff had proved a deed in the cause, and defendant had got an order at the Rolls for leave to inspect it, on the ground that the deposition referring to the deed had made it part of the deposition. Order discharged per Lord Chaneellor, because defendant is not before the hearing to see the strength of the cause, or any deed to pick holes in it. Dacers v. Dacers, 2 P. W. 410; 2 Str. 764; Ogle v. Gower (Earl), 2 Fowl.

The rule extends equally to letters referred to

7 Ves. 414.

A plaintiff stated certain papers in his bill, but did not allege that they were in his possession : the defendant, after answer, moved for the production of the papers, and the motion was refused with costs. Jackson v. Sedgwick, 2 Wils. 167

Whenever a defendant wants a discovery of a deed in the hands of a plaintiff, he must file a cross-bill for the purpose, although the deed be referred to, by the original bill, as being in the plaintiff's custody, and ready to be produced, as the court should direct. Spragg v. Corner, 2 Cox,

After an answering affidavit had been filed to a cause petition, and the petition had been amended, without interrogatories to the amendments, the court refused, without a cross-petition, to order the production of document stated in the petition to be in the petitioner's possession. Slige (Marquis) v. Hildebrand, 2 Ir. Ch. R. 118.

On a bill to set aside a partition on the ground of inequality, and for a new partition, stating a valuation and estimate, the gross result of which, without the particulars, was contained in a schedule to the bill, the answer denying the accuracy of the valuation, but alleging that the defendant was unable to set forth in what particulars it was inaccurate, by reason of such omission : a motion by the defendant for production of the valuation, and papers, &c., relative thereto, refused with costs. Michlethweit v. Moore, 3 Mer. 592.

Where a defendant seeks the production of deeds, &c., stated to be in the plaintiff's possession, the usual course is by filling a cross-bill, but such a case as the present would not, even if a cross-bill were filed, suffice to obtain an order for the purpose. Ib.

Motion by a defendant for the production of a document, admitted by the plaintiff to be in his custody, refused. Milligan v. Mitchell, 6

Production of deed in plaintiff's possession ordered on motion, and affidavit that defendant believed instrument to be forged, and that he could not fully answer bill before he inspected it. Jones v. Lewis, 2 Sim. & S. 242.

The court will not, on motion by a defendant,

compel a plaintiff to produce documents in his possession, although the defendant swears that an inspection of them is necessary to enable him to

answer the bill. Penfold v. Nunn, 5 Sim. 409.
Plaintiff in tithe cause, lessee of vicar, ordered on motion on part of defendant to bring in and deliver to clerk in court books, papers, &c., stated in affidavits to be in his possession, and to belong to vicar, who was not a party to snit. Foreman v. Cooper, 11 Price, 515.

rector's title, cannot, by a cross-bill, compel the rector to discover the evidence of his title : therefore, where the rector, by his answer to such a cross-bill, refused to set forth under what deed or deeds the rectory was conveyed to the persons under whom he claimed, exceptions to the answer, which had been taken on the ground of that refusal, were overruled. Bellwood v. Wetherell, 1 Y. & Coll. 211; 4 L. J., Ex. Eq., 23.

As to how far vicar, plaintiff in tithe cause, is compellable to produce for inspection, &c., vicar's books, and those of predecessors admitted by him in his answer to cross-bill by defendant to be in them, in order to put in his answer, the court,

as exhibits by the depositions. Wiley v. Pistor, | payments of sums of money as compositions corresponding in amount with the money payments set up by defendant as modus relied on. The costs of all proceedings had for the obtaining the discovery by such means, must be paid by party so acquiring it. Firkins v. Love, 13 Price, 193; M'Clel, 73.

Where an information was filed by the attorney-general, under the 43 Geo. 3, c. 58, s. 25, against an army agent for a discovery of accounts from 1792 to 1802, who pleaded a settled account by clearing warrants, and, the plea having been overruled, afterwards moved to amend the plea, and for the purpose of so doing that the attorneygeneral, or the secretary at war might be ordered to produce certain vouchers, accounts, &c., rendered annually during that period by the defendant to the war office, and there deposited, and which the defendant swore were material to his defence : the court under the particular circumstances ordered the proceedings upon the information to be stayed until the documents were produced. Att.-Gen. v. Brooksbank, 1 Y. & J. 439; 30 R. R. 819.

In a bill against executors, the plaintiff having stated two promissory notes of the same date, one for 15,000% sterling, the other for 15,000 French louis, given by the testator for securing a sum of 15,0007, on an affidavit by one of the executors that he had inspected the first note, and observed on the face of it circumstances tending to impeach its authenticity, that he was informed and believed that the second note had been produced by the plaintiff for payment in a foreign country, and that he was advised and believed that it was necessary, in order that his answer might fully meet the case, that he should, before answer, have inspection of the second note, it was ordered that. the defendants should not be connelled to answer till a fortnight after production of the second note. Princess of Wales v. Liverpool (Earl), 1 Swanst. 114; 1 Wils. 113; 19 R. B. 282.

Motion by defendant for inspection of book produced by plaintiff under commission issued after publication had passed, was refused with costs. Forester v. Helm, M'Clel, 558.

The usual course of proceeding, where doenments are in the hands of the plaintiff, which the defendant is desirous of the panton, when the defendant is desirous of seeing, is for the defendant to file a cross-bill. \*Shepherd v. Morris, 1 Beav. 175; 8 L. J., Ch. 86; 3 Jur. 164.

The court cannot order a document to be produced by the plaintiff for the defendant's inspection; but where a bill seeks an account, and requires the defendant to inspect a certain document relating to the accounts in the possession of the plaintiff's solicitor, and explain, if he can, the errors and omissions in the defendant's accounts, the court will grant the defendant a reasonable time for putting in his answer, after The defendant in a title suit, who denies the the plaintiff shall have deposited the document with his clerk in court, for the defendant's inspection. Ib.

Whether a plaintiff, having deposited a document in the hands of his clerk in court, for the defendant's inspection, can compel him to inspect it, is doubtful. Ib,

The court cannot, at the instance of the defendant, order a plaintiff to produce for the defendant's inspection documents stated in his bill, to be in the plaintiff's possession. Where a plaintiff by his bill states documents to be in his possession, and it is necessary for the defendant to see his possession, and to contain entries relating to though it cannot compel their production, will extend the time for answering, until the plaintiff has produced them. The fact of the documents being in the plaintiff's possession, must, however, appear upon the record. Taylor v. Heming, 4 Beav, 235, 10 L. J., Ch. 369; 5 Jur. 766.

Where the defendant, with a view of paying on heumbrances according to the provisions of a trust-deed, which the excitions sought to enforce by the suft, was in treaty with an insurance office for a loan on the security of the estates, and who sought inspection of the tritle-deeds for the purpose of ascertaining the value, &c.; a notion by the defendant for staying the proceedings, and for the solieitor of the company to inspect, &c., the deeds, &c., in the Master's office, refused. Damer v. Portarlington (Ebril), 15 Sim. 380. Sec & C., 2 Ph. 30; 15 L. J., Ch. 405; 10 Jun. 673.

Motion by defendants, to a bill for partnership account for a production of the accounts before answer, refused. *Pickering* v. *Rigby*, 18 Ves.

A plaintiff, although appointed receiver in the cause, cannot, before decree, be ordered as plaintiff to produce books or accounts in his possession for the inspection of a defendant. Maund v. Allies, 4 Myl. & Cr. 503; 3 Jur. 309.

A plaintiff, unless he specifically offers to do by the bill, or is required to do so by a crossbill, is not bound to produce, previous to the defendant being compelled to put in his answer, documents admitted to be in his (the plaintiff's) possession, and alleged as proving his case. Bate v. Bate 7. Bate 7. But, 23 by 191, 232.

Under 15 & 16 Vict. c. 86, ]—Production of all relating to the matters in question in the suit was refused, there being no distinct evidence of the nature of the documents required, or that they were in the plaintiff's possession. First v. Mullivas, 22 L. J., Ch. 72; 16 Jur. 946; I. W. R. 6.

No affidavit is necessary to support an application for production on oath of documents under the 15 & 16 Vict. c. 86, s. 20. \*Rochdale Canal Co. v. King, 15 Beav. 11; 9 Hare (App.) with v. 15 Vict. c. 86, s. 20. \*Rochdale Canal Co. v. King, 15 Beav. 11; 9 Hare (App.)

The court has settled an order under that act, requiring the plaintiff to make an affidavit of the documents in his possession, and to produce such as he does not thereby object to produce. Th. A defendant is entitled of right to such an

A defendant is entitled of right to such an order for production, and a delay in making the application does not deprive him of it. *Ib*.

In a suit for an account a defendant moved for the production of certain documents after the cause had been set down for hearing:—Held, that the court would not order production at that stage of the proceedings. Waters v. Shaftesbury (Eurl), 12 Jur. (N.S.) 3; 13 L. T. 558; 1; W. R. 239.

Semble, the court will not allow its machinery to be used for the purpose of enforcing production, where it suspects that such production is required in aid of criminal proceedings relating to the matters in question in the suit. 1b.

Motion to compel plaintiff to produce certain documents, &c., in his possession, relating to the motions in the sait. The notice of motions in the sait when the production of the particular documents required, and affidavits were filed alleging that the particular documents so specified were in the possession of the plaintiff. Production ordered. Mo Autosia v. G. W. Ry, 22 L.J., Ch. 70, 72, 182; 10 Jun. 284, 1012; 1 W. R. 19.

A defendant is entitled to production of documents in the plaintiff's possession before the hearing, and the plaintiff is bound either to produce such documents or to shew that he is unable to do so. Mertens v. Maigh, 11 W. R. 792.

A plaintiff not having interregated the defendant as to documents, and not having excepted to the answer, obtained an order calling upon the defendant to make the common affiliarit as to documents, and the defendant having made the affiliarit, the plaintiff obtained a second order requiring the defendant to make a further, more full and sufficient affiliarit as to documents relating to a particular purchase or sale specified in the plaintiff's second ammons as having been mentioned in the bill. Before filing any second affidiarit, the defendant obtained the common order against the plaintiff for the production of the documents in his possession or power relating to matters in question in the cause:—Held, that the defendant no being in default at the time of obtaining this order, was entitled to it, and a motion to discharge the order was dismissed with costs. Morl v. Nucl. 2 N. R. 156; 8 L. T. 346; 5

A defendant, after filing his answer, may apply for production of documents, under the 15 & 16 Vict. e. 86, s. 20, although the six weeks during which the answer is open to exceptions have not elapsed. Walker v. Kennedy, 26 L. J., Ch. 397; 3 Jur. (N.S.) 481.

A sait was commenced by bill, to which no interrogatories were filed, and no answer was required. The defendant obtained leave to file a voluntary answer, and moved, before putting in such answer, that the plaintiff might be ordered to produce documents:—Held, that as no discovery was paryed by the bill, and no answer required, the defendant was entitled to the order.

Briley v. Dunkorley, 27 L. J., Ch. S.H.; if W. R. S.B.. Where a plaintiff set out in his bill a letter written by the defendant, and stated that it was the plaintiff's intention to prove, and put in cyclence all letters which had passed between him and the defendant on the subject of the transactions in question, if so advised:—Held, that the defendant was not entitled, before putting in his answer, to more for the production of the plaintiff's documents. Halliday v. Temple, 8 De G. M. & G. 96.

Under no circumstances will a defendant be entitled to an order for production of documents by the plaintiff before he has put in his answer. Swith v. Lay, Fairbairn v. Lay, 22 L. T. 785; 18 W. R. 915.

A defendant, before filing his answer, cannot in the absence of special circumstances, obtain an order compelling the plaintiff to produce a deed referred to in the bill. Philips v. Pennefather, I. W. R. 73.

If a plaintiff files an affidavit in support of an interlocatory motion for an injunction, and is cross-examined upon the affidavit, if he has been served with a notice to produce, on cross-examination, all deciments relating to the subject matter of the injunction, he may be ordered, at the request of a defendant, to produce any documents referred to in the uffidavit, or which are material to the motion; although such defendant may not have had time to put in an unswer to the bill, as directed by 15 & 16 Victe, 28 ds, 20, CRiff v. Bull, 38 L. J., Ch. 571; 20 L. T. 841; 17 W. R. 1120.

A defeudant in contempt for non-compliance with orders of the court is, nevertheless, entitled

the plaintiff to support his case under an inquiry directed by the decree. *Haldane* v. *Echford*, 38 L. J., Ch. 372; L. R. 7 Eq., 425; 20 L. T. 389; 17 W. R. 570.

A defendant's case being that the plaintiff has no title, he has a right to call for production by the plaintiff of any documents which tend to impugn the plaintiff's title. Boyd v. Petrie, 20

L, T. 984; 17 W. R. 903. The 20th section of the statute 15 & 16 Vict. c. 86, does not extend to enable a defendant to obtain an order for the production of documents in the possession of a co-defendant; in such a case a cross-bill may still be necessary. Att.-Gen. v. Clapham, 10 Hare (App.), lxviii.

B. was the general agent of a receiver of rents for T., who filed a bill, stating certain accounts, and referring to others which had been furnished by B.; and interrogatories were filed, examining B, as to the correctness of these accounts. But before answering, B. moved that T. might produce the accounts for his inspection, stating that the vouchers were lost, and that, without such production, he would not be able to put in a full and sufficient answer; and the motion was refused with costs. Turner v. Burhinshaw, 2 N. R. 414; 9 Jur. (N.S.) 866; 8 L. T. 569; 11 W. R. 851.

### 3. IN WHAT ACTIONS.

For Recovery of Documents. ]—A plaintiff instituted a suit for recovery of letters and documents, upon which the defendant claimed a lien for literary labour performed thereon at the plaintiff's request, part of such labour consisting of notes, &c., written upon the documents themselves. Upon a common summons by the plaintiff that the defendant might be ordered to produce the letters and documents, and the plaintiff be at liberty to inspect the same, the court granted the application. Brougham (Lord) v. Canvin, 37 L. J., Ch. 691; 18 L. T. 281; 16 W. R. 688.

The plaintiff, the owner of an estate, appointed the defendants receivers and surveyors. The plaintiff discharged the defendants and filed a bill for the delivery up of all documents relating to the estate. The defendants admitted the possession of certain documents connected with the property, which they insisted were their own private memoranda :- Held, that they were private inconsuma:—rich, that may were bound to produce them, in order to enable the court to judge whether they were of such a nature that they ought to be delivered up. Beregford (Lady) v. Dricer, 14 Beav. 387; 20 L. J., Ch. 476.

A decree made with costs against a land agent and receiver, after his discharge, for the delivery up of all documents relating to the estate and its management. S. C., 16 Beav. 134; 22 L. J., Ch. 407.

Upon bill by heir at law for discovering and delivering up or depositing title deeds against persons in possession of them as executors, and in possession of the premises by agreement with a tenant by the curresy, plaintiff need not state every link in his pedigree. Ford v. Peering, 1 Ves. J. 72.

To Impeach Documents.]-Bill by a widow, devisee in fee, impeaching a mortgage by her.

to an order for the production of documents by stating it differently from the bill, by the addition of a power of revocation and appointment of new uses, by the exercise of which a fine was not necessary. Production of the will, not being affected by the answer, ordered on motion. Bird v. Harrison, 15 Ves. 408.

Where a deed is sought to be impeached, the plaintiff is entitled to have it produced, and the defendant cannot resist the production upon the ground of lien. Baloh v. Symes, Turn. & R. 87: 23 R. R. 195. See Tyler v. Drayton, 2 Sim. &

- To Rectify.]-A bill was filed to rectify a deed of settlement of partnership accounts, and, as consequential relief, to have the accounts taken. The deed, and certain correspondence relating to the contract between the parties, and the partnership accounts, were admitted by the answer to be in the possession of the defendants. The plaintiff obtained an order, upon motion, for leave to inspect the deed; but, semble, he was not entitled, before he obtained a decree to rectify the deed, to the production of the partnership accounts. Wimburn v. Lloud, 12 L. J., Ch. 92.

— To Set Aside.]—Production refused of a deed, which the plaintiff, by his bill, sought to set aside. Dendy v. Cross, 11 Beav. 91.

Plaintiff filed his bill to set aside an agrycument

signed by himself, containing terms to be performed partly by himself, and partly by the defendant. On the motion of the plaintiff, the court ordered the defendant to produce the agreement, notwithstanding he alleged that he intended to produce the same in evidence against an action at law brought against him by the plaintiff. Rapson v. Cubitt, 7 Jur. 77.

A party having deposited with his bankers an annuity deed, together with other instruments, as security for the balance of his banking account, cannot, by his answer to a bill seeking to have the annuity deed cancelled, and the other securities first applied in satisfaction of the banker's claim, protect himself from answering as to such other scenrities, by alleging that they are his own title-deeds, in which the plaintiff has no interest. Duncombe v. Daris, 1 Hare, 181; 11 L. J., Ch. 17.

A suit was instituted by a cestui que trust, toset aside a sale by trustees to their solicitor. The solicitor submitted to give up the purchase on repayment. He admitted the possession of the title-deeds, but resisted their production unless the plaintiff consented to repay the purchasemoney, saying that the title was bad, and that the plaintiff would have the power, as he had the inclination, to expose the title, in case he abandoned the suit :- Held, that the solicitor was bound to produce the deed. Shalleross v. Weaver, 12 Beav. 272. Affirmed 2 Hall & Tw. 231: 19 L. J., Ch. 450.

The object of the suit was to set aside certain long leases granted in 1740, which became vested in the defendant, who had made family settlements of them which he admitted to be in his custody:—Held, that the plaintiff was entitled to a production of those settlements. Att.-Gen. v. Ellison, 4 Sim. 238.

Where a suit was instituted by a mortgagor to-

set uside the mortgage deed, on the ground that it was obtained by the mortgagee under circumwhile cover, for amount of a fine. Answer, stances of pressure and surprise, which, how-admitting possession of the will, and the title ever, the mortgage denicel, the court, upon under it; alleging the loss of the settlement; motion, ordered the production of the deed, it and that he had been the mortgagor's only pro- 238: 8 L J, Ch. 305.
fessional adviser in the transaction. Davis v. Upon a bill charging fraudulent concealment Parry, 4 Jnr. (N.S.) 431 : 6 W. R. 174.

Plaintiff alleged that a certain deed was deposited with the defendant as security for a sum of money alleged to have been lent and paid off. Defendant insisted that the deed was an absolute conveyance, and did not set up his right as mortgagee to refuse to produce the deed. Production ordered, and production likewise ordered of documents of subsequent dates in the defendant's possession resulting from the deed.

Jones v. Janes, 1 Kay (App.), vi.
In a bill to redeem, the plaintiff contested the validity of one of several mortgages held by the defendant:—Held, that he was not entitled to a production. Crisp v. Platel, 8 Beav. 62.

- Charging Fraud. ]-A deed belonging to the defendant, which the bill impeached for fraud, ordered to be produced for the plaintiff's inspection, after it had been proved by the defendant and publication had passed. Fencott v. Clarke, 6 Sim. 8.

Where, as a security for money advanced from time to time to A., the creditor of A. had taken various bills of sale and assignments of A.'s personal property, but had left A. in the wisible user and enjoyment of that property; upon a bill filed by a subsequent judgment creditor of A., impeaching the prior securities for fraud:—Held, upon motion before hearing, that plaintiff was entitled to production of the several bills of sale and assignments. Neate v. Latimer, 2 Y. & Coll, 257. Affirmed 11 Bli. (N.S.) 112; 4 Cl. & F. 570.

Where deeds are impeached for fraud, the mere allegation of fraud by the bill will not entitle the plaintiff to an order for their production : on the other hand, in order to obtain a production, it is not necessary that the fraud should be admitted by the answer; the court must look at the circumstances of each case. Bussford v. Blakesley, 6 Beav. 131.

Order made for the production of a deed impeached for fraud, though the fraud was denied by the answer, the case, on the whole, being

such as to render an inspection proper. Ib. A deed in the custody of a purchaser for valuable consideration, which the bill impeached for fraud, ordered to be produced. Kennedy v. Green, 6 Sim. 6.

On a bill to set aside an agreement for the purchase of the secret of a process of manufacture, charging fraud, and that the defendant had no secret to disclose, and calling on him to set forth what his secret (if any) consisted in ;-Held, upon demurrer to the discovery of the secret, that the defendant must disclose it. Carter v. Gartze, 2 Keen, 581; 7 L. J., Ch. 276; 2 Jur. 736.

A title-deed of the defendant, which was not directly the subject of the suit, was charged by the bill to have been fraudulently altered. The charge was denied by the answer. The court refused to order its production until the hearing of the cause. Swift v. M'Ternan, 13 Ir. Eq. R.

Where the purchase of a reversionary interest was impeached on the ground of fraud and inadequate consideration, the purchaser was held bound to produce the deeds by which that transaction was effected and all subsequent documents relating to it, but not any of the

appearing that the mortgagee was a solicitor, other title-deals. Addis v. Campbell, 1 Beav.

of an incumbrance forming an obstacle to the plaintiff's title in selling, motion made that the defendant might produce his mortgage deed, by reason that such deed contained a recital admitted by the answer, that such incumbrance had been paid off :- Held, that inasmuch as the plaintiff had paid 4,000%, and it was not the ordinary case of mortgagor and mortgage, the deed must be produced. Cannock v. Chichester, Cannock v. Jauncey, 1 Drew. 497; 1 W. R.

Incidental to Relief. ]-Primâ facie discovery is incidental to relief. Angell v. Angell, 1 Sim. & S. 83; 1 L. J. (o.s.) Ch. 6; 24 R. R. 149.

4. PRODUCTION OF DOCUMENTS REFERRED TO IN THE PLEADINGS.

Admissions, Sufficiency of. ]—Defendant referring to deed in his answer, as in his possession, bound to shew the whole deed. Potts v. Adair, 1 Austr. 259.

Papers specifically referred to in an answer, and admitted to be in defendant's custody, may be ordered to be inspected by the plaintiff. diner v. Mason, 4 Bro. C. C. 479.

The plaintiff has a right to inspect documents admitted by the defendant's answer to be in his possession, before the dissolution of a special inimnetion. Walker v. Corke, 3 Y. & Coll. 276: 8 L. J., Ex. Eq. 56.

The statement of a defendant, by his answer. of the contents of an instrument is not a sufficient ground for an order for the production, without an express admission of the instrument being in the defendant's custody or power. Erskine v. Bize, 2 Cox, 226.

Defendant, though he might perhaps have objected to answer, compelled to make full disclosure by production of letters mentioned in schedule to answer. Taylor v. Milner, 11 Ves.

The plaintiff is entitled to the production of documents referred to in the answer, and admitted to be in the custody of the defendant, although an injunction obtained by the plaintiff has been dissolved, on the ground that the contract which he seeks to enforce is illegal. Erans v. Richard, 1 Swanst. 7.

In ordering the production of documents, the court proceeds on the principle that they are, by reference, incorporated into the answer, and become a part of it. Id 8.

If the defendant refers to a document in his answer, but does not admit it to be in his possession, the plaintiff is not entitled to have it produced. Souby v. Mercer, 3 Jur. 949.

Qualified submission to produce a deed, if the

court shall require it, does not fix the defendant ; and deprive him of the discretion of the court as

to the propriety of the production. Id. 213.

A defendant answered that he had in his possession a book relating to matters improperly inquired into by the bill, and that, save as aforesaid, he had no books, &c., relating to the matters in the bill mentioned:—Held, that this was not sufficient admission to entitle the plaintiff to production of the book. Harford v. Rees, 15 Jur. 663.

Semble, where the bill charges that certain

deeds are in the possession of a particular defendant, who allows the bill to be taken as confessed against him; the charge in the bill is equivalent to the defendant's admission by answer, so as to ground a motion for an order upon him to produce the deeds. Parcell v. Langston, 4 Ir. Eq. R. 443

It is not the practice to order the production of documents admitted in the answer for a limited period. Att.-Gen.v. Bingham, 9 Beav. 159.

A mortgagee against whom a bill for redemption was filed by another mortgagee having admitted the possession of vouchers (bills and notes):—Held, bound to produce them. Gibson v. Honest, 9 Beav. 203

A book, admitted to be in the defendant's possession, must be produced, though the answer admits the fact in reference to which the production is required. *Thomas v. Morgan*, 3 L. J., (0.8.) Ch. 157.

Where documents are referred to in an affildavit, it does not give the other side an absolute right to their production, but it is a matter for the discretion of the court. Motion for this purpose before hearing petition refused with costs. Armsby, Exparte, 2 Deac. & C. 192.

Where defendant referred to his schedule as

Where defendant referred to his schedule as containing all deeds, &c., in his enstody, &c., the plaintiff is entitled to the inspection of all such deeds, &c., as of course, nuless it appeared by description of any particular instrument in schedule, or by arhidavit, that it was evidence not of the title of plaintiff, but of the defendant, or that plaintiff had otherwise no interest in its production. Fuler v. Dragton, 2 Sim. & S. 908.

The plaintiff sought a renewal of a lease not in his possession: the defendant's answer denied his right to the enewal, "insemuel as he is convinced from bouncars in his possession, to which is such lease was executed." Defendant standed that it appears by a certain dead and schedule, which he admitted to be in his cossession, that a lease for a different term and each had been executed, and that it is manifest from the schedule, a renewal, if obtained, was fraudulent.—Held, that the defendant had referred to the deed and schedule in such a way as to make it part of his answer, and was bound to produce it. Pholan v. Hamilton, 9 Ir. Eq. R. 946.

Where a defendant in his answer states his gnorance of a fact, save as may appear in his answer, or by documents in his schedule, no document in the schedule will be exempted from production, although the answer as to some positively states that they are privileged committed tons. Mathods. V. G. W. Ry., 1 Mac. & G. 73: 1 Hall & Tw. 41; 18 L. J., Ch. 169; 13 Jnr. 179.

The mere statement in an answer of a document, the contents of which defendant is not bound to disclose, does not entitle to production. The principal question in the cause was, whether a party who was equitably entitled for life to a long term of years, with a general power of appointment over the residue of the term, had by a certain deed assigned the whole term to the party nucler whom the defendant claimed, or only her life-interest. The plantiff asserted that the deed had passed only the life-interest. The defendant set forth a short abstract of the deed as howing the contrary. A notion for production for the deed was refused. Glover v. Hall, 2 Ph. 184; 17 IL J., Ch. 249.

Production of a deed constituting the root of the plaintiff's alleged title, under particular circumstances, refused. *Ib.* 

On the sufficiency of the admission upon which the order for production of documents should be made. Wing v. Harcey, 10 Harc (App.), lxviii.; 1 Sm. & G. (App.), 10; 17 Jnr. 481.

Answer admitting the execution of an instrument, and craving leave to refer to it, when produced, is not a ground to move for the production; not admitting that it is in the possession or power of the defendant. Darwin v. Clurke, 8 Ves. 158.

A defendant who, in his answer, refers to a dead in the words "as by the said indenture when produced will appear," must produce it for the inspection, &c., of the plaintiff, although he does not eraye leave to refer to it. Welford v.

Skainthrope, 2 Beav. 587.
If a defendant in his answer states the effect of documents admitted to be in his possession, but for his greater certainty eraves leave to refer to the documents themselves when produced, the plaintiff is entitled to move for their production, although the answer positively swears that they form part of the defendant's title, and in no way assist or make out the title of the plaintiff. Hardman v. Ellames, 2 Myl. & K. 732; Coop. though 351; 5 Sim. 409; 4 L. J., Ch. 181. And

see 3 L. J. Ch. 74.

That defendants, by their answer, admitted that two deeds were in their possession, stated them partially, and referred to them, when produced, for greater certainty —Held, on motion, that they were bound to produce them for the inspection of the plantiffs. Dundas v. Blake, 9 Ir. Eq. R. 640; 10 Ir. Eq. R. 260.

If a defendant, by his answer, refers to the contents of a document, and continues, "as by the said deed, &c., when produced will appear," he is bound on motion to produce it. Hill v. Homme, 6 L. J., Ch. 258.

The defendant in his answer set out the contents of certain documents, but did not refer to them when produced, or admit them to be in his possession, nor was he directly interrogated to the fact:—Held, that the plaintiff could not compel the production of them. Southneed v. Daly, 10 Ir. Eq. B. 7.

The 18th section of the 15 & 16 Vict. c. 8f, does not alter the practice with respect to the production of documents. A plaintiff is entitled to the production of those documents only white are admitted by the answer and not privileged. Druft answer is a privileged document. Lumbe v, Orton, 1 Druv. 41+; 1 W. R. 207.

Description of Document, Sufficiency of.]—
Motion for production of deeds and papers,
referred to as in defendant's possession, but not
described by the nuswer or schedule, and without
an office to produce them, as the court shall
direct, refused. Athyns v. Wright, 14 Vcs. 211;
18 R. R. 199.

Rule that there must be schedule before court will order production of deeds and papers, applies only in eases of discovery. Anon., 6 Madd. 97.

only in eases of discovery. Anon., 6 Madd. 97.
Defendant earnot be ordered to produce deeds, &c., males stated in a schedule to his answer, or at least described with certainty. In Ireland it is still the practice to pray in bill a schedule. Anon., 1 Smith, 117.

A defendant by his answer admitted that he had in his possession "divers books of account":

—Held, that the particulars were not sufficiently

Denial of Opponent's Interest or Title.]-If a defendant denies the plaintiffs title, and says positively that the documents in his custody, relating to the matters in the bill, will not shew the plaintiff's title, the court will not order him to produce them : but if he says merely that he believes that they will not shew the plaintiff's title, the court will order him to produce them. Bannatyne v. Leader, 10 Sim. 230.

Defendants in their answer admitted the possession of certain deeds, &c., contained in schedule thereto, but said that all and every such deeds, &c., " make out and shew the title of defendants, and that they did not in any respect make out or assist in making out the title of said plaintiff thereto, or to any part thereof":—Held, upon motion for production, that defendants were protected by the form of their answer. Colls v.

Sterens, 7 Jnr. 54.

An admission in the answer to a bill of discovery, that the defendant possessed documents specified in a schedule wholly or in part relating to the matters mentioned in the bill, not accompanied by a precise denial of a precise case which the bill specifically charged, or by a denial that the documents related to that case :—Held, to entitle the plaintiff to the inspection of all the documents in the schedule which might be evidence on the case so specifically charged, although the defendant said they were the evidences of his own title. Smith v. Beaufort (Duke), 1 Hare, 507. Affirmed, 1 Ph. 209; 13 L. J., Ch. 33; 7 Jur. 1095.

Where a motion for production of documents was resisted on the ground that the answer contained no admission of the plaintiff's title, which title depended solely on whether A. B. had died before or after a certain day, and the answer admitted that the documents in question related to the matters mentioned in the bill, "except the question of the death of A. B." :- Held, that this was not a sufficiently distinct denial that they related to the plaintiff's title to protect them from production. Edwards v. Jones, 1 Ph. 501; 14 L. J., Ch. 62.—L. C. Reversing 8 Jur. 416.

On a motion for the production of documents, a survey or valuation of the property to which the question in the cause related, described by the defendant as consisting of his evidence, and supporting his case, and not that of the plaintiff, and made with the view to the defence in the suit, was considered as a minute furnished by a witness of the evidence he would give, and, as such, it was held, that the plaintiff was not entitled to the production of it. Llewellyn v. Badeley, 1 Hare, 527; 11 L.J., Ch. 310; 6 Jur. 705.

In a suit, seeking a partnership account, the defendant denied that any partnership had existed, but admitted that the names of both of the alleged partners had been used on the show-board, and otherwise in the business, as if they were partners, but with the view only of introducing the alleged partner into the business on the retirement of the defendant; and the defendant admitted the possession of books, accounts and documents relating to the business and matters in question, but said that they related exclusively to his own title, and to matters connected with his own property and affairs, in which the alleged partner had no

specified to enable the court to make an order; business carried on in partnership, or in confor their production. Inman v. Whitley, 4 Beav. junction with the alleged partners :-Held, that the statement in the answer was not sufficient to exclude the title of the plaintiff to the production of the documents mentioned in the schedule. Harris v. Harris, 4 Hare, 179; 9 Jur. 80.

A bill cannot be supported against a mere stranger for the production of documents; but the plaintiff must shew such a connection between him and the defendant as entitles him to see the documents. Where the defendant was retained as the solicitor of a third party Where the defendant acting under a power of attorney from the plaintiff, but the defendant denied the plaintiff's interest, and that he was accountable to him :-Held, that so long as that stood upon the record, it excluded the plaintiff from instituting his suit or to see the documents. Adams v. Fisher, 3 Myl. & C. 526; 2 Keen, 753; 7 L. J., Ch. 289; 2 Jur. 508.

Generally a reference in the answer of the defendant to deeds contained in a schedule makes them part of his answer, and he is bound to produce them; but where he denies, and it does not appear on the face of the pleadings that the plaintiff has any interest in them, he does not make them part of his answer merely referring to them, or even by stating them in a schedule. Farrer v. Hutchinson, 3 Y. & Coll. 692; 9 L. J., Ex. Eq. 10; 3 Jur. 1119.

Whether by an interrogatory founded on a charge in the bill, that the defendant, during a partnership with plaintiff as solicitor, had discounted bills whereby he had made a profit; the plaintiff required him to set forth the names of the persons with whom, &c., and the amount of such profits. Although the defendant in his answer noticed the charge, and admitted the transactions to which it referred, yet he refused to answer as to particulars inquired, because plaintiff was not interested in such transactions. The court, on arguing exception taken thereto, overruled it, and held defendant was not bound to answer the interrogatory. John v. Davie, 13 Price, 632.

The defendant to a bill of discovery in aid of the plaintiff's defence to an action at law, cannot be compelled to produce a document as to which the bill contains no allegation that it relates to the matter in issue in the action; and this protection was held to be sufficiently claimed the defendant stating that he was advised, and verily believed that the document in question did not contain evidence in support of the plaintiff's pleas in the action. Peile v. Stoddart, 1 Mac. & G. 192; 1 Hall & Tw. 207; 13 Jur.

A statement in an answer that certain documents admitted to be in the defendant's possession form part of the evidence of his title, and do not form part of the title of the plaintiff to the premises in question, is not sufficient to protect them from production on motion, if they be in their nature such as may furnish evidence in support of the plaintiff's ease, and the answer does not distinctly deny that they do. Semble, a defendant who has answered cannot resist a motion for production of documents referred to in his answer on the ground that the bill is open to a general demurrer for want of equity. Bute (Marquis) v. Glamorganshire Canal Co., 1 Ph. 681; 15 L. J., Ch. 60.

An information made claim, on behalf of a interest, and that they did not relate to any charity, to a farm, out of which a fixed annual rent-charge had for many years been paid. The G. J. & S. 440: 2 N. R. 145; 32 L. J., Ch. 662: defendant admitted the right to the rent-charge, but contended that he represented parties who were purchasers of the farm for valuable consideration without notice. He admitted that he had in his possession title-deeds, which made out his own title, but did not make or evidence the title of the charity :-Held, that the defendant was not bound to produce them. ... Strutt, 3 Beav, 396; 10 L. J., Ch. 24. Att.-Gen. v.

Production refused on admission of documents. but not of title of plaintiff. Smith v. Dowling.

10 Jur. 63.

Motion to produce documents refused, on the ground that the plaintiff's title was not sufficiently admitted by the answer. M'Hardy v. Hitchoock, 11 Beav. 73.

To protect a defendant from production of a document, it is not sufficient for him to aver by his answer that the document does not sup-Dipple v. Corles,

port the plaintiff's equity. 22 L. J., Ch. 15; 1 W. R. 47.

The title of the attorney-general in an information rested in part on an agreement executed by an ancestor of the defendant. The defendant denied the right of the attorney-general, and stated that the previous possessor of the estates in question, who was party to the agreement, was only tenant for life, but set out a settlement in which he appeared to be tenant in tail :-Held. which he appeared to be teledine in that :—reld, that as the discrepancy appeared capable of explanation in favour of the defendant, there was sufficient denial of title to resist production of the documents. Att.-Gen. v. Rivers, 1 W. R. 240.

A. settled property on trust for the plaintiff and others, but he reserved a power of defeating it. The plaintiff alleged that the trusts had been partially defeated by a subsequent deed, and called upon the trustee to produce the deed. The trustee, in his answer, stated that the plaintiff's interest had been totally defeated by the subsequent deed, which he did not object to produce ; but he said that A. (who was not a party to the suit) objected to the production :- Held, that the plaintiff was entitled to inspect it, but that the order could not be made in the absence of A. Buyden v. Tylee or South, 21 Beav. 545; 26 L. J., Ch. 425; 3 Jur. (N.S.) 783; 5 W. R. 128.

Production of books, &c., referred to in answer, ordered, though it was contended that answer shewed plaintiff was not entitled to relief. Unworthy v. Woodcock, 3 Madd. 432.

# 5. AFFIDAVIT OR ANSWER,

Affidavit, when Compulsory. ]-In a snit by the heir at law for discovery in aid of an action of ejectment brought by him against persons in session claiming as devisees of the ancestor :-Held, that the defendants, whether bound to produce any documents or not, must make the usual affidavit in answer to a summons for production by the plaintiff. Rumbold v. Forteath, 3 Kay & J. 44; 2 Jur. (N.S.) 686.

A defendant against whom a decree for an

account was made, had before decree made full discovery by answer as to documents in his possession:—Held, nevertheless, that the plaintiff after decree was entitled to call for an affidavit as to his possession of any documents other than those mentioned in his answer relating to the the schedule thereto, set forth a list of all the matters in question. Hanslip v. Kilton, 1 De deeds, &c., relating to the matters in question in

9 Jur. (N.s.) 482; 8 L. T. 376; 11 W. R. 762. Defendant required on summons to file affidavit as to possession of documents, notwithstanding

his having answered the usual interrogatory as ns as any answered the issue interrogatory as to books and papers, and his answer not having been excepted to. *Manby* v. *Bewicke*, 2 Jur. (N.S.) 671, 672; 4 W. R. 757.

The defendants were ordered to make the usual affidavit as to whether they had any documents in their possession which related to the matters in question in the cause, although by their answers they denied the plaintiff's alleged title to the estates in their possession. Quin v. Rateliff, 6 Jur. (N.S.) 1327; 3 L. T. 363; 9 W. R. 65.

Qualified Answer. ] - It is not sufficient that a party swears he has no books, &c., to his knowledge, concerning the matters in question, but those produced; he must swear without the qualifying words "to his knowledge." Hertford (Marquis) v. Hertford Poor, 4 Vin. Abr. 440; 2 Eq. Abr. 14; Bridg. Prac. Dig. 423.

The defendants to a bill for an account of dealings in stock, were interrogate das to which of them received the several sums of money, and whether the same were paid in cash or cheques; they set forth an account of their receipts as joint, and only specified the sums received :Held, sufficient. Robinson v. Lamond. 15 Jur.

The answer stated that an account of all dealings was set forth in the schedules, and stated that "the defendants have set forth to the best of their belief or otherwise a full account":

Held, sufficient. Ib.

In answering an injunction bill, if the partienlar answer to a particular interrogatory contain an allegation of matter not inquired of by the interrogatory, so that it does not answer the questions directly, but with what amounts to a qualification, and thereby destroys the positive effect of the answer, either as a direct or explicit denial or admission of the fact interrogated to ; it will nevertheless be sufficient if the introduction of the qualifying matter be authorised by anything in the bill on which the interrogatory is founded. Bally v. Kenrick, 13 Price, 291. A peeress ordered to produce deed confessed

in her answer on honour only, not on oath. Hamilton v. Gerrard, Pre. Ch. 92.

A defendant is bound to answer directly and precisely; and in answer to a specific interrogatory is not at liberty to refer to a schedule which he does not pray may be taken as part of his answer. Boldero v. Saunders. 3 N. R. 59.

Description of Documents or Accounts.]— Upon a bill filed by the representative of a deceased partner in a firm of wine merchants, against the surviving partner for an account and for particulars of all transactions for a period of six months, the defendant referred to a book containing the particulars required, but refused to set them out in the form of a schedule. He also claimed protection against disclosing the names and private dealings of the customers of the firm. Exceptions to the answer allowed on both grounds. Telford v. Ruskin, 29 L. J., Ch. 867 ; 8 W. R. 575.

A defendant, in his answer to the usual interrogatory as to deeds, &c., stated that he had, in of the items in the schedule was "Banker's Pass-book":—Held, that this description was sufficient, Houghton v. Barnett, 20 L. J., Ch.

An answer admitting the possession of "divers books of account," is not sufficiently specific to enable the court to make an order for their production. Inman v. Whitley, 4 Beav. 548.

When interrogatories are in a form which would make it oppressive to require a detailed answer, a defendant may answer by reference to books; but he must refer to them with such explanation and in such a manner as to make it as convenient as possible for the plaintiff to consult them. Drake v. Symes, 1 Johns. 647: 29 L. J., Ch. 349; 6 Jur. (N.S.) 318; 1 L. T. 186; 8 W. R. 85.

Accordingly, in answer to interrogatories as to policies and investments of an insurance

company of which the defendants were directors :- Held, that it was not sufficient to schedule a large number of ledgers, policy books, and the like, and to say the books were correct, and the defendants willing to be bound thereby, that they could not set forth any information except what was contained in the books; and that the detailed particulars asked for would occupy many hundred folios. Ib.

A defendant who is required to set forth accounts, is bound to set them forth as well as he is able, without much labour or expense, and he is not bound (more especially where he has not been a party to the transactions, but is only the representative of a party, and the accounts are long and complicated) to refer to the books for the purpose of making out the accounts. He must, however, allow the plaintiff to inspect the books, Christian v. Taylor, 11 Sin. 401; 10 L. J., Ch. 145.

How far Conclusive.]-Bill for discovery, whether in a mortgage made by A, to B., which had been assigned to the defendant, there was not some trust declared for the benefit of the plaintiff; defendant by answer denied that there was any trust declared for the plaintiff; the answer being replied to, the question at the hearing was, whether the defendant should be obliged to produce the deed; the court would not compel him to do it. Hall v. Atkinson, 2 Vern. 463.

In a suit for tithes instituted by a rector against a party who was both patron of the rectory and lord of the manor, in which the land for which the tithes claimed were situate, suggesting that a customary payment of 40l. per annum, alleged by the defendant to have been made from time immemorial in lien of all tithes was founded on a series of corrupt contracts by way of resignation bonds, and otherwise between successive patrons and rectors :—Held, upon a supplemental bill of discovery filed by the rector, that the defendant was bound to produce all such private documents in his custody relating to the matters inquired after by the bill as did not constitute his title to the inheritance of the manor, or the lands of which the tithes were claimed, or the inheritance of the tithes. The plaintiff is not bound by the defendant's construction of documents in his possession (not his title-deeds) if it be clear from the circumstances that they may relate to the plaintiff stitle. Knight v. Waterford (Marquis), 2 Y. & Coll. 37.

An injunction had been obtained restraining

the suit, and traversed the interrogatory. One the defendants whose title to the surface land was admitted, from interfering with or working certain mines claimed by the plaintiffs. Upon a motion by the defendants for production of documents in plaintiff's possession, the plaintiff's stated in their affidavit in opposition that the documents in question showed the title of themselves and other defendants in the same interest to the mines and minerals exclusively, and that none of them in any manner shewed that the defendants applying had or ever had any estate, right, title, or interest, in the mines or minerals: -Held, that these documents were entitled to be protected from production. But an affidavit that documents (admitted to be relevant) relate to, or shew or tend to shew the title of the plaintiffs exclusively, is not sufficient to entitle the plaintiff to protection. Parties are answerable for the correctness of their affidavits as delivered to the other side. Lloyd v. Purves, 6 W. R. 421, 507.

A plaintiff filed a bill charging the defendant with infringing his patent, and praying for an account of the dealings and profits of the business :- Held, that the defendant must answer the interrogatories asking for such accounts, although he expressly denied the plaintiff's title to relief, or that the accounts would assist him in making out his case. Swinborne v. Nelson, 22

L. J., Ch. 831; 1 W. R. 155.

Duty to Examine Documents and make Inquiries. ]-It is the duty of a corporation, when apprised by an information of the nature and extent of the claims made upon them to cause a diligent examination to be made before they put in their answer, of all deeds, papers and muniments, in their possession or power, and to give in their answer all the information derived from such examination; and if they pursue an opposite course, and in their answer allege their ignorance upon the subject, and the information required is afterwards obtained from the documents selected. in their answer, the court will infer a disposition on the part of the corporation to obstruct and defeat the course of instice, and on that ground alone will charge them with the costs of the suits. Att.-Gen. v. East Retford Corporation, 2 Myl. & K. 35.

To a bill by the executors of a lessor against the lessees (trustees for a mining company) the defendants, after giving some of the discovery required, stated that there were other documents in the custody of the agents of the association, but who were not their agents personally, containing all the information that could be obtained about the matters in question, but that the defendants had no power to use those documents except when sitting at the board of directors, or by an order of the board, and that they believed the directors declined to allow them to use the same, or to afford them any information which would assist the plaintiffs in prosecuting the snit, until all the other shareholders should have been made parties :- Held, this answer was insufficient by reason of its not stating that the defendants had applied to the board of directors for leave to procure and give the information required, and that they had been refused. Taylor v. Rundell, Cr. & Ph. 104; 11 Sim. 391; 4 Jur. 426.

Discovery case in which a defendant must seek for information, which he may not himself possess. Glengall (Eurl) v. Frazer, 2 Hare, 99; 12 L. J., Ch. 128; 6 Jur. 1081.

In answer to a bill seeking to impeach a

security, and requiring the defendant to set forth what communications passed between his on the sufficiency of the answer of the corporation, solicitor and agents in the transaction and the plaintiff; and what letters were written and received, and entries made on the subject by such solicitors, it is not sufficient for the defendant to say that the solicitors had ceased, for several inquired after. Ib. years since the transaction, to be his solicitors or agents, and that he does not know what communications or entries they had or made: the defendant, if he has not personal knowledge of the facts, must at least shew that he has endeavoured to acquire the information from his agents in the transaction in question. Ib.

An answer may be verbally full, but technically insufficient, as where a defendant sets up his ignorance of facts as to which he has plainly the means of obtaining the information required. The answer of persons engaged in working a coal mine, which stated that they could not, as to their belief or otherwise, set forth the mode of working :- Held, insufficient, the court assuming that they must have workmen under their control from whom such information might be derived, and which the defendants were bound to afford. Att.-Gen. v. Rees, 12 Beav. 50.

If a bill state a fact not denied by the answer, by which it appears that the defendant has the means of making an inquiry, he must auswer as to the result of his inquiry. Neate v. Marl-borough (Duke), 2 Y. & Coll. 3; 5 L. J., Ex. Eq. 98.

Upon a bill of discovery, in aid of a defence to an action on a bill of exchange, if the defendant in equity is interrogated as to the consideration given for the bill, he must answer, not only as to the consideration which he gave for the bill himself, but as to that which he knows another party to have given. Edwards, 2 Y. & Coll. 125. Glengall (Lord) v.

The directors of a company are bound to make an affidavit as to documents belonging to the company, as being in their possession, though the company is a party to the suit. Clinch v. Financial Corporations, L. R. 2 Eq. 271; 12 Jur. (N.S.) 484; 14 W. R. 685.

A defendant, after making in his answer a statement, from which it appeared that he had not personally inspected the documents in his possession relating to the subject of the suit, stated that he was advised, and that to the best of his knowledge, information, and belief it was the fact, that the documents did not, nor did any of them, in any way make out evidence or support, or tend to make out evidence or support, the case, or any part of the case, made by the plaintiff, nor defeat nor impeach, or tend to defeat or impeach, the case or defence, or any part of the case or defence, of the defendant, but were evidence in support of the defendant's case : -Held, that as it appeared on the face of the answer that the defendant had not himself inspected the documents, Peile v. Stoddart (1 Maen. & G. 192) did not apply, and they were not protected from production. *Manby* v. *Bewiche*, 8 De G. M. & G. 476; 2 Jur. (N.S.) 671; 4 W. R. 757.

Where an incorporated company, in answer to an interrogatory in a bill as to documents which ever were in the power of agents formerly and not now in their employment, stated ignorance as to the fact, but did not state that they had made any particular inquiries of such former agents :-Held, that the answer was sufficient, there being no special circumstances alleged applicable to any particular document or any particular person. M. Intosh v. G. W. Ru., 4 De G. & Sm. 502.

Held, also, that the court could not, in deciding regard the circumstance that the engineer, in a separate answer (which had not been excepted to in that particular), stated that he did not remember, and could not set forth any of the particulars

Sealing up Documents.]-Where a defendant has appended to his answer a schedule of documents, which he is afterwards, upon summons in chambers, required to produce, it is his business to see that the summons is drawn up in such a form as will allow of his scaling up any part of such documents as he maintains upon affidavit to be irrelevant to the matter in suit. Talbot v. Marsh field, 11 Jur. (N.S.) 901: 13 L. T. 424: 13 W. R. 885.

But, where a defendant has made an affidavit of documents in his possession upon summons in chambers, he is entitled to make a substantive application before the chief clerk for the protection of any part of them, supporting the right to production by the usual affidavit as to relevancy.

Where a decree or order directs parties to produce books, &c., the master, under the 16th General Order of 1828, may determine not only as to the books, &c., to be produced, but also as to the parts of them to be inspected. Duncan v. Varty, 14 Sim. 393.

Affidavit to Vary-On behalf of Defendant. ]-The defendant, by his answer, admitted that he had in his possession certain documents relating to the matters in question, but he stated that several of them were privileged. The plaintiff having moved for the production of all the documents, the court admitted an affidavit to be read on the part of the defendant, specifying which of them were privileged. Pursons v. Robertson, 2 Keen, 605; 7 L. J., Ch. 1; 1 Jnr. 770.

Semble, on a motion to produce documents, the affidavit of the defendant is admissible to shew that the documents are within any ground upon which the defendant is entitled to withhold the production. Llewellyn v. Buddeley, 1 Hare, 527: 11 L. J., Ch. 310; 6 Jur. 705.

Upon a motion for production of documents, the

defendant was permitted to produce an affidavit to show they were privileged :- Held, that the plaintiff was not entitled to use an affidavit in opposition to it. Blenkinsopp v. Blenkinsopp, 10 Beav. 143; 16 L. J., Ch. 88; 11 Jnr. 721.

Privilege as to cases and opinious anterior to

any litigation. A defendant, by his answer, stated that he was advised that the cases and opinions stated in the schedule were privileged: -Held, that the privilege was not sufficiently shewn by the answer; but liberty was given to supply the omission by affidavit. Penruddoch v. Hammond, 11 Beav. 59.

A defendant, by his answer, stated that he had handed over some documents relating to the matters in question to his agent in Jamaica, to enable him to defend a suit there; that the agent had left the island; and that the documents had been taken possession of by a receiver appointed by the Court of Chancery there :- Held, that this admission entitled the plaintiff to an order for production, but liberty was given to the defendant to relieve himself, if possible, by affidavit, from the effects of this admission. Morrice v. Swaby, 2 Beav. 500.

The cost of affidavits used to qualify the

the production of documents, must be paid by the Smith v. Massie, 4 Beav. 417; 5 defendant. Jur. 1053.

On a motion for the production of documents, the defendant was permitted to shew, by affidavit, that they could not be left in the office without great inconvenience; but as the ground for this indulgence was not stated by the answer, he was ordered to pay the costs. Gardner v. Dangerfield, 5 Beav. 389.

On Behalf of Plaintiff. |-On a motion for a defendant to produce a deed before the examiner, affidavits cannot be read to prove the fact of its being in his possession; it must appear upon his answer. Leave given, though the cause was at issue, to amend the bill for the purpose of obtaining that permission. Barnett v. Noble, 1 Jac. & Walk. 227.

On a motion for the production of papers, Lord Langdale gave leave to supply a defect in the auswer by affidavit. Davis v. Harford, 7 L. J.,

Ch. 2, n.

On a motion for the production of documents. affidavits to prove that a letter was written by a defendant, of which the defendant denied in his answer that he had any recollection, and to prove a fact of which the defendant stated that he was ignorant, were rejected. Edwards v. Jones. 14 L. J., Ch. 62.

Where the answer is found insufficient, plaintiff may read affidavits filed since it was put in, Wilson v. Wilson, C. P. Cooper, 499.

Upon a motion for production of documents in the defendant's custody, the court will not receive evidence extraneous to the answer to shew that a particular document had been fraudulently omitted from the schedule, although the defendant does not object to the admission of extrinsic eyidence, and has adduced evidence to contradict it. Reynell v. Sprye, 1 De G. M. & G. 656; 21 L. J., Ch. 13; 15 Jur. 1046.

Where, on a motion for the production of papers admitted to be in the defendant's possession, the right to their production depends on documents stated in the bill, but which are neither admitted nor denied by the answer, the plaintiff is at liberty to verify such documents by affidavit. Addis v. Campbell, 1 Beav. 258;

8 L. J., Ch. 305.

- To Vary Affidavit of Documents. ]-An affidavit of documents, under s. 18 of the 15 & 16 Viet. c. 86, partakes of the nature of an answer : and hence the court will not order the production of a document not mentioned in the affidavit, upon evidence given by the plaintiff of the materiality of such document, but will order the defendant to put in a further affidavit. Richards v. Watkins, 6 Jur. (N.S.) 168.

The court will make an order under the 15 & 16 Vict. c. 86, s. 18, after decree. Ib.

Claim of Professional Privilege, Sufficiency of Allegations on. ]—The schedule to a defendant's answer of the documents in his power contained as follows: "Letters from Messrs. K. & C., the defendant's solicitors, to Mr. F., one of the witnesses examined for the defendant at the trial of the action, bearing date, &c."; and the defendant, in the body of his answer, stated that all the documents in the schedule related to and were connected with the matters in question in the suit, and were prepared and written for the 115.

answer of a defendant so as to excuse him from institution of it, for the purpose of the defendant's defence to the suit, and for the purpose of the action between the parties to which the suit related:—Held, that the letters were not sufficiently characterised, as being of a confidential nature, to protect them from being produced. Dartmouth Corporation v. Holdsworth, 10 Sim.

> A bill filed by the insurers of a life against the insured, to which the solicitor of the insured was a defendant, stated that, on a particular day, an agent of a company, with whom the insured wished to effect an insurance, came to the office of the insured, and told their agent that the life was bad, handing to such agent at the same time an unfavourable medical report upon the life. The defendant, the solicitor of the insured, was present at this interview, but in his answer to the bill, refused to state what passed, because he was then the solicitor and attorney, and was present as the solicitor and attorney of the insured, and acquired his information touching the matters which he refused to answer, solely from the fact of his being present at the time in the capacity of solicitor and attorney, and professional and confidential adviser of the insured : -Held, on appeal, that the defendant, not having shewn that the circumstances were such as to make the communication privileged, was bound to answer more fully. Principles upon which some communications are privileged. Desharough v. Rawlins, 3 Myl. & C. 515; 7 L. J., Ch. 171; 2 Jur. 125.

> A defendant, by his answer, stated that he was advised that the cases and opinions stated in the schedule were privileged :- Held, that the privilege was not sufficiently shewn by the answer; but liberty was given to supply the omission by affidavit. Pouruddock v. Hammond. 11 Beav.

A defendant admitted that he had in his possession documents relating to the matters in the bill, and refused to set forth a list of them, because they had been procured by his solicitor since the institution of the suit. and for the purpose of his defence to it; and the same were. as he was advised and insisted, confidential communications:—Held, that the allegation relative to the documents did not justify the defendant's refusal to set forth a list of them; and, therefore, that his answer was insufficient. Balguy v. Broadhurst, 1 Sim. (N.S.) 111; 14 Jur. 1105.

A solicitor declined answering some interroga-tories, on the ground that he had obtained all his information "whilst acting as the solicitor" of his co-defendant:—Held, that he had not brought himself within the rule as to professional privilege. Thomas v. Rawlings, 27 Beav. 140; 5 Jur. (N.S.) 667.

A solicitor said he had obtained his information "either as a creditor or as the solicitor" his client :- Held, that this statement, must be taken most strongly against the solicitor, and that he was bound to give discovery. Ib.

The rules of the court as to privileged communications will not exempt a defendant from answering, who states that his knowledge has been acquired "by virtue of his employment as the solicitor of his client." It must have been acquired by means of confidential communica-March v. Keith, 1 Dr. & Sm. 342; 30 L. J., Ch. 127; 6 Jur. (N.s.) 1182; 3 L. T. 498; 9 W. R. that the defendant has acquired information as solicitor of A., acting as such in relation to the matters inquired after, but not alleging that he acquired it from the client, is insufficient. Ib.

A judgment creditor filed a bill against his debtor, alleging that he was cutitled to property, and praying that the same might be sold : that the debt might be paid out of the proceeds; and that the priorities of the different incumbrancers might be declared. He made A. and B. defendants, whom he alleged to be incumbrancers upon the property, and who were also the solici-tors of the debtor. The plaintiff filed interrogatories for the examination of A. and B. They put in their answer, but declined to give discovery as to certain matters, on the ground that they were the solicitors of the indement debter, and that all the knowledge and information which they possessed in reference to the matters had been acquired by them in their capacity of solicitors to the debtor:—Exceptions for insufficiency allowed. Lowis v. Pennington. 29 L. J., Ch. 670; 6 Jur. (N.S.) 478; 8 W. R.

#### 6. ORDER FOR.

#### a. Discretion of Court.

It is within the discretion of the court to make or refuse an order for production by a defendant upon oath of documents under 15 & 16 Vict. c. 86, s. 18. Lane v. Gray, 43 L. J., Ch. 187.

Where documents are referred to in an affidavit, it does not give the other side an absolute right to their production, but it is a matter for the discretion of the court. Motion for this purpose, before hearing petition, refused with costs. Arusby, Ex parte, 2 Deac. & C. 192.

#### b. Application.

Time for. ]-The court will not, upon an interlocutory application after cause is set down for hearing, declare that at the hearing a particular document may be produced and read in evi-Att.-Gen. v. Fishmongers' Co., 4 Myl. & C. 1.

If a defendant submits to produce a deed, he will be obliged to do so before the hearing, if the court shall think fit to order it. Stanhone v. Roberts, 2 Atk. 214.

A defendant put in a plea to a part of the bill, and answered the remainder. The plaintiff moved for production before the plea had been set down, but the court directed the motion to stand over until the plea had been argued. Buchanan v. Hodgson, 11 Beav. 368. And see Arnsby, Ex parte, supra.

Application for Payment into Court-Separate Motions.]-Where a defendant admits, by his answer, the possession of documents and a balance of money, it is irregular to move for the production of the former and payment into court of the latter by two separate motions ; they ought to be included in one. In this case the court ordered the plaintiff to pay the extra costs occasioned by this irregular proceeding. Hawke v. Kent, 3 Beav. 288; 10 L. J., Ch. 30.

Where Application in Former Suit. ]-A defendant had been ordered by the Vice-Chancellor in another suit to give inspection of documents. the defendants to make the usual affidavit of the

A plea of privilege by the answer, alleging The order had been made two years, but had not been acted on :-Held, that this did not prevent an order for production in the present suit.

Bourne v. Mole. 4 Beav. 417.

> On Appeal, ]-Plaintiff appealing from a decree dismissing the bill, entitled to the usual order for the production and inspection of deeds. Church v. Barclay, 16 Ves. 435,

Under 15 & 16 Vict. c. 86-At Chambers. ]-Applications for production of documents should be made at chambers in the first instance. Thomson v. Teulon, 9 Have (App.) xlix.; 22 L. J Ch. 11, 243; 1 W. R. 12.

Where a plaintiff desired to compel the discovery and production of documents by a defendant, and took out a summons in chambers (afterwards adjourned into court) for leave to file exceptions, on the ground of the insufficiency of the defendant's answer to the interrogatory in the bill, the court held that the application must be dismissed with costs, the new practice under the 15 & 16 Vict, c. 86, being settled that either the plaintiff or the defendant had the power of enforcing immediate discovery and production of documents by an application to the judge's clerk in chambers. Burnard v. Hunter, 1 Jur. (N.S.) 1065 : 4 W. R. 34.

- Time for.]-A bill is filed for specific performance of an agreement by twenty-one persons, the first being called agent of the others; and the next day after the answer is filed, the defendants take out a summons that the plaintiff may produce documents. The plaintiff objects, on the ground that such proceeding cannot be taken under six weeks, when the answer must be deemed sufficient under the 20th section of the 15 & 16 Vict. c. 86. The defendants also reonire the affidavit to be made by all the plaintiffs :- Held, that a defendant can apply instanter upon the filing of an answer, that the plaintiff may produce documents, but the court will give sufficient time to the plaintiff. to ascertain that the answer is sufficient; and that interrogatories may be filed within six weeks. Held also, that the affidavit must be made by all plaintiffs, unless there is some special reason to the contrary. Walker v. Kennedy, 26 L. J., Ch. 397; 3 Jur. (N.S.) 481; 5 W. R. 396.

A cause having been heard on further directions, a decree made, and accounts taken, the next friend moves in his own name for production of a special document for a special purpose, and there is a variation between the summons in chambers and the order. Upon motion to discharge that order :- Held, that the summons must follow the notice of motion; that a plaintiff has no right after decree to move for production; and there being no admission in the answer, order discharged with costs. Rippin v. Dolman, 2 W. R. 432.

A plaintiff, in March, 1860, filed a bill claiming to be entitled as heir to estates in the possession of the defendants, but subject to a term of 1,000 years outstanding, which prevented him from bringing ejectment. The bill contained the usual allegation in reference to documents. The answer, filed on the 15th June, denied the title of the plaintiff, and declined to make discovery of the deeds in their possession. No exception was taken to that answer. On the 24th July a summons was taken out, requiring chambers. On the 30th July the plaintiff amended his bill, and filed further interrogatories. The second answer of the defendants was filed on the 29th August. On the 24th October exceptions were filed on the ground of insufficiency. The Vice-Chancellor directed that the hearing of the summous should be adjourned into court, and come on to be heard with the exceptions. Quin v. Ratcliff, 6 Jur. (N.S.) 1327; 3 L. T. 363; 9 W. R. 65.

The defendants undertaking not to set up the term of 1.000 years, or any other term, the court overruled the exceptions, and gave the plaintiff

leave to bring ejectment. Ih.

Production of documents ordered upon motion by the plaintiffs, the defendants having put in a plea to the bill, to which the plaintiff had replied. Parkinson v. Chambers, 1 Kay & J. 72;

3 Eq. Rep. 234; 3 W. R. 130,

The practice of raising questions as to the production of documents on a summons to consider the sufficiency of the affidavit is too firmly established to be disturbed, though not to be commended. Nicholl v. Jones, 2 Hem. & M. 588; 5 N. R. 361; 13 W. R. 451.

- Documents must be Specified.]-A defendant, moving, under s. 20 of the 15 & 16 Vict. c. 86, that the plaintiff may produce documents, must specify in his notice of motion the documents required. Fiott v. Mullins, 16 Jnr. 946. After decree, a summons requiring affidavit as

to documents by the plaintiff must specify the points as to which discovery is sought. Haldane

v. Eckford, L. R. 7 Eq. 425.

\_\_\_ Evidence.]—No affidavit is necessary to support an application for production on oath of documents under the 15 & 16 Vict. c. 86, s. 20, whether that application be made by the plain-tiff or the defendant, Rochdale Cunal Co. v.

King, 9 Hare (App.) xlix. u.
A plaintiff, before answer, or a defendant, is entitled to an order for the production of docu-ments in the possession of his adversary; and delay in making the application does not deprive

him of the right. Ib.

Upon a claim, the court refused a motion made by the plaintiff, under the 15 & 16 Vict. c. 86, s. 18, for the production of documents, supported by the plaintiff's affidavit alone of their importance to the cause. Wing v. Harrey,

1 Sm. & G. (App.) x.; 17 Jur. 481.
Semble, that in a suit by claim, the plaintiff ought to file an affidavit, with interrogatories, to obtain the necessary admissions on which to move for production. S. C., 17 Jur. 481.

\_\_\_ Must be Founded on Answer.] -A motion for production of documents, at or before the hearing, must be founded on the answer [or affidavit, see 9 Hare (App.) p. xlix.] of the defendant [or party against whom the application is made], and the 18th sect. of the stat. 15 & 16 Vict. c. 86, does not enable the court to make an order for such production, founded upon the affidavit of any other person, and not upon the admission of the party against whom the order is sought. Lamb v. Orton, I Drew. 414; 10 Hare (App.) xxxi.; 22 L. J., Ch. 713; 1 W. R. 207.

- Plaintiff's Case assumed True. ]-For the

documents in their possession; and on the 28th, documents, it must be assumed that the plainthe chief clerk having refused to make an order, the plaintiff appealed to the Vice-Chancellor in documents upon that assumption; because, if the court must wait until the fate of the litigation is known, that would be equivalent to refusing production. Gresley v. Mousley, 2 Kay & J. 288: 2 Jur. (N.S.) 156.

> Forms.]—The court has settled an order. with reference to the act 15 & 16 Vict. c. 86, s. 20, requiring the party against whom the application is made to make an affidavit as to the documents in his possession or power, and to produce such of them as he does not state an objection to produce. And the court has also settled a form of affidavit on the model of a carefully prepared answer, which, though not obligatory, will be considered satisfactory. 1b.

> Form of notice of motion, and affidavit in support, making a sufficient prima facie case for an order in the terms of the notice. Order made where the defendants had previously been compelled to produce documents and make full discovery, though during a five years' litigation they had never before taken any step to obtain such discovery from the plaintiff. M'Intosh v.

G. W. Ry., 16 Jur. 989.
Sect. 20 of the 15 & 16 Vict. c. 86, was intended to give power to a defendant to enforce discovery of what documents the plaintiff had, without cross-bill. Semble, however, that the hunguage of the section is inefficient for that purpose. Ib.

# c. Amending Bill, Effect of.

On a motion for production of documents, it is for the plaintiff to shew from the admissions in the answer that the documents relate to the contents of the bill as it stands when the motion is made. And therefore, where, after an answer admitting possession of certain documents relating to the matters mentioned in the bill, or some of them, the plaintiff amended his bill by striking out part of it, and then moved upon that answer, the motion was refused. Haverfield v. Pyman, 2 Ph. 202.

A plaintiff does not, by obtaining an order to amend, between the time of giving notice of a motion for the production of documents and its being heard, deprive himself of his right to their production. Chidwick v. Prebble, 6 Beav. 264;

production. 12 L. J., Ch. 338; 7 Jur. 294.

Order for production made, on admissions in an answer filed prior to the amendment of the bill, but which did not vary the case. Reynell v. Sprye, 11 Beav. 618.

The effect to be given to the answer to an original bill, after such bill has been varied by amendment. Att.-Gen. v. Thompson, 8 Hare, 118.

The bill stated that the defendant, a stockbroker, had converted old 33 per cent. stock, which he had received as the attorney for the plaintiff, to his own use, and prayed a re-transfer. The defendant, in answer, said that, on the dissolution of a partnership between him and H. W., and formation of two new establishments for carrying on the business of brokers, he, by the directions of the plaintiff, and other customers of the old firm, transferred to H. W. a large specified sum of like stock, in which was included the stock belonging to the plaintiff and the other customers of the old firm who were purpose of an application for the production of similarly circumstanced. The plaintiff amended his bill, stating the defence as a pretence, and interrogated as to the quantity of stock vested in the old firm at the time of the dissolution, and the quantity that belonged to each of the customers of the old firm at that time, and the uame of and quantity of stock belonging to each of them, and the uame of and quantity of stock belonging to the customers of the old firm who transferred their business to H. W., and the same of those who continued their business with the defendant:—Held, that the defendant was bound to answer the interrogatories so far as they related to the old 3½ per cent, stock, but not as to other stocks. Flanagua v. Williams, 2. Jones, 557.

A plaintiff filed a bill in the Court of Exchenger for an account of tithes, and for discovery and relief. The defendant, being an infant, put in his answer by his guardian. The answer set up an immemorial payment in fleu of tithes, but did not make the required discovery. When the defendant came of age, the plaintiff filed a supplemental bill against him, alleging the existence of new facts, and praying for discovery:—Held, that such bill, so far as it sought discovery as to supplemental or newly-discovered matter, and the unanswered statements in the original bill, could be supported. Waterford (Marquis) v. Knight, 3 Cl. & F. 270; 9 Bli. (X8.) 307.

Where, after a defendant has made a sufficient affidavit as to documents, the plaintiff amends his bill, introducing new marters, he is cutitled to have from the defendant a further affidavit of documents as to the amendments. Warden v. Peddianton. 32 Beau. 33.

# d. Privilege, how Claimed.

Where a bill seeks discovery of matter that the defendant is not obliged to answer, he must take the benefit of it by demurrer. Selby v. Selby, 4 Bro. C. C. 11.

Where a bill charges a defendant with acts which would subject him to a criminal presention under a strutue, the defendants need not plead the statute, but may demur to the bill. Flowing v. 8t. John. 2 Sim. 181.

Plea that the discovery will subject the defendant to penalties, does not require the support of an answer, as a plea of purchase for valuable consideration without notice does, as to facts from which notice is inferred. Cluridge v. Houre, 14 Ves. 59.

Plaintiffs having brought au action against the defendant to recover payments made for insuring lottery tickets, prayed a discovery and account, offering to allow payments made by the defendant; as the defendant could not have that advantage at law, a denurrer was overruled. Brandon y. Johnson. 2 Ves. J. 516.

An objection to the production of documents must be properly raised by the defendant's answer, where the bill seeks their production. Hunter v. Capron, 5 Beav. 93.

Where defendant demurred generally to bill for discovery, as to whether he had not deeds, &c., in his possession, destructive of his title, there being parts of the bill which, whatever should be the fate of the demurrer, ought to be answered, and the demurrer was, on that account, overruled, the court gave leave to withdraw and demur particularly, and answer on payment of costs, as between party and party. Whyman x, Legh, 6 Price, 88.

# e. Consequences of Non-Compliance.

Attachment, —On a motion for an attachment for refusal of production and inspection of documents, pursuant to order, or for immediate inspection, the defendants objecting that the documents contained passages improper for inspection, the Loud Chamcellor refused the application, but directed the defendants to pay the costs of it. Jones v. Powell, I Swaust, 535. See Editerties v. Powl. Dick. 693.

An attachment had bear directed against a defendant for putting in three insufficient affidavits; but before it issued he had put in a fourth affidavit;—Held, that the court could not order the attachment peremptority to issue, nor direct the affidavit to be taken off the file for irregularity, as in the case of a fourth answer, which is governed by a general order. Harford v. Lloyd, 2 W. R. 537.

An order had been made upon the defendant for production of documents. The plaintiff went to the office of defendant, where he was shewn a letter-book, of which inspection was refused until counsel's opinion had been taken. The defendant subsequently asserted that he had lost take the book:—Held, that the plaintiff was entitled to an attachment against the defendant not-withstanding the circumstances of having gone to his office for the purpose of inspection. Moralington v. Keee, 4 w. R. 793.

Order to Enforce.]—The four-day order to enforce the production of documents in the master's office by a party to the cause, does not require personal service. Hobson v. Shearwood, 6 Beav, 63: 12 L. J., Ch. 447: 7 Jur. 687.

It is not irregular to obtain the four-day order for production of deeds before the certificate of the defendant's default has been filed. Askew v. Peddle, 10 Sim. 182.

Sequestration.]—Commission of partition, and partits to produce deeds, defendant in contempt for not producing, &c. Sequestration finally ordered. Trigg v. Trigg, Dick. 325; 1 Sim. & S. 274. n.

Sequestration for non-production of deeds discharged on payment of the costs, the party having been examined and denied knowledge of them. Pelham (Lard) v. Vewcastle (Duke), 3 Swanst. 29.

Receiver.]—Receiver granted against tenant for life, subject to term for ruising portions, he refusing to produce title-deeds necessary to raise such portions. Brigstocke v. Mansel, 3 Madd. 47.

Dismissal of Bill.]—After an order that the defendant should have a fortnight's time to answer, after the plaintiff had produced an instrument stated in the bill, fifteen months having clapsed without production, the plaintiff was ordered to produce the instrument on or before a day named, and production not being made the bill was dismissed with costs. Princew of Wales v. Literpuol (Eurl), 3 Swaust. 567; 2 Wils. Ch. 29; 19 R. R. 282.

Denial of Relief.]—Whether, after a verilict at law, in an action of trespass, the court will grant an injunction against future trespasses, in favour of parties who refused at the trial to produce documents necessary to a fair decision, quare. Freld v. Beaumont, I Swanst. 210.

Where defendant denies charge in bill pertz, 7 Ex. 67; 2 L. M. & P. 597; 21 L. J., Ex. of fraud and misconduct in partnership, and 25; 15 Jur. 1040. explains others away, and alleges his inability to put in a full answer, by reason that plaintiff withheld improperly the partnership's books, the court refused (but without prejudice to future application) the injunction prayed by the bill. Littlewood v. Caldwell, 11 Price, 97; 25 R. R. 711.

Costs.]-Plaintiff procured the usual order for defendants to produce certain deeds within a particular time, but did not take the usual steps to enforce it, on account of the defendants submitting to perform the order. Subsequently, the delants not having produced a particular deed, plaintiff gave notice of motion to produce the same, and for defendants to pay the costs of the application. Defendants immediately produced application:—Determine infinite and provided the deed, but refused to pay the costs of the application:—Held, upon motion by plaintiff for defendants to pay the costs, that plaintiff was entitled to the costs of the motion, made necessary by the non-compliance of defendants with the order, although the plaintiff had not taken the regular steps to enforce it. Mare v. Marsden, 4 Jur. 1079.

# f. Effect of Delay in Application.

Delay in moving for production of documents until after the defendant's witnesses are examined, and the exhibits marked, whereby the plaintiff may ascertain which are the defendant's exhibits, is no objection to the order being made. Branfort (Duke) v. Taylor, 2 Hare, 245.

The court has settled an order under the 15 & 16 Viet. c. 86, s. 20, requiring the plaintiff to make an affidavit of the documents in his possession, and to produce such as he does not thereby object to produce. A defendant is entitled of right to such an order for production, and a delay in making the application does not deprive him of it. Rochdale Canal Co, v. King, 15 Beav. 11; 9 Hare (App.) xlix. n.; 22 L. J., Ch. 604; 17 Jur. 1001.

## B. AT LAW.

# 1. AT COMMON LAW.

Where Interest. ]-Wherever an action is brought upon an instrument in which the defendant has an interest, the court has a common law jurisdiction to order the plaintiff to allow the defendant to inspect it. Doe d. Child v. Roe, I El. & Bl. 279; 22 L. J., Q. B. 102; 17 Jur. 136:1 W. R. 53.

In an action against the proprietor of a newspaper for the breach of a contract to employ the plaintiff as sub-editor, the defendant justified the dismissal of the plaintiff on the ground of his having, from improper motives, lent himself to the insertion of a garbled report of proceedings in a court of justice. The court refused to allow the plaintiff to inspect and take copies of the original report, and of the alleged garbled statement, he having no legal interest therein. Powell v. Bradbury, 2 C. B. 541.

Necessary to Action.]—The court has power, independently of 14 & 15 Vict. c. 99, to compel the plaintiff to produce for the defendant's inspection a document upon which the action is brought, where the defendant is a party to the brought, where the defendant is a party to the tion for so doing. Reid v. Coleman, 2 C. & M. document and has no copy of it. Bluck v. Gom- 456; 2 D. P. C. 354; 4 Tyr. 274; 3 L. J., Ex.

A defendant had a freehold interest in premises, and was also assignee of the lease of other adjoining premises, the reversion of which was in the lessor of the plaintiff. The defendant for some time previously to and until the end of the term, occupied the freehold and leasehold pre-mises together, and, as the lessor of the plaintiff stated, had obliterated the boundaries between On the expiration of the lease the lessor of the plaintiff brought ejectment to recover a portion of the land which he claimed as parcel of the leasehold, and alleged that the defendant claimed as his freehold; and he prayed to be permitted to inspect the lease, the assignment of the lease to the defendant, and the conveyance of the freehold to the latter, alleging that he believed that the parcels in the lease and in the conveyance of the freehold would help to make out his case :- Held, that he was entitled to inspect the lease (if he had no counterpart), and also the assignment, but not the conveyance of the freehold, as that deed did not prove any part of his title to the land he sought to recover. Doe d. Arery v. Langford, 1 B. C. C. 37; 21 L. J., Q. B. 217.

Held, also, that the lessor of the plaintiff might, even independently of the 14 & 15 Vict. c. 99, s. 6, upon an affidavit of the loss or nonexistence of the counterpart, inspect the deed creating the term. Ib.

The court will not in general grant an inspection of documents, nuless they are set out in the declaration, or the one party holds them as trustee or agent for the other. Goodliff v. Fuller, 14 M. & W. 4; 2 D. & L. 661; 14 L. J., Ex. 104.

The court would not, in the exercise of its discretionary power, compel a defendant to produce certain bills of exchange, on which an action was brought, and which were set out in the declaration, in order that he might inspect or take copies of them, on an affidavit by the plaintiff, stating that the defendant had obtained them from him by undue and fraudulent means, and which the defendant negatived by affidavits in general terms. Threlfull v. Webster, 7 Moore, 559; 1 Bing. 161: 1 L. J. (o.s.) C. P. 28.

A defendant is entitled under the common law jurisdiction of the court to have an inspection of letters which, in the course of a negotiation for taking a farm, he as agent for his brother had written to the plaintiff, but of which he had kept no copies, it being shewn that the claim in the action was founded upon such letters, and that the inspection was necessary for his defence thereto. Price v. Harrison, 8 C. B. (N.S.) 617; 29 L. J., C. P. 335; 6 Jur. (N.S.) 1345.

Copies. - Where a defendant makes an affidavit at judges' chambers, identifying a document, which is exhibited to him only and not filed, he will be compelled to allow the plaintiff to take a copy of that document, although it is sworn to furnish a defence to the action. Telibortt v. Ambler, 7 D. P. C. 674.

Where no Counterpart.]—Where there is an agreement between the plaintiff and the defendant, of which there is only one part, the party who has the agreement in his possession ought. when applied to, to give the other party a copy; and he has no right to impose terms as a condi138. S. P., Morrow v. Saunders, 3 Moore, 671; that he might discover what the alleged contracts 1 Br. & B. 318. See Doe d. Avery v. Langford, were. Whithourne v. Pettifer, 4 M. & Scott, 182.

If one part only of an indenture is exceuted, the court will compel the party having the action commenced against him by the other

party. Blakey v. Porter, 1 Taunt. 386. Where a lease is in the hands of a tenant, and it appears that no counterpart can be found, the court will permit the landlord to inspect and take a copy of the lease. Doe d. — v. Slight, 1 D. P. C. 163.

Where two parts of a lease were interchangeably executed, and the part in the possession of the plaintiff was lost, the court would not interfere the planners was ast, the court would not interfere to compel the defendant to permit the plaintiff to inspect and take a copy of that part which was in his possession. Woodcock v. Worthington, 2 Y. & J. 4.

Where a lease is executed by both lessor and lessee, and the lessee assigns it by way of mortgage, the lessor, having no counterpart, is entitled, on an ejectment brought for a forfeiture, to compel the mortgagee to allow an inspection, and give a copy of the lease. Doe d. Morris v. Roe, I M. & W. 207; I Gale, 367; I Tyr. & G. 545;

5 L. J., Ex. 105.

A lessee of a corporation elected to pay an increased rent, pursuant to the finding of a jury under 5 & 6 Will. 4, c. 76, and indorsed the finding of the jury on his part of the original lease. In an action for the increased rent, the lessee was compelled to produce his part of the lease for the inspection of the corporation, and to allow a copy of the indorsement to be taken; although it was admitted that the original lease was still in the admitted that the original tease was sent in the possession of the corporation, as well as the inquisition taken before the jury. Arandel Corporation v. Holmes, 8 D. P. C. 118; 1 W.

W. & H. 313. An annuity deed was prepared by R., as agent of both the grantor and the grantee; and there being no counterpart, was left in the hands of R., who received, and for several years paid over to the grantee, the amount of the anunity. R. ultimately absconded, and the deed came into the possession of the grantor on his redeeming the annuity two years after it was granted. In an action by the grantee against the grantor for arrears of the annuity, the court permitted the former to inspect and take a copy of the deed, to enable him to declare thereon, although it was sworn by the latter that R, was the agent of the grantce alone. Develoge v. Bouverie, 8 Bing, 1; 1 M. & Scott, 29; 1 L. J., C. P. 1.

Letter from Agent.]-A plaintiff declared on an agreement to employ him at the end of a The defendant pleaded the general issue, and that there was no memorandum in writing of the agreement as required by the Statute of Frauds. The plaintiff replied that there was such a writing :- Held, that he was bound to permit an inspection of it by the defendant, although it consisted only of a letter from his agent. Blogg v. Kent, 6 Bing. 614; 4 M. & P. 433; 8 L. J. (o.s.) C. P. 229.

Joint Contracts. J.—C., assignee of A., who had become bankrupt, sued B. in respect of certain contracts alleged to have been entered into by A. with the plaintiff on the joint account of A. Held, that he was not entitled to the inspection and B.; the court allowed B. to inspect the of a deed in the plaintiff's possession, by which books of A., in the hands of the assignce, in order it was suggested time had been given to the

Draft Agreement.]—A defendant, after settling a draft of articles of partnership with the plaintiff, custody of it to produce it for inspection, in an having engrossed and executed a deed, differing in some respects from the draft of the articles. the plaintiff refused to execute the deed; but having afterwards commenced an action for breach of agreement to take him into partnership, he moved to be at liberty to inspect and copy the deed: the court refused to order such inspection. *Rateliffe* v. *Bleasby*, 3 Bing. 148; 10 Moore, 523; 3 L. J. (o.s.) C. P. 208.

But the court granted the application as to the droft Ih

Log-Book, -In an action on a charter-party against charterer, the court refused to compel the plaintiff to produce and allow the defendant to inspect the ship's log-book. Rundle v. Beavmont, 4 Bing. 537; 1 M. & P. 396; 6 L. J. (O.S.) C. P. 91.

As against a Trustee. |- The court will not compel a person not a party to the suit to produce for inspection a deed which he holds as a mere trastee, where the individual praying the inspection is not an executing party to the deed, though he claims to be interested in it, and though he may, by operation of law, be affected by it. Cooks v. Nash, 3 M. & Scott, 164; 9 Bing, 723; 2 L. J., C. P. 129.

Inspection was refused to a plaintiff in re-plevin, of a deed to which he was no party, assigning to the avowant the reversion of the demised premises. Brown v. Rose, 6 Tannt. 283.

The court will not compel a party to allow the inspection of his title-deeds, and give copies to a person who supposes that such deeds contain a reservation in his favour of manorial rights, unless it appears that the party holds the deeds as trustee for the applicant. Pickering v. Noyes, 2 D. & R. 386; I B. & C. 262.

Other Cases. ]-The court will compel a defendant in an action on a covenant in a deed, which he holds, to produce it to the plaintiff for the purposes of the cause; it matters not that the plaintiff seeks for inspection for the purpose of discovering some defect in the deed. King v. King, 4 Tannt. 666.

Where two parts of an indenture of charterparty were supposed to have been interchangeably executed, and the part of which the master of the chartered vessel had the custody was lost at sea with the ship, the court would not compel the charterer, being sued thereon, to grant inspection and a copy of the other part, for the purpose of the plaintiff's declaring with certainty. v. Brown, 1 Marsh, 610; 6 Taunt, 302.

In an action by the owner of a ship against the proprietor of goods on board, for contribution in respect of the general average loss, the defendant is entitled to an inspection of the statement of the general average, but not of the documents from which it has been drawn up. Twizell v. Allen, 5 M. & W. 337; 7 D. P. C. 496; 8 L. J., Ex. 269: 3 Jur. 484.

When an action on certain bills of exchange was brought against a defendant, who pleaded that he was liable, if at all, as a surety only :-Held, that he was not entitled to the inspection principal debtor, but to which deed the surety was no party. Smith v. Winter, 3 M. & W. 309: 6 D. P. C. 386; 1 H. & H. 45; 7 L. J., Ex. 79.

The court refused to set askle an order made by a judge requiring the plaintiff to permit the defendant to inspect and take a copy of a promissory note on which the action was brought, although it appeared that no special ground was shewn for the order at the time that it was made. Woodner v. Decerence, 2 Man. & G. 7.58; 3 Scott (N.B., 224; 9 D. P. C. 572; 10 L. J., C. 2075. S. P., Cottis v. Cortis, 3 M. & Scott, 819.

The court refused to compel the plaintiff to the objectivith the master an agreement upon which he was suing, on a suggestion by the defendant that the signature theoret, numporting to be his signature. Was a force by: but permitted the detendant and his witnesses to have inspection of the agreement in the hands of the plaintiffs of the property of the property of the plaintiffs (8 Scott (S.A.) 834; 1 D. & L. 333; 6 Man. & G.

The court refused to allow a plaintiff to inspect a document in the hands of the defendant, alleged by his (the defendant's) attorney to be signed by the plaintiff, and to afford a perfect defence to the action, upon an affidiavit of the plaintiff, that, if such document existed, and purported to be signed by him, the signature was a forgery. Jessel v. Millengen, 1 M. & Scott, 605. A creditor has a right to domand inspection,

A creditor has a right to demand inspection, at common law, of the written assents to a deed under the Bankruptey Act of 1861, s. 192; they being by virtue of the stante part of the deed itself. Andrew v. Pell. L. R. 2 C. P. 251.

On New Trial.]—Where a deed has been produced and read on a trial by one party, the court will oblige him to permit the other party to inspect that deed in case of a new trial. \*\*Identity v. \*\*Pigott, 1 D. P. C. 219; 5 M. & P. 252; 7 Bing, 400; 9 L. J. (O.S.) C. P. 120.

The court refused to admit a plaintiff to inspect and take a copy of a deed in the hands of the defendant, for the purpose of enabling him to shew cause against a rule for a new trial, 1Food v. Morewood. 2 Scott (N.R.) 204; 9 D. P. C. 44; 10 L. J. C. P. 229.

For the Purpose of Stamping Document.]—If one part of a document has been lost, the party holdling the other part, or his attorney fit he holds it, may be compelled to produce it at the stamp-office, to be stamped, though not held on any trust for the party applying. Neale v. Successy, 1D. P. C. 314; 2 C. & J. 278; 2 Tyr. 318; 1 L. J., Ex. 118.

If there are two parts of an agreement between landlord and tenant, in an action upon the agreement by a purehaser of the premises, the court will not compel the tenant to produce his part to be stamped, unless such purehaser has applied to the vendor, or used every endeavour without success to find him. Travis v. Collins, 2 C. & J. 625; 2 Tyr. 726; 1 L. J., Ex. 244.

The courts will not, at the instance of the plaintiff, compel a defendant to produce an instrument to be stamped which is in his hands, and to which the plaintiff is neither an instrumentary party nor a party in interest. Taylor v. Osborne, 4 Taunt. 150:

The court will not compel a defendant to produce, for the purpose of being stamped, an agreement between himself and a third person, although it appears by an affidavit of the third

person that the act complained of by the plaintiff arose out of that agreement. Laurenea v. Howker, 5 Bing. 6; 2 M. & P. 9; 6 L. J. (o.s.) (C. P. 193.

Where a defendant surreptitionsly obtained by bissession of an unstamped agreement, excented by himself and the plaintiff (thereby preventing the plaintiff from fixing a stamp as he had intended in twenty-one days after execution), and then swore that he had lost the agreement, the court ordered that he should produce a copy in his possession to the plaintiff, and that if the plaintiff produced that eopy stamped at the trial, the defendant should be precluded from producing the original. Bousfield v. Godfrey, 5 Bing, 418, 2 M. & P. 771; 7 L. J. (0.8.) C. P. 158; 30 R. R. 683.

In an action founded upon a document in which both parties have an interest, and which was in the possession of one, but is said by him to be lost, a judge cannot order that if such party does not produce the document to be stamped, a copy duly stamped shall be read at the trial, and that the original shall not then be produced on the other stide, nor objection taken to the want of a stamp on the original. The centre rescribed such an order after it had been enforced by the judge at mist privas and made a rule of court. Lunkin v. Humitton, 16 J. B. 187.

ranco court. Bunkow V. Bunkow, 15 Q. S. 181.
The defendants contracted with the plaintiff to pay him certain sums per horse power, for all engines manufactured for them on the plaintiff's principle, the money to be paid on the contract for manufacturing the engines being entered into. In an action brought upon that contract:—Held, that the plaintiff hald a right to the production of a letter written by a third party to the defendants, containing evidence of a centract to manufacture an engine, for the purpose of lawing it stamped. Hald v. Bainbridge, 3 D. & L. 92; 14 L. J., Q. B. 289.

When Doouments not admitted to be Gennine.]—Where, in an action of contract, it appears that documents, evidencing the contract sized upon, are in the possession of the plaintiff, the defoutant is entitled to inspect them, although he does not admit their gennineness. Benjimin v. Szades, fr. R. 6 C. L. 16. And see Wilson v. Thornburg, 48 L. J., Ch. 356; L. R. 17 Eq. 517; 22 W. R. 509.

# 2. Under 14 & 15 Vict. c. 99, s. 6.

#### a. Effect of Statute.

On Common Law Jurisdiction.]—The 14 & 15
Vice. 99, s. 6, has not taken away the jurisdiction previously possessed by courts of common law, to order the inspection and copy of documents in the hands of an adverse party. Hunt

Materiality. — The power given by the statute extends only to the production of instruments which can be shewn to be material and relevant to the proof of such issues as lies upon the applicant, and not to the production of an opponent's books for the mere purpose of enabling a party to search them, with the view of discovering anything favourable to himself. \*\*Rayner\* v. Almaese, 2 I. M. & P. 055; 21 L. J. Q. B. 68; 15 Jur. 1069. S. P., Alexeerthy or Galexorthy v. Norman, 21 L. J., Q. B. 58; 17 J. 17 U. 1061, n.

Where it reasonably appears upon affidavit

that a document in the possession of one party is material in support of the case of the other pairy, or to contradict the ease set up in answer, an inspection of such a document will be granted. Scott v. Walker, 2 El. & Bl. 555; 22 L. J., Q. B. 404; 17 Jur. 916. party, or to contradict the ease set up in answer,

The powers of ordering the inspection of documents given by statute to the courts of common law, will not be exercised except for the purposes of assisting a bonâ fide suit, and will not be exercised to assist a plaintiff in another action against another person. Temperley v. Willett, 6 El. & Bl. 380; 25 L. J., Q. B. 259; 2 Jnr. (N.S.)

519 : 4 W. R. 546.

The court refused to grant an order for the inspection of a document upon an affidavit made by the defendant which stated that the plaintiff's claim was for money lent to the defendant's wife, and that the first intimation which the defendant received of such claim was after the death of his wife, but on the day of her death, when the plaintiff shewed the defendant an account-book, which the plaintiff stated contained accounts between himself and the defendant, and in which the defendant believed the sum claimed was charged against him, and that he was desirous of knowing whether the money was advanced before or after his marriage with his deceased wife, Wright v. Morrey, 11 Ex. 209; 24 L. J., Ex. 259.

Inspection will only be allowed by the court where it is reasonably shewn that the documents sought to be inspected really exist, and are relevant to the case of the party seeking the inspection. Houghton v. London and County

Assurance Co., 17 C. B. (N.S.) 80. Upon a motion for an inspection of the plaintiff's books, which the defendant alleged to be necessary, for the purpose of establishing a setoff in respect of commission which he claimed on sales effected by the plaintiffs through his introduction : the court granted the rule, although the plaintiffs swore that there was no agreement to allow the defendant any commission; but held, that the plaintiffs were entitled to seal up all those parts of the books which they pledged their oath that the defendant had no interest in. Bull v. Clarke, 15 C. B. (N.S.) 851.

Title Deeds.]—Inspection, under the 14 & 15 Vict. c. 99, s. 6, can only be had in a case where a discovery could have been obtained by filing a bill in equity. Gomm v. Parratt, 3 C. B. (N.S.) 47; 26 L. J., C. P. 279; 3 Jur. (N.S.) 1150; 5 W. R. 882.

A demandant in dower is not entitled to inspection of the deed under which the property out of which she claims to be endowed was conveyed away by her husband, as against a bonâ tide purchaser for value without notice of the marriage, the balance of authorities being assumed to be in favour of the position that a bill for discovery could not be sustained in such a case. Ib.

Since the 15 & 16 Vict. c. 76, ss. 55, 56, abolishing profert, the court will order inspection of a deed relied on by a defendant in his pleaan a deed renea on by a derendant m ins piea, though it is a disclosure of his title. Penarth Harbour Co. v. Cardiff Waterworks Co., 7 C. B. (N.S.) 816:29 L. J., C. P. 230; 6 Jur. (N.S.) 942; 1 L. T. 551; 8 W. R. 215.

When a party pleading justifies under a deed the opposite party is entitled to an inspection and copy of the deed, although he is not a party to the deed and is not interested in it. Ib.

Disclosing Case, -It is no objection to an order for the inspection of a document in the possession of a defendant, that its production will disclose his case, provided that it is satisfac-torily shewn that it also supports the plaintiff's case. London Gas Light Co. v. Chelsea Vestry, 6 C. B. (N.S.) 411; 28 L. J., C. P. 275; 5 Jur. (N.S.) 469.

Neither by statute nor at common law has the court any power to grant an order for the in-spection of documents to a plaintiff who seeks it, not in order to support his own case, but to see whether any, and if so, by what means any, defence can be made out against him. Shadwell v. Shadwell, 6 C. B. (N.S.) 679; 28 L. J., C. P. 315; 5 Jur. (N.S.) 1410. S. P., Reynoldson v. Morton, 2 L. T. 462.

With a view to New Trial. ]-The court will not grant an inspection of documents produced at a trial, merely to enable the losing side to see whether they will furnish him with grounds upon which to move for a new trial. Pratty. Goswell, 9 C. B. (N.S.) 706; 3 L. T. 669.

Where Fraud alleged. |-In an action for a breach of contract in not accepting goods, to which the defendant pleaded fraud, a judge having made an order for the inspection of correspondence between the plaintiff and the consignors of the goods and the plaintiff and his brother, after the contract and breach :--Held, that the order was properly made in the exercise of the discretion of the judge. Colman v. Truman, 3 H. & N. 871; 28 L. J., Ex. 5.

# b. In what Actions.

Mandamus.] — A mandamus, the object of which is to enforce a civil right, is a proceeding in aid of which, under 14 & 15 Vict. c. 99, s. 6. a judge may grant an order for the inspection of documents by either of the litigant parties, when the return to such writ is traversed. Reg. v. Ambergate Ry., 17 Q. B. 957; 16 Jur. 777.

Breach of Promise of Marriage.]-In an action for a breach of promise of marriage, the court will grant leave to the defendant to inspect his letters to the plaintiff, written between ascertained periods, upon an affidavit that the letters relate to the matters in question in the cause, and are in the plaintiff's custody, and that the defendant is advised and believes that he has a good defence on the merits, and that the production of the letters is material and necessary to support his case. Stone v. Strange, 3. H. & C. 541, 34 L. J., Ex. 72; 11 Jur. (N.S.) 164; 11 L. T. 717; 13 W. R. 350.

In an action for breach of promise of marriage to which the defence is a simple denial of the promise, the court will on motion of the plaintiff direct an inspection and interchange of copies of the letters which have passed between the par-Chute v. Blennerhasset, 16 Ir. C. L. R.

App. ix.

But the court refused to allow the defendant to inspect his letters sent to the plaintiff, upon an affidavit that the promise, if any, was contained in the letters. Hamer v. Sowerby, 3 L. T.

Libel and Slander.]—In an action in which the declaration stated the libel to have been contained in various letters sent to several persons, the defendant, his attorney, and witnesses were allowed to inspect and take, by photograph or otherwise, fac-simile copies of the several letters and envelopes thereto. Dazeny v. Pemberton, 11 C. B. (N.S.) 628; 8 Jur. (N.S.) 891.

1008, 11 C. D. (S.S.) 202; 5 JM. (S.S.) (S.S

In an action for libel, where there is a plea of justification, inputting to the plaintiff dishonesty while in the employ of the defendant, the plaintiff will be allowed inspection of statements of accounts furnished by himself, of noneys received in the course of such employ, and of letters from himself to the defendant relating thereto, and of entries in the defendant relating thereto, and of entries in the defendant's books of moneys received from him, so far as they may be material to disprove charges contained in the plea; or if the plea is general, so far as they may relate to charges specified in particulars; and the defendant will be compelled to delives such particulars. Cultins v. Yutes, 2T L. J., Ex. 150. See Cartis v. Luttis, 8 M. & Sooti, 810.

In Insurance and Shipping Cases.]—In an action on a policy of marine hisamunee for a constructive total loss, the defendant is cuttitled to an inspection of all papers in the possession of the plaintiff relative to the matters in issue, including letters between the captain and the plaintiff. Hayner v. Ribon, 6 Ib. 8, 888; 35 L. J., Q. B. 50; 14 W. R. 81.

In an action upon a fire policy, the court made an order for the production of communications which passed between the company and their agent by whom the insurance was effected, and between the company and other offices who shared in the risk, relative to the existence my value of the property about to be insured. Wielley v. Pole, 14 C. B. (N.S.) 538; 32 L. J., C. P. 263.

But they refused to allow the plaintiff to inspect the reports and list of salvage made out for the company by their own officers. Ib.

In au action by a consignee of goods against shipowners, for damage sastanded in consequence of the unseaworthiness of the ship, the contrade an order for him to inspect and take copies of certain surveys made on a ship, in a foreign port, a general average statement, the ship-wright's bill for repairs done to the ship, the capitain's protest, and the logbook, as being dooments proximately connected with the matter in issue. David v. Lond, 9 C. B. (N.S.) 716; 3 L. T. 700; 9 W. R. 313.

#### c. Affidavit.

Primâ facio Casa.]—Under the statute, where an inspection is litigated, the party applying for it must shew by affidavit that an action or other proceeding is pending, and also circumstance satisficient to satisfy the court or judge that there are in the possession or under the control of the opposite party certain documents relating to such action or proceeding; a primâ facie case, calling for an answer, must at least be stated in this respect. Hant v. Hewitt, 7 Ex. 286; 21 L. J., Ex. 210: 16 Ju., 503.

To this affidavit the opponent may answer, by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is for any sufficient reason privileged from producing them; or he may show on affidavit that the part encetted does not in any way relate to the plaintiffs case. Lb.

In an action against a director of a company completely registered, to receive money due for services rendered to the company, the plaintiff made affidavit, that there was, as he believed, in the possession of the company and of its directors, a book or books containing minutes of the resolutions, orders and proceedings of the directors of the company and of the committees thereof; and that he was advised that it might be necessary that the minutes or some parts thereof should be adduced on the trial of the cause as evidence on his part; that without an inspection and a copy thereof he could not safely proceed to trial; and that he had no copy thereof in his possession or control, or any certain information as to the contents :- Held, that this affidavit was insufficient to obtain an inspection of those documents under 14 & 15 Vict. c. 99, s. 6. Papper v. Chambers, 7 Ex. 226: 21 L. J., Ex. 81; 16 Jur. 19. Sec Sneider v. Mangino, 7 Ex. 229; 21 L. J., Ex. 121; 16 Jur. 153.

## d. Costs.

Rule as to.]—There is no general rule that the costs of inspection of documents must be borne by the party seeking it, and that the costs of obtaining an order for the inspection are costs in the cuse; but the court will, in its discretion, order both the costs of the application and inspection to be, in any event, the costs in the cause of the party called upon to grant the inspection. Scilorit v. Ruck, 4 H. &. N. 468; 1 F. & F. 546; 7 W. R. 488.

# e. Order to Produce and Inspect.

Extracts.]—Under a judge's order to produce papers and give copies, it is sufficient to give extracts of those parts of letters which are relevant to the subject. Clifford v. Taylor, 1 Taunt. 167.

Conclusiveness of Affidavit.]—When an inspection of documents is asked, the court is not bound by the denial of the party in whose possession they are that they relate to the case of the adversary; but if the court can collect from the whole of the materials before them that, in fact, the documents, although they may relate to the subject-matter of the suit, are not such as good to establish the case of the party asking inspection, they will refuse inspection. Chartered Bask of Isdain, Australia, and Chinav. Lioh, 4 B. & S. 73; 32 L. J., Q. B. 300; 8 L. T. 454; 11 W. R. 830.

Place.]—Where an application is made for inspection of documents under the statute, a place for the inspection should be named. Rogers v.

Turner, 21 L. J., Ex. S.

Issue need not be joined before the order is

g applied for. Ib.
Form of rule to inspect. See Scatt v. Walker,
2 El. & Bl. 555; 22 L. J., Q. B. 404; 17 Jur.

3. UNDER 17 & 18 VICT. C. 125, S. 50.

When Granted. - The court will not order a defendant to answer on affidavit what documents he has in his possession or power where he has furnished the plaintiff with an abstract of an account, and informed him that it was taken from a particular book which contained all the entries relating to the matters in dispute between them. Bray v. Finch, 1 H. & N. 468; 26 L. J., Ex. 91; 5 W. R. 148.

At what Stage.]-The court has no power to grant a rule to inspect documents when no cause or proceeding in court has been commenced. Saddlers' Co., In re. 31 L. J., Q. B. 62: 10 W. R. 87.

Except under special circumstances the court will not, where by the indorsement on the writ of summons it appears that the action is to recover principal and interest on a mortgage deed, order the plaintiff, before declaration, to allow the de-fendant inspection of the deed; for non constat that the plaintiff may declare upon the deed, and it may turn out that the application is premature. The fact that the defendant executed the deed under the advice of the plaintiff's attorney, without any copy of it, and is ignorant of its effect or contents, is not sufficient to justify the application at so early a stage in the cause. Jones v. Hargreaves, 29 L. J., Ex. 368.

An application for the discovery of documents may be made by a defendant before plending. Forshaw v. Lewis, 10 Ex. 712; 1 Jur. (N.S.) 263.

Against Directors of Companies. - In an action against a company, the court, or a judge, has power under 14 & 15 Vict. c. 99, s. 6, and 17 & 18 Vict. c. 125, s. 50, to order a director of the company to allow inspection of their doenments in his possession. Lucharme v. Quartz Rock Muriposa Gold Mining Co., 1 H. & C. 134; 31 L. J., Ex. 335; 6 L. T. 502; 10 W. R. 565.

An affidavit of a director, in answer to an attachment for disobedience, of such an order, stating that he had not, on the day the order was made, or at any time since, the documents in his possession, custody, or power; and that ever since the order was made it had been out of his power to comply with it, is insufficient; and the court ordered the director to be examined vivâ voce before a master. S. C., 31 L. J., Ex. 508: 10 W. R. 799.

Against Attorney of Company. ]-The aftorney of a body corporate is not an officer thereof within the meaning of the Common Law Procedure Act, 1854, s. 50, and therefore cannot be compelled to make a discovery of documents in an action to which the body corporate is a party. Brown v. Thames and Mersey Marine Insurance Co., 43 L. J., C. P. 112.

Affidavit to Obtain.] - An application for a discovery of documents must be inade upon an auxiliary to relief or remedy at law. Lempster affidavit of the party to the cause. Christopherson v. Latinga, 15 C. B. (N.S.) 809; 33 L. J., C. P. 121; 10 Jur. (N.S.) 180; 9 L. T. 688; 12 W. R. 410.

An affidavit by his attorney is not sufficient, even though the party is absent beyond seas. Herschfield v. Clark, 11 Ex. 712; 25 L. J., Lx. 113 ; 2 Jur. (N.S.) 239.

But, in the case of a corporation aggregate, the

v. G. W. Ry., 16 C. B. (N.S.) 761; 33 L. J., C. P. 307; 10 Jur. (N.S.) 804; 10 L. T. 722; 12 W. R. 1059.

An affidavit of belief that some documents (as letters or entries) are in the possession of the opposite party, which relate to the subject-matter of the snit, and of which it is material that the applicant should have a discovery, is insufficient, but the affidavit must describe the documents, that the court may see that they are documents "to the production of which he is entitled for discovery or otherwise"; and it must state or shew reasonable grounds for belief that such documents are in the possession or power of the opposite party. Thompson v. Robson, 2 H. & N. 412; 26 L. J., Ex. 367; 5 W. R. 728. S. P., Hewett v. Webb, 2 Jur. (N.S.) 1189; 5 W. R. 73.
To entitle a party to discovery he must shew by affidavit that his adversary is in possession of

some one document to the production of which he is entitled. Erans v. Louis, L. R. 1 C. P. 656. The court will not, in an action against an attorney for negligence, make an order for the production of his books, upon a mere suggestion of the client's belief that they contain entries

relating to the matters complained of. Ib. Upon an application for discovery the affidavits should identify the documents of which discovery is sought; a mere vague suggestion that some documents exist will not suffice. Woolley v. Pole, 14 C. B. (N.S.) 538; 32 L. J., C. P. 263.

In order to support an application to inspect, it is sufficient if the party applying shows that the documents sought to be inspected are in the possession, custody, or control of the other party, and are material to substantiate his own case; the effect of the evidence to prove that case being a matter to be decided at the time of the trial, and forming no ground for determining whether the inspection should or should not be ordered. Riccard v. Inclosure Commissioners, 4 El. & Bl. 329; 8 C. L. R. 119; 24 L. J., Q. B. 49; 1 Jur-(N.S.) 495; 3 W. R. 113.

Setting up Privilege.]—It is no answer to an application for an order for a discovery of documents that they are privileged from production; if such is the fact, that must be shewn in the affidavit made in obedience to the order. Firshaw v. Lewis, 10 Ex. 712; 1 Jur. (N.S.) 263.

Equitable Jurisdiction not affected. ] - The 50th section of the Common Law Procedure Act, 1854, under which the production of documents ean be enforced by summons, does not affect the jurisdiction of courts of equity. Makepeace v. Rogers, 5 N. R. 499.

#### III. PRIVATE DOCUMENTS IN WHICH APPLICANT HAS AN INTEREST.

Heir or Issue in Tail.]-Heir in tail refused discovery of settlement unless he wants it as v. Pomfret, Ambl. 154; Dick. 238.

But if for purposes of mortgage then he may

have discovery. Or marriage. Ib.

Negative plea that plaintiff is not heir, as alleged, should be accompanied by an answer to facts charged as evidence of plaintiff's title, and, therefore, where the bill charged that defendant was in possession of deeds and writings, to prove the plaintiff's pedigree, he was entitled to ffidavit may be made by its attorney. Kingsford | discovery, though not of all deeds and writings.

in defendant's custody or power, of all such deeds and writings as, on the face of them, connected the plaintiff with the heirship, and to a full and circumstantial answer so far as the defendant knew, or had heard and believed, the particular pedigree set out in the plaintiff's bill. Nolan v. Shannou, 1 Moll. 168.

Where the heir admits by his answer, that he is testator's heir, and that the will is duly executed, and to the purport set forth in the bill, he shall not be entitled to an inspection of the title deeds. Patter v. Patter, 3 Atk. 719; 1 Ves. 274 : Ambl. 98.

An heir-at-law has no equity except to remove incumbrances in the way of his legal right; he cannot call for an inspection of deeds in possession of the devisees. Shaftesbury (Lady) v. Arrow-smith, 4 Ves. 66: 4 R. R. 181.

Bill by heir in tail against devisees; on motion an inspection was ordered of all deeds of settlement admitted to be in the possession of the defendants creating estates in tail general, but

no farther. 1b. Every heir has a right to inquire by what means and under what deed he is disinherited, and before he has established his title at law, he may go into equity to remove terms out of the way which would prevent his recovering there, and may also have a production and inspection of deeds and writings in equity. Harrison v.

Southeate, 1 Atk, 539 A peer disinherited by his ancestor is entitled to the favour of the court, and on bill and answer to have the family deeds brought before the master, in order to see whether anything can be discovered for his advantage. Suffolk (Earl) v.

Howard, 2 P. W. 177. Bill of discovery in aid of an ejectment by a plaintiff, claiming as heir-at-law, against the devisees of a feme covert, alleging the absence of any power of appointment in such feme covert, or that it was never duly exercised by her. The only issue raised on the pleadings being on the validity of the appointment by the devise; the plaintiff was held not to be entitled to the production of the deeds under which the defendants alleged that the power of appointment was given to their devisor, although it appeared that by such deeds the estate was limited to her heirs and assigns in default of appointment. Benutt v. Glossop, 3 Hare, 578.

The right of the heir-at-law, and that of the heir in tail, to production of documents upon bill for discovery in aid of an action of ejectment, distinguished. Rumbold v. Forteath, 2 Kay & J. 748; 3 Jnr. (N.S.) 657.

The principle upon which, in such a suit, the heir in tail is entitled to inspect deeds of settlement creating estates in tail has no application to a suit by the heir-at-law. Ib.

But in a suit of this nature the heir-at-law is entitled to production of all such parts of deeds and writings admitted by the defendant as relate to or tend to shew his pedigree. Ib.

Form of an order for this purpose. A bill alleged the plaintiff to be entitled under wills which it set out as tenant in tail; it alleged that the defendants claimed under the same will as tenants in fee. The question as raised by the pleading was one of pure con-struction of these wills. The bill also alleged the plaintiff's pedigree as tenant in tail. The answer ignored the pedigree, but admitted the possession of documents tending to evidence that pedigree :- Held, that the plaintiff was entitled cannot compel production. Ib.

to production of them. Wright v. Verna 1 Drew, 344; 22 L. J., Ch. 447; 1 W. R. 138. Wright v. Vernon.

The plaintiff is entitled to a production of such papers only in which he has a common interest with defendant, Burton v. Neville, 2 Cox, 242.

Tenant for Life and Remainderman. ]plaintiff claimed, by virtue of a remainder in tail expectant on the tenant in tail's dying without issue, and was the heir male of the family: the defendants were sisters and heirs general of the tenant in tail and by their answer shewed that their brother, the tenant in tail, suffered a recovery, declaring the use to himself in fee, and referred to the deeds in their enstedy; the court ordered, before the hearing, the defendants to leave with their clerk in court the deeds making the tenant to the precipe, and leading the uses of the recovery. Bettison v. Furrinadon. 3 P W 363.

A son is not entitled to discovery of settlement against his father of course, but must shew a reason of it. Lemnster v. Pomfret, Ambl. 154; Dick 238

Semble, bill does not lie by purchaser from contingent remainderman, for inspection of titledeeds in hands of tenant for life. Noel v. Ward,

1 Madd, 322 : 16 R. R. 229. A tenant for life in remainder expectant on the death without issue male of a defendant, a tenant for life in possession aged about fifty-nine and numerried, having incumbered his reversionary interest, applied to the defendant for particulars of the estates devised by the will which created the settlement, and of the estates since purchased. The will contained devises and bequests of freehold and leasehold estates in strict settlement, and directed the purchase, with the residue of the personalty of other freehold estates, to be settled to the same uses. The defendant refusing to produce the deeds, on the ground that it was undesirable that facilities should be afforded for any further incumbrance of the reversionary life-interest, the bill was filed for an account, and for production of the deeds and discovery. The defendant demurred to the latter portion of the bill, but the demurrer was overruled. He then filed an answer setting forth a list of the deeds, but without giving particulars of the property. The interrogatories had asked for a statement of the acreage rental and particulars. Exceptions to the answer allowed. Beynon v. Morris, 10 L. T. 710.

When the title of a remainderman is clear, the court will, at his instance, compel the remainderman to produce the title deeds; but if his title is not clear, the court will not, incidentally, decide in favour of the remainderman's title to the estate, in a suit merely for the production of the title deeds. Pennell v. Dysart (Earl), 27 Beav. 542.

Any remainderman whose estate is vested, may maintain a bill against the tenant for life mannam a bu against the tenant for fife for the sole purpose of production and inspection of the muniments of title. *Ducis v. Dysact* (*Eurl*), 20 Beav, 405; 24 L. J., Ch. 381; 1 Jur. (8.8), 743; 3 Eq. R. 599; 3 W. R. 393.

If the tenant for life suggests that the purpose for which production is required is improper, the onus is on him to shew it. 1b.

This right, however, only exists when the title of the remainderman is undisputed; for, if there is a reasonable cause for litigating his title, he

ment, brings a bill for discovery of the deed, and posited with the clerk of the peace, among the it appearing the entail was discontinued, the court would not relieve him. Kelley v. Berry, 2 s. 8. Rex v. Staffordshire JJ., 1 N. & P. 260; 6 Vern. 35.

Testator devised a term for years, and all his personal estate to A., an infant; and if A. died during his infancy, and his mother should die without any other child, then to B. A. died during his infancy, though the mother was living and might have a child, yet the court aided B. the devisee over, by directing an account and discovery of the estate, in order to secure it in case the contingency should happen. Studholme v. Hodgson, 3 P. W. 300.

Landlord and Tenant. ]-A party interested in documents in the custody of his adversary is entitled to their production. Inman v. Hodgson, 1 Y. & J. 28.

Whenever a plaintiff has established an interest in any instrument in the hands of the defendant, he is in general entitled to a production of it; and in this case, the court thought the plaintiff had established a sufficient interest in the documents required, and ordered a production of them. Smith v. Northumberland (Duke), 1 Cox, 363.

The landlord having lost his counterpart has a right to a discovery from his tenant, and the tenant refusing to permit a copy of his lease to be made on the landlord's application, and at his expense, shall pay the costs of the bill of discovery. Perry v. Newenham, 1 Moll. 72.

As to what discovery a landlord is entitled to from his lessee as to the management of the rrom ins lessee as to the management of the property, particularly in the case of mines, &c. Taylor v. Rundell, Cr. & Ph. 104. Affirming II Sim. 391; 1 Y. & C. C. C. 128; 1 Ph. 222.

A bill of discovery was filed by the assignee of the lessor against the assignce of the lessee in aid of an action at law on the covenants in the lease. The latter had the lease and assignment in his possession, but stated that he had the property by way of security, and he objected to produce them in the absence of the party entitled to the equity of redemption :- Held, that he was bound to produce them for the plaintiff's inspection. Balls v. Margrave, 4 Beav. 119.

A court of equity will not compel tenant to make a discovery which may invalidate his title in a court of law. Lowther v. Troy, 1 Ridgw. L. & S. 192.

If a tenant holds lands of his own, together with demised lands, and allows the boundaries to become confused, he is bound (if necessary) to produce his own title deeds to elucidate the matter. Southwell (Chapter) v. Thompson, 6 L. J., Ch. 196,

Trustee and Cestui que Trust.] - Where trustees deal with trust fund, all cestui que trusts have a right to see documents relating to such dealings. Tulbut v. Murshfield, 13 W. R. 885.

#### IV. PUBLIC DOCUMENTS.

# 1. PARISH AND COUNTY BOOKS.

Sessions Books. - Everybody has a right to inspect the books of the sessions of the peace. Herbert v. Ashburner, 1 Wils, 297.

Bills of Charges, County. ]-The ratepayers of a county have neither at common law, nor by tion of documents relating to the manor, and statute, any right to inspect and copy the bills admitted to be in the possession of the lord of

A remainderman in tail, in a voluntary settle, of charges of county officers, when they are des. 8. Rev v. Staffordshire J.J., 1 N. & P. 260; 6

A. & E. 84; 6 L. J., M. C. 65.

The right of inspection is confined to the justices of the peace for the county. Ib.

Parish Books.]—In a suit touching the validity of a parish rate, the plaintiff is entitled to inspect the parish books without paying any costs. Newell v. Simpkin, 6 Bing, 565; 4 M. & P. 395;. 8 L. J. (o.s.) C. P. 228.

So, in an action of trespass for turning the plaintiff out of a vestry-room. Ib.

In an action for entering to distrain for poor rates, the defendant (who acted on behalf of the parish officers) averred, in justification, that the plaintiff's house was within the parish, which the plaintiff denied:—Held, that the plaintiff could not demand an inspection of the parish books, on the ground that the defendant alleged him to be a parishioner. Burrell v. Nicholson, 3 B. & Ad. 649. But subsequently allowed in chancery. See S. C., 1 Myl. & K. 680.

Upon an information against overseers for making an illegal rate, the parish books shall. not be inspected. Rev v. Lee, 1 Wils, 240. And

see Orr v. Marice, 6 Moore, 347; 3 Br. & B. 139. A parishioner has no right to inspect parish books, for the purpose of gaining information, which may be useful to him, with a view to support his claim to an estate in the parish; and the court refused to grant a mandamus for that purpose. Rew v. Smallpiece, 2 Chit, 288.

The court would not compel a vestry clerk of a parish to produce and permit copies to be taken of documents from the parish chest in his custody. May v. Gwynne, 4 B. & Ald. 301; 23 R. R. 273.

Inspection of parish books must be for parochial purposes only. Rew v. Osmand, 4 L. J.: (o.s.) K. B. 52; Rew v. Clere, 5 B. & C. 899; 7 D. & R. 893; 4 L. J. (o.s.) K. B. 53.

A rule for an inhabitant of a parish to inspect the parish books may be absolute in the first instance. Anon., 2 Chit, 296.

Pending an indictment, at the instance of a parish against a county, for not repairing a bridge, the object being to try whether the parish or the county was liable to repair the bridge, the court refused to grant the defendants an inspection of the parish books relating to former repairs of the bridge. Rex v. Bucks JJ., 2 Man. & Ry. 412; 8 B. & C. 375; 6 L. J. (0.8.) K B 346

On an information by the parishioners against ', churchwardens and overseers, trustees of a charity,. books ordered to be produced, though sworn not to relate to matters in the suit, Att.-Gen, v. Berry, 2 Coll. 33; 9 Jur. 224.

Parish Accounts.]—The court will not grant a mandamus to churchwardens to allow an inspection of their accounts, under 17 Geo. 2, c. 38, s. 1, unless the applicant states some public ground for desiring such inspection. Rev v. Clear, 7 D. & R. 393; 4 B. & C. 899; 4 L. J. (o.s.) K. B. 53; 28 R. R. 498.

#### 2. COURT ROLLS OF MANOR.

Inspection-In what Actions. ]-A plaintiff who claims common appurtenant over the waste of a manor is not necessarily entitled to producthe manor, where the defendant denies that they contain anything supporting the claim. Minet v. Morgan, L. R. 11 Eq. 284; 24 L. T. 120; 19

W. R. 374

A plaintiff filed a bill in equity to establish a right of common of vicinage over a common within a manor of which the defendant was lord. By his answer the defendant denied the plaintiff's right:-Held, that he was entitled to production of the records of, and documents relating to, courts baron held within the manor, to the production of accounts and memoranda relating to the digging of gravel and cutting of turf on the common, and to have a list of the documents relating to the title of the lord of the manor: but not to have such documents produced, the defendant stating by affidavit that they related exclusively to his own title as lord of the manor, and did not in any way tend either to establish the rights claimed or to defeat the defence to the snit. 1b.

In a snit by the owner of lands adjoining a manor to establish a right of common appurtenant to his tenement :- Held, that the defendant, though not a tenant of the manor, was entitled to require the production of all documents which might support his claim. Minet v.

Morgan, 18 W. R. 1015,

In a snit by plaintiffs against the lord of a manor, claiming as freeholders a tract of pasture or sheep-walk with the minerals and usual incidents of the ownership in fee simple of freehold land, and expressly denying the existence of any rights of ownership in the lord over this sheepwalk, where the defendant by his answer stated that the plaintiffs were tenants of the manor, and as such had exclusive right of pasturage over the sheen-walk, but claimed as lord of the manor to be absolutely entitled to the soil of this sheep-walk, subject only to the plaintiffs' right of pasturage:—Held, that the plaintiffs were not entitled to an inspection of the rolls of the manor. Owen v. Wynn, 9 Ch. D. 29; 38 L. T. 623; 26 W. R. 644-C. A.

See also Att.-Gen. v. Emerson, 52 L. J., Q. B. 67; 10 Q. B. D. 191; 48 L. T. 18; 31 W. R. 191.

Upon a bill by rector for tithes against a lord of a manor who claims tithes within the manor, the defendant may be ordered to produce old maps of the manor, and also the court rolls, unless they relate to the title of his own lands within the manor. K. (Marquis), 2 Y. & Coll. 37. Knight v. Waterford

A copyhold tenant, in a suit in equity against the lord of the manor, is entitled to the usual order for the production of documents, including the court rolls, without payment to the steward of the enstomary fees. Houre v. Wilson, L. R. 4 Eq. 1; 16 L. T. 112; 15 W. R. 548.

In a suit in equity by a plaintiff alleging himself to be a freehold tenant of a manor, against the lord, to establish customary rights over commons in the manor, where the defendant, by answer, denied both the title of the plaintiff and answer, deficit both the of the plantal and the alleged custom, he is entitled to production of all the court rolls. Warwick v. Queen's College, Oxford, 36 L. J., Ch. 505; L. R. 3 Eq. 683.

Public books, as of a manor, ordered to be produced, but not books in private hands. Anon.,

Under an order for production of documents court rolls of a manor (as a merchant's account books) are merely to be produced for inspection, and not to be deposited in the court. Carew v. Davis, 21 Beav. 213.

Mandamus to Inspect. ]-Where a devisee of a rent-charge, on certain copyholds, was desirous of completing his title, the court granted a rule absolute in the first justance for the usual limited inspection of the rolls of the manor, although the applicant was not a copyholder. parte, 2 D. (N.S.) 20; 7 Jur. 217. Barnes. Ex

If an application to inspect the court rolls of a manor is made when no cause is pending, the rule is nisi in the first instance. Best, Ex parte,

3 D. P. C. 38.

Leave to inspect the court rolls of a manor will be granted of course on the application of a tenant of the manor, who has been refused that permission by the lord. Rew v. Shelley, 3 Term Rep. 141; 1 R. R. 673.

A claimant to copyhold property who comes to the court for a mandamus to the steward of the manor to compel him to grant inspection of the court rolls, and admit the claimant as a convholder, to enable him to try his right to the property he claims, must in the affidavit used in moving for the rule, either swear positively that he is entitled to the property claimed, or set out his title or good grounds for his belief that he is entitled to the property. Co. & L. 413; 2 B. C. Rep. 205. Cooke, Ex parte, 5

It is not sufficient to swear that he "verily believes" that he is entitled to the property, Ib. An exception exists where the action is between the lord and a stranger. Talbot v. Villebous,

3 Term Rep. 142, n.; I R. R. 675.

A tenant has no such right, unless there is some cause depending in which his right may be involved. Rew v. Allgood, 7 Term Rep. 746; 4 R. R. 574.

It is not necessary that all or a majority of the persons interested in copyhold property, should join in an application to inspect the rolls of the manor, as any of the persons interested in the property are entitled to inspect. Hutt. Ex parte, 7 D. P. C. 690; 3 Jur. 1105.

The demand to inspect cannot be made by a delegated authority. 'Ib.

A rule to inspect court rolls relating to the defendant's title, in an action by one copyholder against another, for encroachment on the com-mon, was granted. Folkurd v. Homet, 2 W. Bl. 1061.

One who has a prima facie title to a copyhold is cutitled to inspect the court rolls, and take copies of them, so far as relates to the copyhold claimed, though no cause is depending for it at the time. Rev v. Lucas, 10 East, 235; 10 R. R.

283. So, where a copyhold tenant was forbid by the lord to cut underwood upon the copyhold without the lord's licence, the court granted a mandamus to the lord to permit him to inspect the court rolls, so far as related to the cutting of underwood, after application to and refusal by the lord, although there was not any suit depending. Rew v. Tower, 4 M. & S. 162; 16 R. R.

A mandamus will be granted to the steward of a manor, to allow inspection of the court rolls to two tenants litigating a right of common in the manor, although the cause is not at issue. Rogers

v. Jones, 5 D. & R. 484; 27 R. R. 529.
But a mandanus will not lie to the lord and steward of a manor to inspect court rolls, for the purpose of supporting an indictment against the lord for not repairing a road within the manor. Rew v. Cadogun (Lord), 1 D. & R. 559; 5 B. & Ald. 902; 24 R. R. 612.

Records of Court-leet,]—And a mandamus does not lie to allow the inspection of the records of a court-leet unless the party assigns some satisfactory reason for the inspection. Rew v. Maidstone Corporation, 6 D. & R. 344. See Ann., 2 Cht. 241.

#### 3. CORPORATION BOOKS AND RECORDS.

Under 32 Geo. 3, c. 58.]—This statute does not bind an officer of a corporation, having the custody of the records, to permit any member of the corporation to inspect the order for the admission and swearing in of the freeman of the corporation. Davies v. Humphreys, 3 M. & S. 223.

Chapter.]—A prebendary may inspect charters of the chapter, in a suit concerning his prebend, at seasonable times. Found v. Lynch, 1 W. Bl. 27.

Gorporation Rights.]—A dispute arose between the freemen of a borough and the corporation, with respect to the right of entiting down trees on pastures, formerly granted to the burgesses of the old corporation; and an injunction to restrain the cutting down of the trees having been obtained by the new corporation, a mandamus was granted, at the instance of the freemen, to permit them to inspect the deeds, &c., concerning the pastures in question, and which were in the possession of the new corporation, with a view to dissolve the injunction. Reg. v. Becveley Corporation, 8 D. P. C. 140; 1 W. W. & H. 343.2

Where a corporator unkes a claim to be elected to an office in the corporation, and founds it upon an invariable custom to elect the person who at the time of a vacancy fills the position which he then occupies, and the corporation admits the general practice set up by him, but says that it is not invariable, the court, at the instance of the corporator, will grant a mandamus to allow him to inspect the minutes of the corporation as to former elections to assist him stating his case, even though the court entertains great doubt whether the eastom, if proved, could contradict the charter, which prescribes that there is to be a free election. Reg. v. Saddlers' (b., 31 L. J., Q. B. 62; 1 DW R. 8.7.

In Civil Proceedings.]—Where a corporation is plaintiff in a civil action, leave to inspect its books is granted to the defendant as of course. Lynn v. Deuton, 1 Term Rep. 689; 1 R. R. 359.

In an action by a corporation for toll the court, on the application of the defendant, granted a rule for inspection of such parts of the deeds, &c., as related to that matter, on the town-clerk, which he was to give upon oath. Barnstaple v. Luthey, 3 Term Rep. 303.

In an action by an attorney for work and labour as such, against a corporation of which he was a burges, the court refused to grant him inspection of the books of the corporation. Steems by Berwiek Corporation, 4 D. P. C. 227; 1 H. & W. 517.

In a suit by the city of London, the defendants obtained an order to inspect the city books and their by-laws. London (City) v. Thomson, 3 Swanst. 265, n.

In Criminal Proceedings.]—A rule to compel a corporation to furnish evidence from their books in a criminal prosecution was denied. Rew v. Heydon, 1 W. Bl. 351.

On an information against a magistrate of a they submitted by corporation for a misdemeanour, the court will not grant a rule to inspect the books of the (City), Bunb. 290.

Records of Court-leet.]—And a mandamus does corporation to furnish evidence. Row v. Purnell, at lie to allow the inspection of the records of a 1 W. Bl. 37; 1 Wils. 239.

Upon an information by the attorney-general against the vice-chancellor of Oxford, for a misdemeanour in his office, the Crown has no right to inspect the statutes and archives of the university. Ib.

Parties Entitled, ]—A resident inhabitant of a town corporation has a right to inspect and take copies of a by-law of the corporation, pending an action against him for a breach of the same, although he is not a corporator. \*\*Harrison v.\*\* Williams, 4. D. & R. 820.

A stranger to a corporation has no right to a rule to inspect its books. *Hodges* v. *Atkins*, 3 Wils. 398; 2 W. Bl. 877.

Pending an action by a corporation for tells, the court will not grant leave to inspect the corporation muniments on the application of a stranger to the corporation. Southampton v. Graces, 8 Term Rep. 590; 5 R. R. 480.

In an action for tolls due to a comporation, the defendant who had acquired the chameter of a corporator after the cause of action arose, but before trial, has no right to inspect the corporation books, and must still be considered as a foreigner quotal this action. Bristal v. Visger, 8 D. x R. 434.

The court will not grant an application by members of a corporate body for a mandamus to inspect the documents of the corporation, unless it is shewn that such inspection is necessary with reference to some specific dispute or question depending, in which the parties applying are interested; and the inspection will then only be granted to such extent as may be necessary for the particular occasion. Raw v. Merchant University of the particular occasion.

Mandanus to compel corporation to allow inspection of charters and grants. Stafford Corporation, Exparte, 1 L. J. (o.s.) K. B. 41.

Mode of compelling Inspection.]—A mandamus lies to permit a resident inhabitant of a corporate town to inspect and take copies of a by-law of the corporation, pending an action against him for a breach of the same, although he is not a corporator. Harrison v. Williams, 4 D. & R. 820

The rule is absolute in the first instance for an inspection of the books of a corporation, where a quo warranto is depending. Rex v. Travavnion, 2 Chit. 366.

If an affidavit in support of the rule for such an information omits a material fact which is stated in the affidavit filed on the other side, the latter affidavit may be read by the prosecutor in support of his rule. Rew v. Mein, 3 Term Rep. 596.

Object of the Secrey Clause.]—The object of the secrecy clause continued in bank deeds is only to prevent vexations attempts to pry improperly into the affairs of the concern, and wherever a proper case is made out, a court of equity will not hesitate to make an order for inspection, non obstante the secrecy clause. Birmingham Banking Company, In re, 36 L. J., Ch. 150; 15 L. T. 203.

Relating to Charitable Trust.]—A corporation as trustees for a charity shall not be obliged to produce their books relating to the trust, though they submitted by their answer to produce them as the court shall direct. Att.-Gen. v. Coventry (Chio) Buth 290

# 4. BOOKS OF CORPORATIONS AND COMPANIES.

Inspection under Companies Clauses Act, 1845.]—By the Companies Clauses Act, 1845, 8 Vict. c. 16, s. 117, it is enacted that the company's books when bulanced, together with the page more than attacked, conjunct with the balance sheet, shall for the prescribed periods, and if no periods he prescribed, for fourteen days precious to each ordinary meeting, and for one mouth thereafter, he open for the inspection of the shareholders at the principal office or place of business of the company; but the shareholders shall not be entitled at any time, except during the periods aforeseid, to demand inspection of the books, unless in virtue of a written order signed by three of the directors. For s. 119 see Reg. v. London and St. Kutharine's Docks Co., infra.

By Shareholders.]—By the Companies Clauses Act, 1845 (8 & 9 Vict. c. 16), s. 115, the directors are ordered to keep full and true accounts of all sums of money expended on behalf of the company. By s. 119, the directors are required to appoint a bookkeeper to enter the accounts in books to be kept for the purpose, and every such bookkeeper shall permit any shareholder to inspect such books and take copies and extracts therefrom. Under these provisions a shareholder is not entitled to inspection of the books of a public company unless he satisfies the court that he requires such an inspection for a bona fide purpose, and not out of mere idle curiosity. Reg. v. London and St. Katharine's Docks Co., 44 L. J., Q. B. 4; 31 L. T. 588; 23 W. R. 136.

Therefore, where a shareholder applied for a mandamus calling on the directors to permit him to inspect the books without shewing that he had any definite object in view beyond looking at the accounts, the court refused the application. Ib.

A canal company was incorporated under acts of parliament which provided for inspection by the shareholders of the company's books and documents. A shareholder of nine years' standing was solicitor to a waterworks company, who had obtained a decree in chancery against the canal company, and it was under consideration whether the company should appeal. This shareholder applied to the secretary, without stating his object, for inspection of the register of shareholders, and was refused. Upon a rule for mandamus by the shareholder to obtain this inspection, the secretary stated on affidavit, and it was not contradicted, that the prosecutor made his application for inspection in the interest of his clients, and not for any purpose or in the interest of the company or of any member of the company as such; that his object was to canvass the shareholders and endeavour to persuade them to oppose the appeal.—Held, not sufficient reason for discharging the rule.

Reg. v. Wilts and Berks Canal Navigation, 29 L. T. 922.

The right given to holders of stock and debentures by the Companies Clauses Acts, 1845 and 1863, of inspecting the registers of a company, is not confined to an inspection of the names and addresses only of the holders of the stock and debentures. Holland v. Dickson, 57 L. J., Ch. 502; 37 Ch. D. 669; 58 L. T. 845; 36 W. R. 320.

And it may be exercised without assigning any reason. Ib. The fact that a person has taken his stock in a

for the purpose of serving the interests of such company, does not deprive him of this statutory right. Mutter v. Eastern and Midlands Ry., 57 L. J., Ch. 615; 38 Ch. D. 92; 59 L. T. 117; 36 W. R. 401-C. A.

— By Creditor of Company. ]—The 8 & 9 Vict. c. 16, s. 36, gives a judgment creditor of a company a right to inspect the list of shareholders if he cannot have execution against the company. This right may be enforced by rule of court or order of a judge. Meader v. Isle of Wight Ferry Co., 9 W. R. 750.

Inspection by Party sued by Company. ]-In an action by a company against an alleged shareholder for calls under a winding-up order, the court will uphold an order of a judge giving liberty to him after plea to inspect the registry of shares, and the allotment and agenda books in the possession of the company. Lancashire Cotton Spinning Co. v. Greaturer, 14 L. T. 290. Lancashire

The granting such an order is purely in the discretion of the judge, and the court will not review his exercise of such discretion unless the court clearly sees that the order was wrong. Ib.

Persons sucd by a corporation for making, while directors, false entries in the books of the corporation, are not entitled to inspect the books of the corporation; at all events, not without an affidavit that such inspection is necessary to their defence. Imperial Gas Co. v. Clarke, 7 Bing. 95; 4 M. & P. 727; 9 L. J. (o.s.) C. P. 28.

Production on Cross-Examination of Secretary of Company. ]—A petition for winding up a company having been presented by a shareholder, the secretary filed an affidavit in opposition to the petition, and was cross-examined by the petitioner before a special examiner. On his cross-examination, he was called on to produce the books of the company, which be refused to do. Malins, V.-C., accordingly, on the application of the petitioner, made an order, that the company, by their secretary, should produce before the special examiner, upon the cross-examination of the secretary, the books and papers which they had had notice to produce :-Held, that the petitioner had a right to the production of the company's books and papers on the cross-examination of the secretary for the purpose of testing his evidence, but for no other purpose; and that the order of Malins, V.-C., was right both in form and substance. Emma Silver Mining Co., In re, 44 L. J., Ch. 455; L. R. 10 Ch. 194; 31 L. T. 816; 23 W. R. 300.

The power of the Court of Chancery to make an order for the production of documents, for the purpose of their being put into the hands of a witness who is being cross-examined in order to test his evidence, is the same as that of a common law court at a trial at uisi prius. Ih.

Rights under Special Act. ]-A railway act contained several clauses relating to inspection of the books. In an action for ealls, the defendant applied for an inspection to enable him to plead, which inspection was not directed to be given by any of the clauses. The court refused to compel the company to permit the inspection required. Birmingham, Bristol, and Thames Junction Ry. v. White, 4 P. & D. 649; 1 Q. B. 282; 2 Railw. Cas. 863; 10 L. J., Q. B. 121; 5 Jur. 800.

A canal act provided, that "proprietors, landcompany at the instance of a rival company, and owners, and others interested in the navigation," should have a right to inspect the books of the ! company :-Held, that a creditor by bond was a company interested in the navigation within the spirit of the enactment. Pontet v. Basingstoke Canal Co., 2 Bing. (N.C.) 370; 2 Scott, 543; 5 L. J., C. P. 153.

Under Deed of Settlement.]—The deed of settlement of a company formed and completely registered under 7 & 8 Vict. c. 110, and after-wards under 19 & 20 Vict. c. 47, contained the following clause: "The books wherein the proceedings of the company are recorded shall be kept at the principal offices of the company, and shall be open to the inspection of the share-holders every day of the year." The deed provided that separate books should be kept of the minutes of the proceedings at the general meetings of the shareholders, and of the minutes of the proceedings of the directors. A rule having been obtained for a mandamus to the company to grant to a shareholder inspection of the books of the minutes of the proceedings of the com-pany :-Held, that the clause gave shareholders only power to inspect the books and minutes of the proceedings at the general meetings, not the books of minutes of the proceedings of the directors. Reg. v. Mariquita Mining Co., 1 El. & El. 289; 28 L. J., Q. B. 67; 5 Jur. (N.S.) 725; 7 W. R. 98.

Commissioners of Sewers. ]-Where commissioners of sewers connected and imposed a joint rate upon two divisions or levels formerly drained and rated separately, and an owner of property in one of them disputed the legality of the joint rate, and gave notice to the commissioners that he should move for a certiorari to quash it, the court refused an application for a mandamus to the commissioners to produce for inspection all commissions, plans, rates, presentments, decrees, accounts, proceedings, and minutes of proceedings relating to the district or any part thereof. Reg. v. Tower Humlets Sewers Commissioners, 3 Q. B. 670; 3 G. & D. 92; 13 L. J., Q. B. 12; 6 Jur. 1059.

Provisional Committees. ]-In an action by an allottee of railway shares against a member of the provisional committee, to recover his deposit, the court ordered that the plaintiff should have an inspection and copy of the subscribers' agreement and parliamentary contract, which both the plaintiff and the defendant had signed, and which were in the hands of the solicitors of the company, the plaintiff's affidavit stating that an inspection of them was necessary to him for the purpose of framing his case, and the defendant not shewing that they were not within his power or control. Steadman v. Arden, 15 M. & W. 587; 4 D. & L. 16; 15 L. J., Ex. 310; 10 Jur. 553. S. P., Ley or Lee v. Barlow, 5 Railw. Cas. 1; 5 D. & L. 375; 1 Ex. 800; 17 L. J., Ex. 105.

In an action by the secretary against a provisional committee man of a projected railway company, for arrears of salary, a judge ordered that the defendant should be at liberty to inspect and take copies from the minute-book of the company containing resolutions of the managing committee, referred to in the plaintiff's particulars as the foundation of his claim. The court refused to rescind the order, the plaintiff not satisfactorily shewing that it was not in his power to comply with it. Shaw v. Holmes, 3 B. 952.

Canal Committee. ]-Where a canal act gives the control over the company's affairs to a committee, and authorises every proprietor to inspect the books in which the committee is directed to enter accounts, &c., a mandamus will not be granted to compel the company to permit a proprietor to inspect the books, where there has been no refusal by the committee, although there has been a direct refusal by the clerk, in whose possession the books are. Rev v. W. Canal Co., 5 N. & M. 344; 3 A. & E. 477.

802

Costs.]-Upon a rule for a mandamus to inspect the register of a company by one of its proprietors, the company opposed on the ground that the applicant was prompted by improper motives. Although the majority made the rule absolute, one of the court expressed his opinion that the object of the application was not justifiable, and dissented from the decision :- Held, that this was no ground for setting aside the ordinary rule, by which costs are given to the successful party. Reg. v. Wilts and Berks Canal Navigation, 30 L. T. 498.

In Winding-up.]—A clause in articles of association, directing that the books of account (thereby directed to be kept) should, subject to any reasonable restrictions as to the time and manner of inspecting the same that might be imposed by the company in general meeting, be open to the inspection of the sharcholders during the hours of business, is no longer applicable when the company is under a voluntary liquidation. Yorkshire Fibre Co., In re, L. R. 9 Eq. 650; 18 W. R. 541.

\_\_\_\_ Liquidator.]—An official liquidator, in respect of claim by alleged shareholders in his company to be released from their liability as shareholders, is in the position of a defendant to a suit commenced against the company for that purpose; and he is not privileged to refuse, on examination, to produce documents drawn up by him, or to answer questions as to which a defendant would not be privileged. The obligation to answer is a wholly different question from the question how far the answer is to be evidence at the hearing. Barned's Banking Co., In re, 36 L. J., Ch. 262; L. R. 2 Ch. 350; 16 L. T. 249; 15 W. R. 524.

When an official liquidator represents the company in a suit against strangers, or in a proceeding in a winding-up against a contributory, the adverse party has a right to the same discovery from him as from an ordinary litigant. Contract Corporation, In re, Gooch's Case, 41 L. J., Ch. 338; L. R. 7 Ch. 207; 26 L. T. 177; 20 W. R.

But when the question is whether a past shareholder is to be placed on list B. and, if so what is the extent of his liability, that being a question which does not concern the company, the official liquidator is only bound to afford equal facilities to the shareholder and the creditors, but not to make discovery at the instance of either party. *Ib.*On an application that the official liquidator

might be ordered to make the usual affidavit as to documents in his possession :-Held, that such an order ought not to be made, for that the official liquidator, being an officer of the court, is not, even in proceedings under s. 165, in the position of an ordinary litigant, and will not, in the absence of special circumstances, be required session, mough he is count to produce to the massast for an escape, are county of the habeas requires to see. Matual Society, Li re, 52 L. J., corpus and committium. Flow v. Janes, 1 M. & Ry, Ch. 621, L. 22, Ch. D. T. 11, 4 S. L. T. 631; 31 W. R. 1570; 7; B. & C. 73; 6 L. J. (co.S. K. B. 181.

872-C. A.

The official liquidator of a previously existing company, registered under the act of 1856, and winding up under the act of 1862, may be directed to make a list of the persons who were shareholders before registration, for the purpose defendant to furnish the plaintiff with a copy of contribution to liabilities incurred previously of it. Word v. Moreccod, 3 Scot (N.R.) 107; to the registration. Beckley's class, 16 LT, 784; [9 D. P. G. 689; 10 L. J., C. P. 229; 5 Jur. 38; 15 W. R. 1104.

Banker's Books. ]action against the Bank of England for refusing to pay the dividends upon stock which had stood in her name in the books of the Bank of England. and their refusal being grounded on an alleged transfer of that stock from her name, the court made a rule absolute for allowing her to inspect the entry in the transfer book of the bank which transferred that stock. Foster v. Bankof England, 8 Q. B. 689; 15 L. J., Q. B. 212; 10 Jur. 872.

A banker with whom a contributory has formerly kept an account may be summoned under the Companies Act, 1862, s. 115, and compelled to produce his books relating to the contributory's account, and to give all information in his power touching his affairs. Contract Corporation, Inc., Europe's Char, 41. L. J., Ch. 467; 26 L. T. 680; 20 W. R. 585. S. C., nom. Druitt's Case,

L. R. 14 Eq. 6.

The managing clerk of a bank in which a contributory has an account is a witness compellable to answer as to that account, under the Companies Act, 1862, s. 115. Financial Insurance Co.,

In re, 36 L. J., Ch. 687.

Shares in a company which was in course of winding-up had been transferred from C. to N. without consideration, G, being the active party in the transaction, and the subsequent calls had been paid with moneys supplied by G. The liquidators, considering it material to trace these moneys, applied for a summons calling upon the secretary of a banking company with which G. kept his account to attend for examination, and produce all books containing entries as to G.'s affairs :- Held, that the summons might issne, it being left to the witness, upon his attending the snumons, to take any objections he might have to the inspection of the books. Smith, Knight & Co., In re, L. R. 4 Ch. 421; 20 L. T. 206; 17 W. R. 510.

Upon a reference to the master, it being necessary (to enable him to make his report) to have the evidence of entries in the books of the Bank of England, the master is bound to grant his certificate, in order to justify the bank in permitting an inspection, rather than compel the parties, by his refusal, to file their bill for a discovery. Brace v. Ormond, 1 Mer.

See Banker's Books Evidence Act, 1879.

#### 5. OTHER PUBLIC DOCUMENTS.

Bishop's Registry.]—A bishop's registry of presentation is a public book; and a mandamus lies to him to grant inspection of it to one claiming a right to present to a vacant living, though the bishop claims a right to collate to it. Finch v. Ey (Bishop), 2 M. & Ry. 127; 8 B. & C. 112; 6 L. J. (O.S.) K. B. 223.

to make an affidavit as to documents in his pos-session, though he is bound to produce to the marshal for an escape, the court will compel the Habeas Corpus. |-- In an action against the

> In Rolls' Chapel. ]-Where it appeared that a document, of which the plaintiff craved inspection, formed part of an inquisition filed in the Rolls' chapel, the court would not compel the

A person having brought an effecting a purchase was brought against a sworn broker of the city of London, who is bound to enter in a book all contracts made by him. The court granted a rule to compel the broker to produce this book to the plaintiff, in order that he might take a copy. Browning v. Alwyn, 7 B. & C. 204; 9 D. & R. 801.

> Answer in Chancery. ]—An answer to a former bill, for the same matter, though not filed, is to be deemed a public document, unless the contrary be shown; if, therefore, it relate to the plaintiff's title in an existing suit, the defendant, in whose enstody it is, will be ordered to produce it unless he can swear that it was not intended to be used as an answer. Knight v. Waterford (Marquis), 2 Y. & Coll. 37.

## B. INTERROGATORIES.

#### I. THE PRESENT PRACTICE.

See Ord. XXXI.

# 1. ORDER FOR.

Summons for—Striking out for Irrelevancy—Grounds for Application.]—On the hearing of a summons before the chief clerk for leave to deliver interrogatories under Rules of the Supreme Court, 1883, Ord, XXXI, r. I. he may consider the general relevancy or irrelevancy of the proposed interrogatories, and may, if a copy of the interrogatories is produced to him on the summons, strike out such as are irrelevant; but he is not at liberty to settle or amend, in the way of condensation, the form of any particular interrogatory that is in itself relevant. Sucabey v. Dovey, 55 L. J., Ch. 631; 32 Ch. D. 352; 54 L. T. 368; 34 W. R. 510.

Upon an application for leave to exhibit interrogatories under Rules of Supreme Court, 1883, Ord. XXXI. r. l. it is not necessary for the applicant, nor can be be required, to produce a copy of the proposed interrogatories; and if produced to the chief clerk on the hearing of the summons he has no right to settle them, or to decide upon the relevancy or irrelevancy of specific interrogatories and allow or disallow them accordingly. All that is necessary to sup-port the summons is a statement by the applicant-not necessarily in writing-as to the general nature and scope of the proposed interrogatories, so as to enable the court to decide whether he is entitled to the whole or any part of what he asks. Martin v. Spicer, 32 Ch. D. 592; 54 L. T. 598; 34 W. R. 589.

Time for Application. - See post, col. 808 et seq.

Leave given though Tendency to Criminate.]
-Leave to administer interrogatories ought not to be refused on the ground that it is plain from the nature of the ease that they must necessarily criminate the party interrogated, who eannot answer them without admitting that he has been guilty of felony. Harrey v. Lorekin, 54 L. J., P. I: 10 P. D. 122; 33 W. R. 188—C. A.

Service of .] -- Service of an order to answer interrogatories upon the solicitor of a party is, under Ord, XXXI. r. 21, sufficient service to found an application for attachment :- So held, where the party in default had in fact notice of the order. Mulcaster, In re, Dalston v. Nanson, 47 L. J., Ch. 609; 26 W. R. 484.

An order to answer interrogatories, as also the notice of motion for an attachment in default. having been served on the solicitor of the defaulting parties:—Held, that, for the purposes of Ord. XXXI. r. 21, discovery includes the answering of interrogatories, and that the service on the solicitor was sufficient service. 1b.

An order upon a party in a suit to answer interrogatories need not be personally served. Little v. Roberts, 30 L. T. 367.

#### 2. IN WHAT MATTERS.

Suit for Nullity of Marriage.]—In a suit for nullity of marriage, the court has power to give leave to administer interrogatories between the parties to the suit; for suits of that kind were formerly within the jurisdiction of the ecclesiastical courts, which had power to allow interrogatories to be administered between the parties. and now all the jurisdiction of the Ecclesiastical Courts as to suits for nullity of marriage (including matters of practice and procedure,) is vested in the Probate, Divorce, and Admiralty Division. And, further, even if the power to allow interrogatories to be administered between the parties did not otherwise exist, it would be conferred upon the Probate, Divorce, and Admiralty Division by the Supreme Court of Judicature Act, 1873; for at the time of passing that statute the superior courts of common law and the Court of Chancery had power to allow interrogatories to be administered between the parties to a snit; and by s. 16, all the jurisdiction of those courts, including the ministerial powers and authorities incident thereto, was transferred to and vested in the High Court of Justice, and by s. 23 the jurisdiction transferred to the High Court may (so far as regards procedure and practice) be exercised in the same manner as it might have been exercised by any of the courts whose jurisdiction has been transferred. Harvey v. Lovekin, 54 L. J., P. 1; 10 P. D. 122; 33 W. R. 188—C.A.

In a suit for nullity of marriage the court has power to order interrogatories. Euston v. Smith,

9 P. D. 57 : 32 W. R. 596.

Petition for Revocation of Patent. ]-A petition was presented under s. 26 of the Patents, Designs, and Trade Marks Act, 1883, to procure the revocation of a patent, on certain grounds, which were stated in the particulars of objections. A summons was subsequently taken out, in pursuance of leave specially reserved, for directions as to the further conduct of the petition, asking that the petitioners might be at liberty to deliver to the respondent interrogation; and (2) that they should be at liberty tories, or, in the alternative, that the respondent to appear at the trial of the action, and oppose

answer to the petition. The question was whether the practice as to delivering interrogatories applied to a petition of this kind:—Held, that interrogatories might be delivered upon the usual terms of making a deposit. Haddan's Patent, In re, 54 L. J., Ch. 126; 51 L. T. 190; 33 W. R. 96.

Action for Penalties. ]-See post, cols. 901 et See further, infra 6, and post, cols, 853 et seg.

# 3. BY AND TO WHAT PERSONS.

Between Plaintiffs and Co-plaintiffs and Defendants and Co-defendants.] - Discovery by way of interrogatories may be allowed to a plaintiff from a co-plaintiff, or to a defendant from a co-defendant, in cases in which there may be rights to be adjusted between them respectively. Shaw v. Smith, 56 L. J., Q. B. 174; 18 Q. B. D. 193; 56 L. T. 40; 35 W. R. 188-C. A.

Discovery cannot be allowed to a defendant from a co-defendant with a view to show that the co-defendant and not the defendant is liable to the plaintiff, as where a defendant, sucd for subsidence under the plaintiff's land, proposes to inspect the mines of a co-defendant in adjoining land. Brown v. Watkins (16 Q. B. D. 125) ex-

By Party brought in.-To original Plaintiff.] M. commenced an action against K. K. delivered a defence and counter-claim, to which M. and I. were defendants. I. applied for leave to exhibit interrogatories for the examination of M .:-Held, that as I. was not a defendant in the original action, and I. and M. were co-defendants in the counter-claim, they were not opposite parties, and that I. had no right to interrogate M. Molloy v. Kilby, 15 Ch. D. 162; 29 W. R. 127-C. A.

By Third Party to Plaintiff.]—Persons who are served by a defendant with a third party notice are not thereby made defendants within the definition of the word in the Judicature Act, 1873, s. 100, nor do they become defendants by putting in a defence. But where persons had been served with a third party notice by the defendant for the purpose of claiming an indemnity, and had obtained an order (1) that the question of indemnity should be tried after the trial of the action; and (2) that they should be at liberty to appear at the trial of the action and oppose the plaintiff's claim so far as they were affected thereby, and for that purpose to put in evidence and cross-examine witnesses :-Held, that the third parties had been placed by the order in the position of defendants, and had a right to examine the plaintiff by interroga-tories under Order XXXI. r. 1. Eden v. Wear-dule Iron and Coal Co., 56 L. J., Ch. 400; 35 Ch. D. 287; 56 L. T. 464; 35 W. R. 507—

By Plaintiff to Third Party.]-Persons who had been served by a defendant with a third party notice for the purpose of claiming indemnity, obtained an order (1) that the question of in-demnity should be tried after the trial of the might be ordered to furnish particulars of his the plaintiff's claim so far as they were affected

thereby, and for that purpose to put in evidence and cross-examine witnesses :- Held, that the third parties had put themselves in the position of "opposite parties" to the plaintiff; and the plaintiff had a right to examine them by inter-rogatories. MacAllister v. Rochester (Bishop) Togatories. MacAusser v. Moenseter (Disamp) (5 C. P. D. 194) followed. Eden v. Weardale Iron and Coal Co., 56 L. J., Ch. 178; 34 Ch. D. 223; 55 L. T. 860; 35 W. R. 235—C. A.

By Claimant to Defendant, - A claimant has a right to interrogate a defendant, in order to discover whether be is the real defendant or not : and if it appears that he is the nominal defendant only, the claimant has a right to ask who the real defendant is. Shetchley v. Conolly, 11 W. R.

Infant. ]-An infant plaintiff or defendant cannot be compelled to answer interrogatories. Mayor v. Collins, 59 L. J., Q. B. 199; 24 Q. B. D. 861; 62 L. T. 326; 38 W. R. 349.

Guardian ad litem.]—A guardian ad litem is not a party to the action within the meaning of Ord. XXXI. r. 1, and therefore cannot be compelled to answer interrogatories. Ingram v. Little, 11 Q. B. D. 251; 31 W. R. 858.

See further, post, cols, 845 et seg.

Who Compelled to make Discovery of Documents. ]-See ante, cols, 697 et seg.

#### 4. TO CORPORATIONS.

Officer-Leave to Deliver. ]-If the court is satisfied that a proper officer is named the leave will be granted as of course. Alexandra Palace Co., In re, 50 L. J., Ch. 7; 16 Ch. D. 58; 43 L. T. 406; 29 W. R. 70.

In an action against a corporation, where an officer of the corporation, against whom no relief is claimed, is made a defendant for the purpose of discovery:—Held, that, inasunch as under the Judicature Act, Ord. XXXI. r. 4, such discovery could be obtained by an order to deliver to him interrogatories, he was improperly joined as a defendant, and that his name should be struck out. Wilson v. Church, 9 Ch. D. 552

Member or Officer. ]-Semble, an ordinary member of a company ought not to be examined on interrogatories unless the judge is satisfied that there is no officer of the company capable of making the discovery, and that the member proposed to be examined has the required information. Berkeley v. Standard Investment Co., 49 L. J., Ch. 1; 13 Ch. D. 97; 41 L. T. 388; 28 W. R. 125—C. A.

An application on the part of the plaintiff for leave to deliver interrogatories to H., the seeretary of the company, and for an order that H. should answer the interrogatories, was resisted by the company on the ground that H. had ceased to be secretary of the company before the date of the application, and it was ordered that the interrogatories should be answered by the proper officer of the company. H. was still a member of the company, but had not been served with notice of the application:—Held, that the order was right. Chaddock v. British South Africa. Ch., 65 L. J., Q. B. 635; [1896] 2 Q. B. 153; 74 L. T. 755; 44 W. R. 658—C. A.

Notice to Member. ]-Where in an action against a company an application is made under Ord. XXXI. r. 5, for leave to deliver interrogatories to a member of the company, notice of the application must be served upon the member.

Answer by Member-Costs. - Where a member of a company is examined on interrogatories under Ord, XXXI, r. 4, he cannot refuse to file his affidavit until he has been paid his taxed costs of making it; nor will the court make any order as to the payment of his costs separately from the costs of the company. Berkeley v. Standard Investment Co., supra.

Answer by Solicitor-Privilege. - Interrogatorics delivered in an action against a cornoration to the town clerk, or other their proper officer, were answered by the town clerk, who objected to give information on the ground that it was derived from communications which had been made to him as solicitor in the action, and were therefore privileged :- Held, that as the corporation had elected to answer through him, the objection could not be matutained. Swansew Corporation v. Quirk, 49 L. J., C. P. 157; 5 C. P. D. 106; 41 L. T. 758; 28 W. R. 371; 44 J. P. 378.

In an action by a corporation interrogatories were administered by the defendant for the examination of the town clerk, who objected in his answer to answer certain of the inter-rogatories, on the ground that the information possessed by the plaintiffs or himself had been obtained by him as the solicitor for the plaintiffs in the action for the purpose of enabling the plaintiffs to bring and maintain the action:— Held, that, as the corporation had no option to answer by any officer other than the town clerk. but were compelled to answer through him, the privilege was properly claimed by him on their behalf, and the objection was good. Swansea Corporation v. Quirk (supra) distinguished.
Salford Corporation v. Lever, 59 L. J., Q. B.
248; 24 Q. B. D. 695; 62 L. T. 434; 54 J. P.

#### 5. AT WHAT TIME.

Before Defence.]-A plaintiff may, before the: statement of defence has been delivered, deliver interrogatories; but if he does, the interrogatories may be struck out, unless sufficient reasons are given by him why the interrogatories are necessary at that stage of the action. Mercien v. Cotton, 46 L. J., Q. B. 184; 1 Q. B. D. 442; 35; L. T. 79; 24 W. R. 566—C. A.

Except under very special circumstances, leave will not be given to a defendant to interrogate the plaintiff before the statement of defence.

Disney v. Longbourne, 45 L. J., Ch. 532; 2 Ch. D. 704; 35 L, T. 301; 24 W. R. 663.

An action was brought against the executors of a deceased truste socking to make his estate liable for breaches of trust. The exceutors were personally ignorant of all the transactions in respect of which the plaintiff sought rollef, and applied for leave to interrogate the plaintiff before putting in the statement of defence, alleging that his solicitor (who was partner in a firm of solicitors who had acted for the trustees during the trusteeship of the testator) could furnish information which would enable them to defend the action successfully :- Held, that leave must

be refused, and that the executors must put in Radford, 65 L. J., Ch. 140; [1896] 1 Ch. 29; 73 such statement of defence as they could, and L. T. 624; 44 W. R. 103. then interrogate. Ib.

It is in the discretion of the judge at chambers whether he will strike out interrogatories delivered by the plaintiff before the statement of defence. Beal v. Pilling, 38 L. T. 486.

A. brought an action against B. for expenses incurred on his behalf and authorised by him in a letter sent to A. by C., B.'s solicitor. B. in his statement of defence denied the authority of C. to write the letter. A. joined C. as defendant, and interrogated him before his statement of defence was delivered as to whether he had authority from B.:—Held, that the interrogatories were not premature. Ib.

In an action in the Chancery Division interrogatories may be delivered before the statement of defence. Harbord v. Monk, 9 Ch. D. 616: 27 W. R. 164.

The case of Mercier v. Cotton (supra) applies only to actions in the nature of common law actions. 1b.

After Close of Pleadings. ]-A plaintiff applied for leave to deliver interrogatories after having himself closed the pleadings, without explaining the reason for his delay. Leave was refused. On appeal, the court refused to interfere with the discretion of the judge in chambers. Ellis v. Ambler, 36 L. T. 410; 25 W. R. 557.

Though great delay had taken place, leave was given to file interrogatories after the close of the pleadings; costs of the application to be costs in the cause. London and Provincial Marine Insurance Co. v. Daries, 5 Ch. D. 775; 37 L. T. 67; 25 W. R. 876.

By Defendant before Delivery of Particulars by Plaintiff. |- In an action by the executors of a married woman against her husband to recover furniture said to be part of her separate estate, delivery by the plaintiffs of particulars of and relating to the exact chattels claimed, was postponed until the defendant had stated on oath which of the articles had belonged to his late wife, on the ground that the defendant must know what furniture his wife had, whereas the plaintiffs, as mere executors, had not the means of knowing. Millar v. Harper, 57 L. J., Ch. 1091; 38 Ch. D. 110; 58 L. T. 698; 36 W. R.

There is no hard and fast rule as to the class of cases in which particulars will be ordered to be delivered before discovery, or discovery to be given before particulars; the court will exercise its discretion upon all the circumstances in each ease. In an action by a colliery company against coal merchants, in which the plaintiffs alleged that they had lost business by reason of the fraudulent acts of the defendants, giving one specific instance of frand in their statement of claim (which was admitted by the defendants), and alleging that "on divers other occasions and anegnig that on divers other occasions the defendants had taken orders from "divers other persons" for coal from the plaintiffs' colliery, and fraudulently supplied coal not purchased from the plaintiffs :- Held, that as the defendants had means of ascertaining from their books whether other frauds of the kind alleged had been committed, which the plaintiffs had not, the defeudants were not entitled to particulars before giving discovery.-Dictum of

General Allegation of Fraud-Principal and Agent—No Particulars.]—The plaintiff alleged that he had employed the defendant as a stockbroker, but that the defendant had in many of the transactions dealt with himself as principal, and had also charged the plaintiff with moneys not paid. The plaintiff delivered interrogatories asking for the particulars of the dealings on behalf of the plaintiff and the names of the persons with whom the defendant had dealt and the amounts paid. The defendant refused to answer on the ground that the plaintiff was not entitled to this information until after decree:— Held (dubitante Fry, L.J.), that though there were no particulars of the frauds alleged, the plaintiff was entitled to discovery in order to enable him to give details of the frauds alleged. Whyte v. Ahrens (26 Ch. D. 717) discussed. Per Bowen, L.J., Ord. XIX. r. 6, is a rule of pleading only. Leitch v. Abbott, 55 L. J., Ch. 460; 31 Ch. D, 374; 54 L. T. 258; 34 W. R. 506; 50 J. P. 441-C. A.

Action for Infringement of Patent-Validity of Patent denied-After Validity established. ]-In an action for infringement of a patent where the defendant denies the validity of the patent. discovery by interrogatories as to the processes used by the defendant ought not as a rule to be postponed under Ord. XXXI, r. 20, until after the validity of the patent has been established. Benno Jaffé Lanolin Fabrik v. Richardson, 62 L. J., Ch. 710; 3 R. 515; 68 L. T. 404; 41 W. R. 534.

See further, post, cols. 839, 840 and 860, 861.

## 6. WHAT ADMISSIBLE.

General Principles.]—The right of discovery as existing in the Court of Chancery still exists. except so far as it is modified by the Judicature Acts and the General Orders ; and a party still has a right to exhibit interrogatories, not only for the purpose of obtaining from the opposite party information as to material facts which are not within his own knowledge, and are within the knowledge of the opposite party, but also for the purpose of obtaining from the opposite party admissions which will make it unnecessary for him to enter into evidence as to the admitted. Att. - Gen. v. Gaskill, 51 L. J., Ch. 870; 20 Ch. D. 519; 46 L. T. 180; 30 W. R. 558-C. A.

It is said that since the Judicature Act we are literally and absolutely bound by the chancery practice, but I can find no decision which goes to that length—per Grove, J. Dalrymple v. Leslie, 51 L. J., Q. B. 61; 8 Q. B. D. 7; 45 L. T. 478; 30 W. R. 105.

An information, which before the passing of the Judicature Act could have been obtained in equity by filing a bill of discovery, can now be obtained by interrogatories in any cause before the High Court of Justice, although the cause may have been entered for trial before the Judicature Acts came into operation, Ramsden v. Brearley, 33 L. T. 322.

Interrogatories may be administered in all the divisions on the same principle as in the old Court of Chancery, subject to the power given to a judge by the Judicature Act, Ord. r. 5, to strike them out as being scandalous or Kay, L.J., in Zierenberg v. Labouchere ([1893] r. 5, to strike them out as being scandalous or 2 Q. B. 189), explained. Waynes Merthyr Cb. v. irrelevant, or not put bona fide for the purpose of the action, or not material at that stage of the allege that the piece of wood was not knocked action. Eade v. Jacobs, 26 W. R. 159.

Therefore a party is entitled to discovery of the facts necessary to support his opponent's case, but not of the evidence by which it is to be proved. 1h.

The Judicature Act and Ord, XXXI. seem to confer on the litigant in every action the right to exhibit interrogatories to his opponent, subject to the protection given by the exercise of judicial discretion, and by the succeeding rules of Ord. XXXI.; and probably the intention was to give the litigant in all cases a right to interrogate his adversary as to every relevant matter on which he could examine him, if he thought fit to call him as his witness on the trial of the cause. semble, Lyell v. Kennedy, 52 L. J., Ch. 385; 8 App. Cas. 217; 48 L. T. 585; 31 W. R.

There was another question discussed, whether, under the Judicature Act and Rules, the right to discovery is or is not more extensive than it formerly was in courts of equity. It was put thus :- The Judicature Act is an act to regulate procedure, and not to affect established rights, and if there was no right to discovery before the passing of the Judicature Act, there is no right to interrogate now. Semble, these propositions are stated too broadly, for there can be no doubt that the Judicature Act, in carrying into effect the object stated in the preamble, "the better administration of justice," does interfere with and alter rights. It seems also not to be very clear that an increased power to exhibit interrogatories and enforce discovery as to the plaintiff's title or vice versa, is an interference with the right of the party interrogated, or is more than alteration of procedure. Ib.

As to Truth of Allegations in Pleadings. ]. An interrogatory whether it was the fact that certain allegations made in the statement of claim were true, and whether it was not the fact that certain statements in the defence were true, was disallowed. Johns v. James, infra, col.

Anticipating Defence.]-A judge has discretion to disallow interrogatories which would not facilitate proof or save expense. Interrogatories of a hypothetical nature, unaccompanied by affidavit as to the source from which they are derived, and put, not for the purpose of support-ing the plaintiff's case, but of anticipating the defence, will be struck out. Grumbrecht v. Parry, 49 L. T. 570; 32 W. R. 203.

Relevancy.]-A party ought not to be compelled to answer interrogatories as to matters not relevant to the issue in the action, even though such matters might be admissible in cross-examination as going to a witness's credit. Generally the rule is that interrogatories are allowable only as to facts well pleaded and not admitted; but this is subject to the qualification that in cases of doubt as to what is properly pleadable discovery ought to be allowed where the facts are so to the control of the state of the control of the c

to have been caused by the fall of a piece of wood through the negligence of the defendant's servants, the plaintiff in the course of interroga-

down by one of your servants, state the name and address of the person or firm in whose employ the person was, and the name of the person by whom and how it was so knocked down, and for what he was on your premises." The defendant in his answer stated that the wood was knocked down, without the knowledge or consent of himself or his servants, by some person who was upon his premises as a customer. and declined to give the name and address of such person on the ground that the information was not relevant, and not required bona fide for the purpose of the action :- Held, on an application for a further and better answer, that the question went beyond the sphere of interrogatorics, and that the defendant's objection to answer was good. Meek v. Witherington, 67 L. T. 122 : 57 J. P. 7.

Evidence of other Party. - In an action to restrain the defendants from using a trade nameand from selling their goods as the goods of the plaintiffs, the defendants by counter-claim claimed the like relief, and also an account of the goods sold by the plaintiffs as and for the goods of the defendants, and of the profits of such sale. Both the plaintiffs and defendants claimed to derive their title under a partnership that had been dissolved in 1861, and both had since that time carried on the same business. An interrogatory exhibited by the defendants required the plaintiffs to set forth the quantities of goods sold by them since 1861, distinguishing the quantities sold in each year:—Held, that the interrogatory was not for the ordinary purposes of discovery, but was directed to the details of the plaintiff's evidence, and was rightly disallowed. Saunders v. Jones (7 Ch. D. 435), infra, col. 817, explained and discussed. Benbow v. Law, 50 L. J., Ch. 35; 16 Ch. D. 93; 44 L. T. 119; 29 W. R. 265—C. A.

Where Answer not Evidence.]-The plaintiff alleged that G. had deposited money with the defendant E. in trust for S. and A. (both since deceased) successively for their lives, and then for the plaintiff and another person absolutely. That E. had employed it in trade and made large profits, and had paid the interest to S. and A. for their lives, but now refused to pay over the principal. E., by his defence, admitted the deposit, but denied the trust and stated that he had only held the money for G. to draw upon, and had many years ago paid it away by G.'s. directions; he denied payment of interest to S. and A. The plaintiff delivered, among others, interrogatories requiring E, to set out (1) the dates and particulars of the payments made by thin out of the deposited sum; (2) an account of the profits made by the employment of the profits made by the employment of the money in trade; (3) whether E, had not paid to S, and A, quarterly sums by way of interest on the moneys, and if not, then he was asked whether he had not during some and what years paid to S. and A. certain and what moneys, and whether or not quarterly, or at some and what dates and under what agreement, or for what reason or in respect of what matters; and he was required to set out an account of all moneys paid by him since 1854 to S. and A., or either of them. E. filed an affidavit verifying his defence and denying the trust, denying the payment of any interest to S. and A. on the deposited sum, tories asked the following question: "If you denying the plaintiff's title, and declining to

make any further answer. Fry, J., ordered E. attorney-general and a local board to restrain the to make a further answer as to (1) and (3). E. defendant from building across a public footappealed :- Held, on appeal, that E, was not bound to answer interrogatory 1, as an answer to it could not furnish evidence to establish the alleged trust, and could not be of any use to the plaintiff except by discrediting E.'s evidence if he made erroneous statements as to the particulars of his payments, and that it would be oppressive to require him to go through his books for a number of years for that purpose. Parker v. Wells, 18 Ch. D. 477; 45 L. T. 517; 30 W. R. 392-C. A.

"Matter in question in the Cause"—Order XXXI. r. 1.]—The plaintiff, as executrix of A. M., sued the executor of H. M., alleging that H. M. had received 6,000L in trust for A. M., had invested it in securities producing at least five per cent. per annum, and applied the interest to his own purposes. The plaintiff claimed payment of the 6,000l, with interest at five per cent. The defendant professed ignorance as to the matters alleged, and set up several alternative defences: that H. M. had not received the 6,000L; that if he had, he paid it to A. M.; that if he received it A. M. agreed that he should retain it for his own use as a gift from her; that if he received it, it was agreed between him and A. M. that he should retain it in satisfaction of a claim which he had against her; that A. M. was at her death indebted to H. M. in an amount exceeding the 6,000l. The plaintiff delivered interrogatories for the examination of the defendant. By interrogatory 18 he asked particulars as to the way in which the 6,000L had been invested by H. M., and what was the rate of interest on the investments, and how the income had been disposed of? By interrogatory 23 he asked whether the defendant was not the brother of H. M., and whether during the period of the transactions referred to in the statement of claim the defendant had not been the solicitor and agent of H. M., and lived with him, and aeted as his confidential agent with respect to his property, and become acquainted with all his affairs? The defendant. in answer to interrogatory 18, stated that H. M. had invested the 6,000£, and applied the income to his own purposes, and declined to answer further, and he declined to answer inter-rogatory 23 at all:—Held, that as the plaintiff was not seeking to follow the investments of the 6,000l., the defendant was not bound to give the particulars of such investments; but that as the defendant did not admit the receipt of five per cent. interest, he was bound to answer as to the amount of interest that had been received, as it would enable the court at the hearing to make an immediate decree for payment of principal and interest if the plaintiff established the trust. Parker v. Wells (18 Ch. D. 477) distinguished. Held, further (dissentiente Cotton, L.J.), that the defendant was not bound to answer interrogatory 23, for that an interrogatory asking in substance whether the defendant had not been in such a position that he must know whether the allegations in the statement of claim were true or false, did not relate to any matter in question in the cause within the meaning of Ord. XXXI. r. 1. Morgan, In re, Owen v. Morgan, 39 Ch. D. 316; 60 L. T. 71; 37 W. R. 248—C. A.

To restrain Building across Public Footpath-

path. The amended statement of claim alleged that at a meeting of the board held after the commencement of the action the defendant had attended and signed an agreement for settling the action on certain terms, and the plaintiffs sought to enforce this agreement, or, in the alternative, to restrain interference with the footnath by virtue of their original title. The defendant. by his defence, denied the existence of any public right of way over the ground. He admitted the signature of the agreement, but alleged that it was obtained by threats and pressure after a long conversation and argument, and without his having it read and explained to him. The plaintiffs delivered interrogatories as to the existence of a public right of way over the land, and as to what passed in the conversation at the board meeting, and at a conversation between the defendant and the plaintiffs' solicitor before that meeting. The defendant declined to answer those interrogatories, alleging that as to the right of way he was not bound to answer as to a right which he had denied by his pleadings; and that as to the conversations he ought not to be called upon to answer till the plaintiffs' solicitor had been examined and cross-examined so to the conversation:—Held, by Bacon, V.-C., that the defendant having by the statement of defence denied the existence of the right of way, was not bound to answer as to it, and that he was not bound to answer as to the conversations, no discovery being requisite as to facts which the plaintiffs had the means of establishing. But held, by the Court of Appeal, that the defendant was bound to answer as to the existence of the right of way, for that one object of interrogatories is to enable a party to obtain admissions from the other party, and so to relieve himself from the necessity of adducing evidence. Att.-Gen. v. Gaskill, 51 L. J., Ch. 870; 20 Ch. D. 519; 46 L. T. 180; 30 W. R. 558—C. A. Held, also, that as the conversations were

material on the issue whether the agreement had been unduly obtained, the defendant must answer as to them; and that it would not be right to allow him to delay answering until he saw what account another person would give of what had taken place. Ib.

Persons present-Grounds of Liability. |-- In an action against two defendants by a plaintiff claiming to be a creditor of a late partner of one of the defendants, for all of whose creditors it was alleged the defendants were trustees under a deed of assignment of certain property, the defence in substance was, that the firm were never indebted to the plaintiff, that the deed contained no trust for the payment of any debt of the late partner, but was an assignment by way of mort-gage to secure repayment to the defendants of a sum advanced by them to pay such of the late partner's debts as they should in their discretion think fit, that neither the late partner nor the defendants ever recognised the plaintiff as a creditor, that the plaintiff was not a party nor privy to the deed, and that he was not aware of its existence until the bankruptey of the late partner. The defence admitted a certain alleged interview, but denied the alleged purport of the conversation therent. Plaintiff stated that he had seen "some accounts," which showed that the defendants had not properly discharged the Conversations.]-An action was brought by the debts. Interrogatories filed by the defendants

calling upon the plaintiff to set forth how the as to what was done by those on board with when communication of the fact of the execution of the deed by the defendants to the plaintiff was made, and what accounts they were which the plaintiff had seen, were allowed. Johns v. James, 13 Ch. D. 370.

An interrogatory as to the persons in whose presence communication of the above fact was made, having been withdrawn. Eade v. Jacobs

(3 Ex. D. 335) observed upon. 1b. In an action for dissolution of partnership in

the business of surgeons, the plaintiff alleged that the defendant "for some time past and since from about" a certain date "so behaved and conducted himself towards the plaintiff in the presence of . . . many of the patients of the partnership," as to make it impossible for the plaintiff to carry on practice with him. An interrogatory by the defendant calling upon the plaintiff to set forth the particulars and circumstances of the occasions on which the defendant had so behaved and conducted himself, allowed. Lyon v. Tweddell, 13 Ch. D. 375,

An interrogatory as to the names of the persons in whose presence the defendant had so behaved and conducted himself, disallowed. Ib.

See Johns v. James, supra.

The plaintiffs sued as administrators to recover possession of hereditaments for breach of a covenant contained in a lease; the defendant alleged that the intestate verbally consented to the breach of the covenant :- Held, that the plaintiffs were entitled to interrogate the defendant as to when the consent was given and as to the conversation which took place, but that they were not entitled to interrogate him as to the persons in whose presence the verbal consent was given. Eade v. Jacobs, 47 L. J., Ex. 74; 3 Ex. D. 335; 37 L. T. 621; 26 W. R. 159-

Knowledge of Servant or Agent.] - In an action against a tramway company for negligence, interrogatories were administered to the defendants, asking (inter alia) whether or not the plaintiff did not raise his hand to warn the defendants' driver to stop, and whether or not such warning was seen by the driver. The defendants, by their secretary, refused to answer, on the ground that they had received no information beyond that contained in the driver's report, and further stated that "certain information had been collected by the solicitor with a view to establish the defence" :- Held, that such answers were insufficient. Paritt v. North

Metropolitan Tramways Co., 48 L. T. 730. A party to a cause is not excused from answering interrogatories relevant to the question in issue on the ground that they are as to matters which are not within such party's own knowledge, but are only within the knowledge of his agents or servants, if derived in the ordinary course of their employment; and he is bound to obtain the information from such agents or servants, unless he shows that it would be unreasonable to require him to do so, as that, either such agents or servants have left his employment, or it would occasion unreasonable expense, or an unreasonable amount of detail or the like, Therefore, in an action by cargo owners against the owners of a ship, for a loss alleged to have arisen from negligence in the navigation of such ship, by which she ran ashore and was stranded,

firm became collectively liable to the plaintiff, regard to such navigation at the time of the accident, which stated in substance that the defendants were not on board at the time, and had no knowledge or information respecting the matters inquired into, except as appeared by the protest of which the plaintiffs had inspection, was held insufficient, as it did not appear that there was any difficulty in the defendants obtaining the required information from those who were in charge of the ship at the time of the accident. Bolokow v. Fisher, 52 L. J., Q. B. 12; 10 Q. B. D. 161; 47 L. T. 724; 31 W. R. 235; 5 Asp. M. C. 20—C. A.

In an action by owners of water mills to restrain a canal company, who had statutory power to take water from the river on which the plaintiffs' mills were situate, from wrongfully diminishing the quantity of water in the river, to the injury of the plaintiffs, the defendants interrogated the plaintiffs, and asked them to give a list of the days between specified dates on which they alleged that the working of their mills was interfered with by the negligence of the defendants. The plaintiffs answered that they were unable to specify the particular days:— Held, that this answer was sufficient, and that the plaintiffs were not bound to state whether they had made inquiries of their agents, servants, and workmen. Bolckov v. Fisher (supra distinguished. Rasbothom v. Shropshire Union Railways and Canal C., 53 L. J., Ch. 327; 24 Ch. D. 110; 48 L. T. 902; 32 W. R. 117.

Grounds on which Mine stated to be Worthless. ]-A statement of claim alleged that the defendant had advertised a worthless mine by means of private newspapers and circulars containing false statements, and that the plaintiff was thereby induced to take shares. Interrogatories were administered by the defendant, asking the grounds on which the plaintiff alleged the mine to be worthless, and that he should set out the particular papers by which he had been deceived:—Held, that the interrogatories were simply directed to show what were the material facts upon which the issues in the case would be raised, and must be allowed. Askley v. Taylor, 38 L. T. 44—C. A.

To Specify Acts of Misconduct, &c., relied on. |-The defendant employed the plaintiff as manager of his business under a written agreement at a salary and a commission on the gross amount of sales. Disputes having arisen, the defendant summarily dismissed the plaintiff. The plaintiff commenced an action for wrongful dismissal. The defendant by his defence alleged specific acts of misconduct against the plaintiff, and also alleged in general terms other acts of misconduct justifying the dismissal. The plaintiff exhibited four interrogatories, of which the substance was to ask the defendant to specify the acts of misconduct on which he relied, and a fifth interrogatory asking for the total amount of the gross proceeds of sales during the period for which the plaintiff claimed remuneration. The defendant refused to answer the first four interrogatories, on the ground that they related to the case of the defendant, not of the plaintiff, and the fifth interrogatory, on the ground that, as the right to an account of commission was disputed, the defendant was not bound to give an answer by the defendants to interrogatories that the interrogatories must be answered. such account at that stage of the action :- Held,

Benbow v. Low, supra, col. 812.

In an action for dissolution of partnership in the business of surgeons plaintiff alleged that the defendant "for some time past and since the defendant "for some time past and since the defendant "for some time past and since time about" a certain date "so behaved in the claim. Ligid'v, Krinedy, 52 L. J., Ch. 385; 8 conducted himself towards the plaintful in the Apin, Cas 217; 48 L. T. 585; 31 W. R. 618. presence of . . . many of the patients of the partnership," as to make it impossible for the plaintiff to carry on practice with him. An interrogatory by the defendant calling upon the plaintiff to set forth the partienlars and circumstances of the oceasions on which the defendant had so behaved and conducted himself, allowed. Lyon v. Tweddell, 13 Ch. D. 375.

Breach of Trust.]—In an action for specific performance of an agreement to sell the remainder of an underlease of house property to the plaintiffs, who were trustees for a married woman, interrogatories by the defendant, who had notice that they were trustees, but no notice of the actual trusts, for the purpose of establishing that the proposed investment of the trust funds in the purchase was a breach of trust, were ordered to be struck out as irrelevant. Mansfield v. Childerhouse, 46 L. J., Ch. 30; 4 Ch. D. 82; 35 L, T. 590; 25 W. R. 68.

As to whether Persons sued as Married were so.]-A plaintiff sued the defendants as man and wife, and then asked them whether they were married. The interrogatory was ordered to The plaintiff did not appeal be struck out. because he considered that a part of the re-maining interrogatories would oblige an answer to the question disallowed. The defendants neglected to answer that part of the interrogatories:—Held, that they were not bound to answer. Smith v. Bery, 36 L. T. 471; 25 W. R. 606.

Accounts-Administration Action. ]-In an administration action the persons beneficially entitled have a right to call upon an executor defendant before the hearing or the close of the pleadings, to answer interrogatories by which he is required to make discovery on oath of the accounts of the estate. This rule has not been abrogated or altered by the Judicature Acts and Rules. Semble, that in such a case, if an account has been already rendered, it would be a sufficient answer to verify such an account. Sutcliffe, In re, Alison v. Alison, 50 L. J., Ch. 574; 44 L. T. 547: 29 W. R. 732.

Of Partnership. ]—Interrogatories seeking to obtain accounts:—Held to be premature and disallowed. Parker v. Wells, 18 Ch. D. 477; 45 L. T. 517; 30 W. R. 392. And see Lyon v. Tweddell, 13 Ch. D. 375.

Question as to Defendant's Title-Action for Recovery of Land. ]-In an action for the recovery of land the plaintiff is entitled to discovery as to all matters relevant to his own and not to the defendant's case. In an action for the recovery of land the plaintiff claimed as the plaintiffs applied for and obtained an order as assignee of co-heiresses of a deceased intestate for a further answer, but the order did not direct owner of the land, and the defendant relied on to what extent the answer should go:—Held, on his possession and also set up the Statute of motion to discharge the order, that the order was Limitations -Held, that the plaintiff was entitled to interrogate the defendant as to matters relevant to the pedigree and heirship of his assignors and as to alleged admissions by the defendant that his possession of the land was as tiff's Evidence. ]-B. and N., two landowners in

Saunders v. Jones, 47 L. J., Ch. 440; 7 Ch. D. trustee for the intestate and her heirs, even 435; 37 L. T. 769; 26 W. R. 226—C. A. See though the plaintiff might have other means of proving the facts inquired after; and that the defendant must answer the interrogatories in substance, subject to any privileges against par-H. L. (E.)

In an action by an administratrix for recovery of lands which formerly were in the possession of the deceased, the defendant was not compelled to answer interrogatories as to the circumstances under which he went into possession, the instru-ment (if any) under which he held, and the character of his possession. If in an action for recovery of land it is alleged that there are peculiar circumstances entitling the plaintiff to administer interrogatories of such a character as the above, there should be an affidavit setting out the facts relied on. Bleazby v. Bleazby, 10 L. R.

Defendants in their defence to an action of ejectment pleaded that they were in possession, "by themselves or their tenants." The plaintiffs delivered an interrogatory asking them to give "the names of the tenants referred to in their defence, to state the nature of their tenancies, and the dates at which the same were respectively created" :- Held, that the interrogatory did not require the defendants to disclose what related exclusively to their own title, and that the plaintiffs were entitled to information as to the dates but not as to the nature of the tenancies. Eyre v. Rodgers, 40 W. R. 137,

- Lay Rector-Vicar. I-In an action by the lay rector of a parish claiming the freehold in the chancel and churchyard against the vicar of the parish and his churchwardens, interrogatories were disallowed which inquired into the evidence of the plaintiff's title. Garland v. Orum, 55 J. P. 374.

— Minerals.]—The plaintiffs brought an ac-tion for an account of coal worked by the defendants under certain closes of land, and an injunction to restrain any further working, and by their statement of claim alleged that they were entitled to the minerals under the said closes of land. The defendants denied the title of the plaintiffs, but did not set up any title in themselves. The plaintiffs administered interrogatories to one of the defendant firm, one of which required him to set forth "under or by what, if any, conveyance, assignment, lease, licence or authority, the defendant firm claim to be entitled to the coals and minerals underlying the closes in question, giving the dates and names or parties to any such conveyance, assignment, or lease, and the names of the person or respective persons from whom they allege that they obtained any such licence or authority, and giving the date of any such licence or authority, and stating whether the same be in writing or not." The defendant objected to answer such interrogatory, whereupon right. Cayley v. Sandyeroft Brick, Tile, and Colliery Co., 33 W. R. 577.

- Commonable Rights-Discovery of Plain-

N. sued as owner in fee of a beerhouse and three The defendant was the lord of an adjacent manor, and his defence was that the piece of land never formed part of M. Common, but was common land forming part of his own manor; guished; that some of the rights could only be used in respect of ancient tenements, and that the beerhouse and three cottages in respect of which N, sued had no land held therewith. After had been owners or proprictors of their pro-perties, and for what estates, what was the tenure thereof, and whether those lands were within the limits of any and what actual or reputed manors, and whether any such premises were ancient messuages, and whether the beerhouse and three cottages had any and what lands appurtenant thereto or held therewith. (2.) Whether the plaintiffs or their predecessors in title, as proprietors or occupiers of any lands in M., or under any other alleged title, had exercised the rights claimed upon any and what part of M. Common, or upon any and what part of the piece of land in question. (3.) The plaintiffs were asked to set forth particulars of their exer-eise of such rights, and whether they did so by any licence or in consideration of any and what payment. The plaintiffs objected to answer these interrogatories on the ground that they related exclusively to their own title and to the evidence they should adduce at the hearing. Upon a summons that the plaintiffs might be ordered to make a sufficient answer :- Held, that the plaintiff N. must answer so much of the first interrogatory as asked, whether the beerhouse and cottages had any lands appurtenant thereto or held therewith, because he had not pleaded they were in effect directed to the discovery of the evidence by which the plaintiffs intended to prove their case at the hearing. Eade v. Jacobs, (3 Ex. D. 334) and Hoffmann v. Postill (L. R. 4 Ch. 673) explained. Lowndes v. Davies (6 Sim. 468) Bidder v. Bridges, 51 L. T. 818; dissented from. 33 W. R. 272.

On appeal by the defendant the question was left to the judges of the Court of Appeal as arbitrators to settle what part of the interro-gatories should be answered, and the plaintiffs were directed to answer further parts of them. S. C., 54 L. J., Ch. 798; 29 Ch. D. 29; 52 L. T. 455; 33 W. R. 792—C. A.

See further as to Interrogatorics relating to title, infra, D, V, 1, b. (post, cols. 958 et seq.).

In Actions relating to Price on Sale of Horses. ] -In an administration action a horsedealer brought a claim against the estate of the testator for charges connected with the purchase and sale of horses for the testator, and for the standing of horses at livery, for several years. The executrix disputed the amount charged, und alleged that the horsedealer had sold several horses, as agent for the testator on commission,

the parish of M. brought an action for a declaration | and asked for discovery of entries in the horsethat a piece of land formed part of M. Common, dealer's books relating to the sales. The horse-and to establish commonable rights thereover. dealer alleged that he had never sold horses on commission as agent for the testator, but on the cottages, and the plaintiffs pleaded the exercise terms that he should pay the testator a fixed of the rights claimed from time immemorial, sum for each horse, and sell it again on his own account for what he pleased, retaining the difference, if any, by way of profit; and this was the custom of all horsedealers of good standing. And he declined to disclose the prices at that if the plaintiffs ever had any rights of which he had sold the horses, as being irrelevant common thereon such right had been extinto the issue, namely, what the agreement or course of dealing between himself and the tes-tator was:—Held, that the discovery was irrelevant to the issue; and the court in exercise of its discretion under Ord. XXXI. r. 19, refused to the defence had been delivered, the defendant administered interrogatories to the plaintiffs. Leight (Steward's Claim), 6 Ch. D. 256; 37 °C. Y. Leight (Steward's Claim), 6 °Ch. D. 256; 37 °C. Y. Charles (Leight (Steward's Claim)), 7 °Ch. D. 256; 37 °C. Y. Charles (Leight (Steward's Claim)), 7 °Ch. D. 256; 37 °C. Y. Charles (Leight (Steward's Claim)), 7 °Ch. D. 256; 37 °C. Y. Charles (Leight (Steward's Claim)), 7 °Ch. D. 256; 37 °C. Y. Charles (Leight (Steward's Claim)), 7 °Ch. D. 256; 37 °C. Y. Charles (Leight (Steward's Claim)), 7 °Ch. D. 256; 37 °C. Y. Charles (Leight (Stew 557: 25 W. B. 783-C. A.

Evidence of the course of dealing of other horsedealers admitted to show that the alleged agreement with the testator was not an unreason-

able one. Ib.

The plaintiffs claimed 1,7321. 10s., the price of three horses alleged to have been sold by them to the defendant. By his statement of defence the defendant denied that the horses were sold to him, and further alleged that the prices charged were excessive, and that the horses were ordered by his wife without any authority to pledge his credit for them. Reply, that the horses were necessaries suitable to the estate and degree of the wife. -The following interrogatories were administered to the plaintiffs :- 1. State the date when you purchased each of the horses alleged by you to have been sold to the defendant on, &c .- 2. State, if you did in fact purchase each or any of the said horses, and were in fact the owners of the same, when, as you allege, you sold them to the defendant. 8. Give the exact amount you paid or had contracted to pay for each of the said horses .- 4. If you were not the owners of the said horses or any of them at the date when, as you allege, you sold them to the defendant, state specifically and in detail how and under what that they had, and the defondant had pleasted that they had, and the defondant had pleasted that they had not but that the rest of the interrogatories need not be answered, because [5. State specifically and in detail the date—interrogatories need not be answered, because [5. State specifically and in detail the date—interrogatories need not be answered. dates upon which you received the said horses into your control :- Held, that the 1st and 3rd interrogatories were relevant and material to the issues, and ought to be answered; but that the 2nd, 4th, and 5th were inadmissible. Sheward v. Londsdale (Lord), 5 C. P. D. 47; 28 W. R. 324. Affirmed, 42 L. T. 172—C. A.

> Action for Non-Delivery of Cargo. ]-The defendant, a shipowner, was sued by the owners of the cargo and charterers for non-delivery of cargo. The defendant alleged that the nondelivery was caused by perils of the sen excepted in the charter-party and bill of lading :- Held, that interrogatories asking the plaintiff whether the cargo was insured, and if so, with whom, by whom, and to what amount, were irrelevant and therefore inadmissible. Bolekow v. Young, 42 L. T. 660.

> Action to recall Probate-Undue Influence. -The plaintiff sued to recall probate on the ground that the testator was not of sound mind, and that the will was obtained by the undue influence of the defendants, two of whom were the executors, and the third universal

legatee. The plaintiff delivered interrogatories circular letter purporting to be signed by the for the examination of the defendants, asking defendant had been sent round to the defenwhat sums they had received from the testator by way of payment for services, loan, or gift, and whether the universal legatee had since the death of testator made over any and what part of the property to the other defendants. The defendants declined to answer these interrogatories as irrelevant:—Held, that the inter-rogatories must be answered, the period in the first interrogatory being limited to three years. Holloway, In re, Young v. Holloway, 56 L. J., P. 81: 12 P. D. 167; 57 L. T. 515—C. A.

Action for Infringement of Patent-Particulars—Documents.]—An action was brought by the registered owner of two letters patent for similar inventions, dated in 1883 and 1884, for infringement of both patents. The plaintiff discontinued the action so far as related to the patent of 1884. The defendants then delivered interrogatories as to what constituted infringements of both patents, and they asked him as to documents in his possession relating to the preparation of the specifications filed under both patents. The plaintiff declined to answer on the ground that the particulars of infringement had been sufficiently stated by him, and as to the documents, that they were confidential communications between himself and his solicitor and counsel, and that such documents were privileged; and that, as regarded any documents relating to the patent of 1884, the interrogatories were irrelevant to the issue. The plaintiff's solicitor the plaintiff was not obliged to give any further answer as to the particulars of breaches; that the plaintiff's answer as to documents was insufficient, as it did not distinguish between the communications between him and his solicitor as such, and communications between him and his solicitor in his character of patent agent; the former class only being privileged. Museley v. Victoria Rubber Co., 55 L. T. 482.

Action against Licensee of Patent for Account -Secret Process-Names of Customers. ]-Action against a licensee under a patent for account and royalties. The defendant denied user and alleged that the process employed by him was a secret process of his own. The plaintiff closely interrogated the defendant as to his process by detailed reference to the plaintiff's specification, and also required names of some of the defendant's customers:—Held, that the defendant was bound to answer fully so long as he did not disclose his own secret :- Held, also, that the interrogatory as to his customers must be answered. Ashworth v. Roberts, 60 L. J., Ch. 27; 45 Ch. D. 623; 63 L. T. 160; 39 W. R. 170.

Libel - Comparison of Handwriting. ] - In order to prove that the defendant was the writer of a libellous letter, he may be interrogated as to whether or not he was the writer of another letter addressed to a third person,— as leading up to a matter in issue in the cause and therefore relevant. Jones v. Richards, 15 Q. B. D. 439.

- Names of Persons, though probably Witnesses. In an action for libel the defendant pleaded that the libel was true. The sub-stance of the libel was that the plaintiff had culation, but declining to answer further, on the

dant's competitors in business. The plaintiff had in speeches and letters stated that he had seen a copy of the alleged letter, that two of such letters were in existence in the possession respectively of a firm of bankers and a firm of manufacturers at Birmingham, and that his informant in the matter was a solicitor of high standing at Birmingham. In interrogatories administered by the defendant the plaintiff was asked to state the name and address of his informant, in whose hands he had seen the copy of the letter, and the names and addresses of the persons to whom the letter had been sent and in whose possession the twoletters existed; but he refused to do so on the ground that he intended to call those persons as his witnesses at the trial :-Held, that the defendant was entitled to discovery of the names and addresses of such persons as being a substantial part of facts material to the case upon the Chamberlain, 55 L. J., Q. B. 448; 17 Q. B. D. 154; 54 L. T. 714; 34 W. R. 783—C. A.

In an action for libel contained in a private letter written by the defendant, the plaintiff cannot interrogate the defendant as to the person or persons from whom he received the information contained in the letter. Machenzie v. Steinkoff, 54 J. P. 327.

— Newspaper—Name of Correspondent— Manuscript.—In an action against the publisher of a newspaper for a libel contained in a letter from a correspondent and in a leading article thereon the defence was that the alleged libel consisted of an accurate report of certain public proceedings and fair comment thereon:— Held, that the plaintiff was not entitled to interrogate the defendant as to the names of the persons on whose information the reports were based, or the name of the correspondent who wrote the letter, or as to the original manuscript of the letter. Hennessy v. Wright, 36 W. R. 879-C. A.

In an action of libel against the proprietor of a newspaper, if the defendant admits the publication of the words complained of, the plaintiff is not entitled to interrogate the defendant as to the name of the writer of the words, unless the identity of such writer is a fact material to some issue raised in the case. Gibson v. Erans, 58 L. J., Q. B. 612; 23 Q. B. D. 384; 61 L. T. 388; 54 J. P. 104.

- Inquiry as to Extent of Circulation of Newspaper-Inquiry as to Source of Information.] -In an action for libels contained in a newspaper and a pamphlet, accusing the plaintiff of being the author of certain discreditable letters, copies of which were printed in the libels, the only defence being payment into court of 40s., which the defendants alleged to be enough to satisfy the plaintiff's claim, the plaintiff delivered interrogatories, asking, by the first and second, as to the extent of the circulation of the newspaper and pamphlet, and, by the others, as to the names of the persons from whom the letters were obtained, what was paid for them, and what inquiries were made, and what steps taken, to test and verify the information supplied to the defendants. The defendants answered, as to the fabricated a story to the effect that a certain ground that the information required could not of the defendants' business transactions, and that the precise number of copies issued was not material or relevant, and declining to answer the other interrogatories on the ground that they were irrelevant and not material, and that their object was to discover the evidence to be adduced in support of the defendants' case, and that they were unreasonable, unnecessary, and vexatious, and not put bona fide for the purposes of the action, but for the purpose of eriminating third parties, not parties to the action, and that the matters inquired into related solely to the defendant's case. On an application by the plaintiff for an order for a further answer :- Held, that as to the first and second interrogatories, the defendants were bound to answer further, stating approximately the extent of the circulation, but that the other interrogatories were not sufficiently relevant or material to entitle the plaintiff to an answer. Purveil v. Walter, 59 L. J., Q. B. 125; 24 Q. B. D. 441; 62 L. T. 75; 38 W. R. 270; 54 J. P. 311.

In an action for libel against a newspaper which is well known in the locality in which the action is to be tried an interrogatory asking the number of copies printed and circulated of the issue containing the libel is irrelevant and will not be allowed. Parnell v. Walter (supra) over-ruled. Whittaker v. "Searborough Post" News-paper Co., 65 L. J., Q. B. 564; [1896] 2 Q. B. 148; 74 L. T. 753; 44 W. R. 657—C. A.

Semble, in the case of an obscure newspaper of small circulation the interrogatory is relevant. Ib.

As to Publication in Newspaper.]—In an action for libel in which the defendant traversed the publication; denied that the words were published of the plaintiff, or in the defamatory sense alleged; and pleaded fair comment, the plaintiff exhibited interrogatories, asking whether the defendant published the libel in two Irish papers specified in the interrogatories, and whether the words were not published of the plaintiff. The defendant was also interrogated (No. 4) as to whether he did not publish the words complained of "in the London 'Times' newspaper or some other and what newspaper?"
"When did such publication take place?" The defendant answered all the interrogatories in the one answer as follows: "That in bona fide comment on the conduct and language of the plaintiff, and in reference to matters of public interest, I caused to be printed and published of and concerning the plaintiff and others in the several newspapers in the said interrogatories mentioned the words in such interrogatories referred to, honestly believing the same to be true and without malice" :- Held, that except as to the fourth interrogatory, the answer was sufficient and was not objectionable, on the ground of its qualified form, but that a further answer should be given to No. 4, giving the date of the alleged publication. Malone v. Fitzgrald, 18 L. B., 1r. 187.

As to Documents—Sufficient Affidavit.]—See Jones v. Monte Video Gas Co., 49 L. J., Q. B. 627; 5 Q. B. D. 556; 42 L. T. 639; 28 W. R. 758— C. A., ante, col. 706.

After defendant has made a sufficient affidavit of documents, the plaintiff will not be allowed to administer to him a general roving interrogatory as to documents in his possession, the effect of

be obtained without a difficult and troublesome; which would be to compel the defendant to make inquiry, that the answer would involve disclosure a further affidavit as to documents. There may possibly be cases in which, after a sufficient affidavit as to documents has been made, the court will allow the plaintiff to deliver an interrogatory as to some specific document or documents, but whether this shall be allowed is a matter within the discretion of the judge in each particular case, and though his decision can be appealed from, the Court of Appeal will not appeared from, the Court of Appeal will not readily reverse it. Jones v. Monte Video Gas Co. (5 Q. B. D. 556) explained. Hall v. Truman, 54 L. J., Ch. 717; 29 Ch. D. 307; 51 L. T. 586— C. A.

In an action for the recovery of land the defendant claimed that certain documents mentioned in his affidavit of documents were privileged from production, on the ground that they supported his title and did not contain anything impeaching his defence or supporting the plain-tiff's ease. The defendant's affidavit was sufficient on the face of it. The plaintiffs proposed to administer interrogatories to the defendant for the purpose of showing that the documents in question supported the plaintiff's title, and therefore that they were not privileged from production:—Held, that the interrogatories were production — Teat and the Interrogatories were inadmissible. Jones v. Monte Video Gas Co. (5 Q. B. D. 556) and Mull v. Trumau (29 Ch. D. 307) followed. Nicholi v. Wheeler, 55 L. J., Q. B. 231; 17 Q. B. D. 101; 34 W. R. 425—C. A.

Interrogatories in Cross-examination-Contentious Affidavit.]—The defendant in an action for recovery of laud having made an affidavit of doenments, which stated that he had in his possession certain documents numbered and tied up in a bundle marked with the letter A, and that he objected to produce such documents on the ground that they related solely to his own title, and did not in any way tend to prove or support the title of the plaintiffs, the plaintiffs administered interrogatories to the defendant, asking whether such documents did not include a will mentioned in the statement of claim and relied upon by the plaintiffs in support of their title, and whether the defendant had ever seen the will, and, if so, when last and where. The defendant objected to answer the interrogatories. The plaintiffs thereupon applied for an order that the defendant should further answer, and at the hearing sought to make use of an affidavit in contradiction of defendant's affidavit of documents :-Held, that a contentious affidavit was not admissible to contradict the defendant's affidavit of documents, and that the plaintiffs were not entitled to a further answer, Morris v. Edwards, 60 L. J., Q. B. 292; 15 App. Cas. 309; 63 L. T. 26-H. L. (E.)

Question as to the Credit of Witnesses only. ]-Questions which go merely to the credit of the witness, and might be put in cross-examination, cannot be put as interrogatories to a party, and are as such irrelevant. Allhusen v. Labouchere, 47 L. J., Ch. 819; 3 Q. B. D. 654; 39 L. T. 207; 27 W. R. 12—C. A.

As to Damages.]-Interrogatories as to the amount of the damages claimed are only admissible, as a rule, where the defendant does not directly traverse the plaintiff's claim, but has either paid money into court or can show that such claims are primâ facie extortionate. Clarke v. Bennett, 32 W. R. 550.

Professional Privilege.]-L. brought an action | tories objected to disclose certain information against K. to recover possession of real estates asked for by the plaintiff L. on the ground of proformerly belonging to A. D., who had died fessional privilege, which the court held properly intestate. His title was under a conveyance claimed in law. L. sought by reference to certain from persons who claimed to be the co-heiresses of A. D. K. brought an action against L. for ments referred to in the interrogatorics and answer, penalties under 32 Hen. 8, c. 9, on the ground that he had bought a pretended title. L. exhibited interrogatories in the latter action for the examination of K., by some of which various questions were asked as to the pedigree of the alleged co-heiresses. K. answered that he had no personal knowledge of any of the matters inquired after by these interrogatories, and that such information as he had received in respect of them had been derived by him from information procured by his solicitors or their agents in and for the purpose of defending his title to the estates, and he submitted that he ought not to be required to put in any further answer :- Held, that since K.'s only information as to the matters of pedigree inquired after arose from privileged communications which he was not bound to disclose, and the matters inquired after were not simple matters of fact patent to the senses, he ought not to be compelled to answer on School, the congression to be competited to answer on his belief as to those matters. Kennedy v. Lygll, 23 Ch. D. 387; 48 L. T. 455; 31 W. R. 691—C. A. Affirmed, 9 App. Cas. 81— H. L. (E.)

The privilege from discovery resulting from professional confidence does not extend to facts communicated by the solicitor to the client which cannot be the subject of a confidential communication between them, even though such facts have a relation to the case of the elient in the action. A plaintiff interrogated a defendant as to whether interviews and correspondence had not, between certain dates, taken place between their respective solicitors, and also between the defendant's solicitor and a third person, in reference to an agreement the specific performance of which it was the object of the action to enforce. The defendant declined to answer the interrogatory, so far as it related to communications between his solicitor and other persons, on the ground that he had no personal knowledge, and the only information he had was derived from confidential communications between him and his solicitor in reference to his defence in the action:—Held, that he must make a further answer. Foukes v. Webb, 54 L. J., Ch. 262; 28 Ch. D. 287; 51 L. T. 624; 38 W. R.

---- Power to go behind Affidavit.]--Where in an answer to interrogatories the party interrogated declines to give certain information on the ground of professional privilege, and the privilege is properly claimed in law, the court will not require a further answer to be put in, unless it is clearly satisfied, either from the nature of the subject-matter for which privilege is claimed, or from statements in the answer itself, or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated. Lyell v. Kennedy, 53 L. J., Ch. 937; 27 Ch. D. 1; 50 L. T. 730—C. A.

The mere existence of a reasonable suspicion which is sufficient to justify the court in requiring a further affidavit of documents is not enough when a claim for privilege in an answer to interrogatories is sought to be falsified. Ib.

admissions in the answer itself, and from docuas well as from documents scheduled to K.'s affidavit of documents, to show that the information sought was obtained under circumstances which negatived the claim of privilege, and sought a further answer:—Held, that no further answer should be required, as the admissions in the answer and in the documents referred to therein only raised a case of suspicion at the most, which might be capable of explanation if K. were at liberty to make an affidavit. Ib.

The court declined to decide how far, under the present practice, reference could be made, as against the interrogated party, to any document in his possession not referred to in his answer, but only scheduled to his affidavit of documents.

And see generally as to Professional Privilege, post, D. IV. (cols. 910 et seq.).

Tendency to Criminate-Refusal to Answer. Where a witness refuses to answer a question put to him on the ground that his answer might tend to criminate himself, his mere statement of his belief that his answer will have that effect is not enough to excuse him from answering, but the court must be satisfied from the circumstances of the ease, and the nature of the evidence which the witness is called upon togive, that there is reasonable ground to apprehend danger to him from his being compelled to answer. But, if it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question. Subject, however, to that reservation, the judge is bound toinsist on the witness answering, unless he is satisfied that the answer will tend to place him in peril. Reg. v. Boyes (1 B. & S. 311) approved. and followed. Roynolds, Ex parte, Reynolds, In re, 51 L. J., Ch. 756; 20 Ch. D. 294; 46 L. T. 508; 30 W. R. 651; 46 J. P. 533—C. A.

When the answer to an interrogatory might tend to eriminate the person interrogated, he may refuse to answer, but the interrogatory isnot therefore objectionable. Ib.

Where a person interrogated refuses to answeran interrogatory on the ground that his answer might tend to criminate himself, if the court can. clearly and affirmatively arrive at the conclusion that there is no reasonable ground for believing. that it would have that effect, it has jurisdiction. to compel an answer. But, if a corpus delicti, or an act which there is reasonable ground for believing amounts to a corpus delicti, is shown to exist, the court should have very clear evidence that danger to the deponent cannot reasonably be apprehended before it declines to allow the privilege claimed. Bradley v. Clayton, 26 L. R., Ir. 405.

- Leave to Administer.]-Leave to administer interrogatories ought not to be refused on the ground that it is plain from the nature of. the case that they must necessarily criminate the party interrogated, who cannot answer them without admitting that he has been guilty of hen a claim for privilege in an answer to intergatories is sought to be falsified. 15.

The defendant K. in his answer to interrogaP. D. 122; 53 W. R. 188—0. A. - Striking Out.]—An action having been brought to set aside a deed of gift made by a lady a few days before her death, on the ground that the instructions for it were given while she was in a state of stupor produced by large doses of a narcotic drug, the plaintiff exhibited interrogatories, following out in detail the statements of the claim, with a view of showing that the defendant, who was the grantee in the deed of gift, had procured the drug for her and encouraged her to take it, in order to avail himself of the stupor which it produced to obtain the execution of the deed of gift. The defendant moved to strike out the interrogatories as scandalous, irrelevant, and not put bona fide for the purposes of the action :- Held, that supposing the matter inquired after to be an indictable offence, that was no reason for striking out an interrogatory, which, being relevant, was not scandalous; and that the remedy of the defendant was to decline to answer, on the ground that his answer might tend to criminate him. Fisher v. Owen, 47 L.J., Ch. 681; 8 Ch. D. 645; 38 L. T. 577; 26 W. R.

In an action of libel the defendant admitted the publication of two libels set out in the statement of claim, but denied the publication of the third. The plaintiff by affidavit stated that he believed this denial to be untrue, and that he was unable to find out except from the defendant himself who had published the third libel. The defendant had obtained an order striking out interrogatories by the plaintiff asking the defendant if the words constituting this libel had not been written or circulated by him, or with his knowledge, authority, or consent :-Held, that there was a conflict or variance between the rules of courty and the rules of the common law with reference to discovery con-cerning matters which might tend to criminate the person interrogated; and, that, therefore, under sub-s. 11 of the Judicature Act, 1873, s. 25, the rules of equity must prevail, and no interrogatories with such a tendency can now be allowed. Athorley v. Harrey, 46 L. J., Q. B. 518; 2 Q. B. D. 521; 36 L. T. 551; 25 W. R.

And see generally as to Tendency to Criminate, post, D, III. (cols. 894 et seq.).

### 7. STRIKING OUT.

Ord. XXXI. r. 7-Interpretation of.]-Order XXXI. r. 7, deals with two cases-first, where interrogatories are exhibited which are in themselves unobjectionable, but which, by reason of the circumstances of the case, it would be unreasonable or vexatious to call upon the party interrogated to answer; secondly, where interrogatories are in themselves objectionable by reason of being prolix, oppressive, unnecessary, or scandalous. In the first case, all or any of the interrogatories may be set aside by a judge's order; in the second case, all or any may be struck out. Oppenheim v. Sheffield, 62 L. J., Q. B. 167; [1893] 1 Q. B. 5; 4 R. 111; 67 L. T., 606; 41 W. R. 65—C. A.

Prolixity.]—Where interrogatories are un-reasonably prolix, it is the duty of the court to strike them out under Ord. XXXI. r. 7. Grumbrecht v. Parry, 32 W. R. 558-C. A. Affirming, 49 L. T. 570.; 5 Asp. M. C. 176. In Whole or Part.]—If a judge thinks that interrogatories as a whole, or en bloc, are vexatious or unreasonable, he may strike out the whole of them without sifting the mass for the purpose of saving those questions which may be reasonable and fit. And he may, if he thinks proper, allow the parties whose interrogatories have been struck out to administer interrogatories again to the opposite party. Cawley v. Burton, 32 W. R. 33.

If the judge considers a set of interrogatories to be as a whole prolix, oppressive, or numecessary, he has power to strike them all out, though some of them may be unobjectionable. Sam-mons v. Bailey (infra) overruled. Oppenheim

v. Sheffield, supra.

Objections should be Specific. 1-Objections to answers to interrogatorics must be specific. party cannot, by objecting at chambers in a general way to the answers given, or by objecting to a particular answer, entitle himself to an appeal from the order of the judge upon the sufficiency of all the answers, or of those not specifically objected to. Church v. Perry, 36 . T. 513.

A party who applies to strike out interrogatories must, unless they are altogether an abuse of the practice of the court, specify those to which he objects. Allhusen v. Labouohore, 47 L. J., Ch. 819; 3 Q. B. D. 654; 39 L. T. 207; 27 W. R. 12—C. A.

Whether Objection to be taken in Affidavit in Answer.]-Objections to particular inter-rogatories on the ground of irrelevance, or that they seek discovery of the other party's evidence, must be taken in the affidavit in answer, and do not afford ground for setting aside the interrogatories. Gay v. Labouchere, 48 L. J., Q. B. 279;
4 Q. B. D. 206; 27 W. R. 413.

An order cannot be made under Ord, XXXI. r. 7, striking out those parts of a set of interrogatories which the judge considers objectionable.

Any objection which the party interrogated may have to answering should be taken in the affidavit in answer. Sammons v. Bailey, 59 L. J., Q. B. 342; 24 Q. B. D. 727; 38 W. R. 605.

Where any party objects to answer interrogatories on any of the grounds mentioned in r. 7, he is entitled to apply for an order under the rule, and cannot be required to take his objection in his affidavit in answer. Oppenheim v. Sheffield, supra.

Where Leave to Administer.]—The fact that leave has been obtained to administer interrogatories is not a bar-to an application under either part of r. 7. Ib.

Right to Leave Interrogatories Unanswered. When interrogatories are administered which it is apparent ought not to be put, the party interrogated may leave them unanswered, and need not allege any reason for so doing. Smith y. Berg, 36 L. T. 471; 25 W. R. 606.

He is not obliged to apply to a judge at chambers to have the interrogatories dis-allowed. Ib.

## 8. THE ANSWER.

Sufficiency of ]-The duty of the court, with reference to answers to interrogatories, is now regulated by Ord. XXXI. rr. 10, 11, and limited to considering the sufficiency or insufficiency of the answer, i.e. whether the party interrogated court can do is to compel a defendant to afford has answered that which he has no excuse for such a discovery as he swears he is able to give, not answering-and only in the case of insufficiency can it require a further answer. Lyell v. Kennedy, 53 L. J., Ch. 937; 27 Ch. D. 1; 50 L. T. 780—C. A.

Semble (per Bowen, L.J.), that an embarrass-

as insufficient. Ib.

A party interrogated may, on a question of sufficiency, refer to his whole affidavit in answer to interrogatories, and is not restricted to the passages dealing with any particular interrogatory, and all embarrassment to the interrogating party is now obviated by the provisions of Ord. XXXI, r. 24; but he must not endcavour to import into an admission matter which has no connection with the matter admitted. Ib.

- Libel-Belief. ]-In an action for libel, the defendant, in answer to an interrogatory asking if she had not written a letter containing certain statements (setting out the alleged libel), and if not those statements, any and what statements, replied, "To the best of my recollection and belief I never wrote a letter containing the statements set out, or any of those exact statements. I did write a letter, but on what exact date I cannot say. I kept no copy, and have no copy of the letter, and I am unable to recollect with exactness what the statements contained therein were":-Held, that the answer was a fair and sufficient answer, and that the defendant could not be called upon from recollection to state, before trial, what was her recollection of the words she used. Dalrymple v. Leslie, 51 L. J., Q. B. 61; 8 Q. B. D. 5; 45 L. T. 478; 30 W. R. 105.

- Defence of plene administravit. ]-In an breaches of trust, the executors pleaded plene 3 W. R. 392—C. A. administravit, and the plaintiffs having thereupon administered interconstructions. estate, and their administration of it, the executors' answer was merely a repetition of their defence:—Held, insufficient, and that the plaintiffs were entitled to a further and more specific answer. St. George v. St. George, 19 L. R.,

Legal Personal Representative—Know-ledge of Solicitor and Banker of Testator— Inquiry of Solicitor or Banker-Oppression. ]-In an action against an executor, to recover from the testator's estate moneys paid to the testator in alleged improper exercise of a power more than twenty years before action brought, the executor need not make inquiry of the solicitor or banker to his testator respecting the dealings of the testator with the moneys, if the inquiry will not obviously result in obtaining information with respect to which the executor is interrogated. Alliott v. Smith, 64 L. J., Ch. 684; [1895] 2 Ch. 111; 131R. 586; 72 L. T. 789; 43 W. R. 597.

Knowledge of Servant or Agent.] - See ante, cols. 815, 816.

a defendant must answer affirmatively or The affidavit was not filed on that day; but on negatively his own recent fact. All that the day following a summons was taken out

such a discovery as he swears he is able to give, Nelson v. Ponsford, 4 Beav. 41.

Irrelevant and Embarrassing.]—Where an interrogatory, setting out a certain letter, and asking whether the defendant had written such ing answer to interrogatories may be dealt with a letter, or one to the same purport and effect at any time to any person, was answered by ninety folios of matter giving the whole circumstances of the case :- Held, that such an answer was irrelevant and embarrassing, although a reasonable and legitimate explanation of an answer to an interrogatory is relevant. Lycll v. Kennedy, 33 W. R. 44.

> Allowance of Interrogatories by Judge—Right to object in Affidavit in Answer—Appeal.]— Although a judge has, under R. S. C., 1893, Ord. XXXI. r. 2, gone through proposed interrogatories and struck out parts of them, and given leave to deliver them as amended, the party interrogated may, as provided by R. S. C., 1883, Ord. XXXI. r. 6, take by his affidavit in answer any proper objection he may have to answering them. *Peek N. Ray*, 63 L. J., Ch. 647, [1894] 3 Ch. 282; 7 R. 259; 70 L. T. 769; 42 W. R. 498-C. A.

The allowance of such amended interrogatorics is a matter in the judge's discretion, and an appeal against it will not succeed unless a strong case of error in principle or of substantial injustice can be made out. Ib.

Time for Answer.]-Where a defendant's answering an interrogatory cannot help the plaintiff to obtain a decree, but will only be of use to him if he obtains a decree, the court has a discretion whether to oblige the defendant to answer it before trial, and will not do so where

particulars of their testator's real and personal The court or judge has power to enlarge the time for appealing against an order in chambers, not-withstanding that the time for appealing has elapsed, and that the action stands dismissed under the order. The defendant obtained an order dismissing the action unless the plaintiff filed his answers to interrogatories within seven days. The plaintiff did not appeal, but by mistake filed his answer too late. He afterwards obtained an order extending the time for appealing, and a further order varying the original order by enlarging the time for filing the answer:—Held, that the court or judge had jurisdiction to make such orders. Burke v. Rooney (4 C. P. D. 226) approved; Whistler v. Huncock (3 Q. B. D. 83) distinguished. Carter v. Stubbs, 50 L. J., Q. B. 161; 6 Q. B. D. 116; 43 L. T. 746; 29 W. R. 132—C. A.

By the combined operation of Ord. LIV. r. 4, and Ord. LVII. r. 6, R. S. C., 1875, the court or a judge has power to enlarge the time limited by an order of a master for doing an act, even after the expiration of the time so limited, and the lapse of the four days' time for appealing, where the justice of the case requires it. On the 25th of March a master made an order dismissing an action for want of prosecution, unless an affidavit As to Recent Act.]-There is no rule that in answer to interrogatories was filed on the 31st. -Held, that it was still competent to the court or a judge to enlarge the time for moving to set aside or vary the order of the 25th of March. Burke v. Rooney, 48 L. J., C. P. 601; 4 C. P. D. 226; 27 W. R. 915.

Default-Setting aside Judgment-Service of Order - Affidavit showing Merits. ] - Interrogatories for the examination of the defendant were delivered by the plaintiffs on January 17. On February 5, the defendant not having filed answers, an order was made that if he should not file answers within three days judgment might be signed against him. On February 9, no affidavit having been filed by the defendant, the plaintiffs signed judgment under this order. On application by the defendant to set aside the indement he stated on affidavit that on February 9 a copy of the order of February 5 had been left at his house and received by him, and that he in consequence filed on February 11, and as he supposed within the three days named in the order, answers to interrogatories which he had sworn on January 28. No affidavit showing that he had a defence on the merits was filed by the defendant :- Held, that the order did not require to be served, that the judgment was therefore regular, and that, in the absence of an affidavit showing that he had a defence on the merits, the defendant was not cutitled to have the judgment set aside. Farden v. Richter, 58 L. J., Q. B. 244; 23 Q. B. D. 124; 60 L. T. 304; 37 W. R. 766.

Printing Answers.]—Where a long schedule forms an integral part of an affidavit, the record and writ clerks have no authority to file it unless it is printed, or the court has ordered it to be filed in writing. Webb v. Bornford, 46 L. J., Ch. 288; 25 W. R. 251.

But if the matter contained in the schedule is in the form of an exhibit it need not be printed. Ib. Where the schedule to an affidavit of twentyfive folios contained 200 folios, the court dispensed with printing altogether. Ib.

Duty to Produce Office Copy.]—The duty of producing the office copy of the affidavit in answer to the plaintiff's interrogatories lies on the defendant, the party on whose behalf the affidavit is filed, Marshall v. National Provincial Bank, 61 L. J., Ch. 465.

See further, post, cols. 861 et seq.

### 9. FURTHER ANSWER.

Summons for. ] - In a case where all the answers to interrogatories are properly objected to, the rule that a summons for a further answer ought to specify the interrogatories or parts of interrogatories to which a further answer is required, does not apply, and the summons may be in general terms. Furber v. King, 50 L. J., Ch. 496; 29 W. R. 536.

Where, on an application for an order for a further answer, the plaintiff in the court below has not asked for a qualified order, but has insisted on a full answer, the Court of Appeal will not give a qualified order, but will simply order the application for a further answer to be discharged. Parker v. Wells, 18 Ch. D. 477; 45 L. T. 517; 30 W. R. 392—C. A.

- Particulars on. ]-A summons for a fur-

"for further time to answer the interrogatories": the interrogatories or parts of interrogatories to which a further answer is required. Anstey v. North and South Woolwich Subway Co., 48 L. J., Ch. 776; 11 Ch. D. 439; 40 L. T. 393; 27

> - Form of Application. ]-The application to be made for further answers to interrogatories should be by summous in chambers and not by motion, and the particular answers objected to as insufficient should be specified. Chesterfield and Boythorpe Colliery Co. v. Black, 24 W. R. 783.

Time for Application.]—Although no time is mentioned in Ord. XXX1. r. 9, within which an order will be made requiring a further answer to interrogatorics, the application for such an order must be made within a reasonable time; and in considering what is a reasonable time, the court will have regard for the period (namely six weeks), limited by the former practice for taking exceptions for insufficiency, and in ordinary cases applications for a further answer should be made within such period of six weeks. Lloud v. Morley, 5 L. R., 1r. 74.

Order for further Answer vivâ voce. - When a person interrogated has answered insufficiently and has been ordered to further answer by viva voce examination, he can only be required to give vivâ voce such an answer to the particular interrogatories mentioned in the order as would have been sufficient if it had been given by his affidavit in answer to interrogatories. The costs of any examination exceeding these limits must be paid by the party examining. Litchfield v. Jones, 54 L. J., Ch. 207; 51 L. T. 572; 33 W. R. 251.

Costs. ] - An interrogating plaintiff having succeeded in obtaining an order for further answers to two only out of twelve interrogatories, costs of an adjournment into court were ordered to be costs in the cause instead of being auportioned according to the relative success of the parties. Sutcliffe, In re, Alison v. Alison, 50: L. J., Ch. 574; 44 L. T. 547; 29 W. R. 732.

Where, in consequence of the party interrogated answering insufficiently, an order was made by the master for his examination viva voce before a special examiner :- Held, that there was power under Ord. XXXI. r. 10, and Ord. LV. r. 1, or the general practice of the court to make it a term of the order that the costs of and occasioned by the application should be paid by the party interrogated "in any event." Vicary v. G. N. Ry., 51 L. J., Q. B., 462; 9 Q. B. D. 168.

### 10. THE DEPOSIT.

Dispensing with-Discretion of Judge. - A judge has no discretion to dispense with the deposit required by Ord, XXXI. r. 26, before application for discovery or delivery of interrogatorics. Boarder v. Lindsay, 34 W. R. 473.

A party to a cause is not entitled to obtain as a matter of right an order to administer interrogatories without making a deposit under Rules of the Supreme Court, Ord. XXXI. rr. 25, 26, merely because the other party consents to it. The judge at chambers has upon an application of that kind a discretion, and in the exercise of that discretion may order the deposit to be made, ther answer to interrogatories ought to specify notwithstanding that the party to be interrogated

C. A.

In an action where the defendants were charged with fraud, which the court considered to require strict investigation, and where the security for costs under Ord. XXXI. r. 26, on delivering interrogatories, would have amounted to between 45%, and 60%; the court, on proof of the plaintiff's want of means, dispensed with the security. Smith, In re, Smith v. Went, 50 L. T. 382; 32 W. R. 512.

A judge or master has, under Ord. XXXI. r. 25, a discretion to dispense with the deposit for 25, a discretion to dispense with the deposit for security for the costs of discovery prescribed by rules 25, 26. Novoman v. L. & S. W. Hy., 59 L. J., Q. D. 341; 24 Q. B. D. 454; 62 L. T. 290; 38 W. R. 348.

Several Defendants.]—Where in a co-owner-ship action, brought by a managing owner against his co-owners for an account to recover a balance, the plaintiff sought to interrogate the defendants, who were numerous, and to be dispensed from making the usual deposit, the defendants contending that a deposit ought to be made in respect of each defendant interrogated. the court ordered a deposit of 5l., and 10s. for each additional folio over five, and no more. The Whickham, 53 L. T. 236; 5 Asp. M. C. 479.

By Ord, XXXI, r. 26, "any party seeking discovery by interrogatories shall before delivery of interrogatories pay into court . . . the sum of 51."—The plaintiff in an action against several defendants delivered separate copies of the same set of interrogatories to the defendants respectively, each defendant being requires to another particular interrogatories only:—Held, that, in the particular interrogatories only:—Held, that, in the circumstances, the plaintiff need not pay into instances in which the right had been claimed and successfully resisted. Ib. burough, 58 L. J., Q. B. 311; 23 Q. B. D. 130; 60 L. T. 452; 37 W. R. 507.

- Severance of Defences-Different Solicitors.]-On application for discovery, whether by interrogatories or otherwise, against several defendants who have severed in their defences and appeared by different solicitors, the plaintiff must pay into court separate sums of 5*L* in respect of each debt. *Erith* v. *Liverpuol Bread Co.*, 40 L. J., Ch. 153; [1891] 1 Ch. 367; 63 L. T. 677; 39 W. R. 296.

Non-Payment—Right to Apply to Strike out.]
-By the latter part of r. 26, the party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment of 51. has been made :-Held, that this provision does not, in the event of nonpayment of the 51., entitle the party from whom discovery is sought to apply for an order to strike out the interrogatories. Eler v. Attenborough, supra.

On Discovery of Documents. ]-Secante, col. 716.

II. BEFORE THE JUDICATURE ACTS-1. IN CHANCERY.

a. To Plaintiff.

Relevancy.]—Upon a bill by a canal company to restrain the diversion of their water by a examination without leave, where his answer waterworks company, and for damages, the has been excepted to and the exceptions have waterworks company filed an interrogatory been ordered to stand over until the hearing.

is ready to dispense with a deposit. Aste v. seeking information as to the sale of their Symmor. 53 L. J., Q. B. 82; 13 Q. B. D. 326; surplus water by the canal company. The canal 4 L. T. 74; 23 W. H. 219; 5 Asp. M. C. 175— [company, having declined to answer on the ground of irrelevancy, and the waterworks company having excepted :-Held, that the information sought was material as shewing whether the canal company had used the water for the proper purposes of their canal, or suffered damage by its withdrawal, and that the interrogatory must be answered. Wilts and Berks Canal Navigation Co. v. Swindon Waterworks Co., 20 W. R. 353.

> Tending to Destroy Plaintiff's Case. ]-Interrogatories for the examination of a plaintiff are on a different footing from those for the examination of a defendant in this respect, that a plaintiff is not entitled to discovery of the defendant's case, but a defendant may ask any questions tending to destroy the plaintiff's claim. Hoffmann v. Postill, L. R. 4 Ch. 673; 20 L. T. 893 : 17 W. R. 901.

> Whether Fishing.]—A defendant who files interrogatories for the examination of a plaintiff is entitled to an answer with respect to all matters which tend to destroy the plaintiff's. ease, but not with respect to matters which tend to support the plaintiff's case. Sever's Commits-sioner's v. Glasse, 42 L. J., Ch. 345; L. R. 15-Eq. 302; 28 L. T. 433; 21 W. R. 520. When, therefore, a bill was filed to establish a

> right of common, and the defendant filed interrogatories requiring the plaintiff to set forth any instance in which the right claimed by the bill had been enjoyed :- Held, that the plaintiff was

not bound to answer. Ib.

Semble, that the plaintiff would have been

A defendant cannot compel a plaintiff to answer an interrogatory which in effect asks him what evidence he has in favour of his case. Each party may obtain discovery of all matters relating to his own case, and is entitled to know what the opponent's case is, but not what is his evidence of it. Ih.

Bill on behalf of the occupiers of land within a forest, whether residing within or without a certain manor, to establish rights of common over waste lands within that manor. Interrogatory by defendant asking for instances in which rights of common over lands within the manor had been exercised by persons residing without it. Answer, declining to set out instances. Exception overruled with costs. Ib.

Where Plaintiff has parted with Interest.] Where a defendant has reason to believe that the plaintiff had, before the institution of the suit, parted with all his interest in the subject matter, he should file cross-interrogatories to ascertain the fact, and if he simply takes the objection by answer, and no evidence is brought forward upon it, the court will not take notice of the objection. Clark v. Malpas, 10 W. R.

Without Leave, where Exceptions stand over. -It is irregular for a defendant to file a concise statement and interrogatories for the plaintiff's

Time for. - A defendant may file interrogatories for the examination of the plaintiff, after notice of motion for decree has been given. another plaintiff has filed his affidavits; and proceedings in the suit will be stayed until the plaintiff has answered, provided that there has parament has answered, provided that there has not been any excessive delay. *Branehor* v. *Carne*, L. R. 2 Eq. 610; 12 Jur. (N.s.) 1015; 14 L. T. 786; 14 W. R. 947.

To Officers of Plaintiff Company. ] - Cross-interrogatories cannot be filed by the defendants to a suit instituted by a company against the company's chairman and manager, who are not parties to the suit. Imperial Mercantile Credit Association v. Gibbon, 12 Jur. (N.s.) 898; 15 L. T. 203; 15 W. R. 97.

Where a company or corporation is plaintiff in a suit, the defendant cannot, under 15 & 16 Vict., c. 86, s. 19, file interrogatories for the examination of its officers, when they are not parties to the suit. Imperiul Mercantile Credit Association v. Whitham, L. R. 3 Eq. 89.

Duty to Answer fully.]—In answering inter-rogatories filed by a defendant for the examination of the plaintiff, the general rule applies that he who is bound to answer must answer fully. Hoffmann v. Postill, L. R. 4 Ch. 673; 20 L. T. 898 : 17 W. R. 901.

Effect of not Answering. ]-If plaintiff do not file his answers to interrogatories, an order will be made on him to shew cause why they should not be taken pro confesso. Lewes v. Morgan, 5

Where Answer Insufficient. ] -- Where, after decree, a plaintiff has not sufficiently answered interrogatories, filed by the defendant for his examination, the defendant's proper course is to except to the answer, and not to apply for an examination viva voce in court in the first instance. Croskey v. European and American Steam Shipping Co., 14 W. R. 514.

### b. To Defendant under 15 and 16 Vict. cap. 86.

Specific Charges in the Bill.]-It is not necessary to introduce charges suggesting imagined facts to form an interrogatory; so that where a bill charged the existence of a mortgage known to the plaintiff, but did not charge that there were others, an interrogatory "whether there were others":—Held, to be correct. March v. Keith, 1 Dr. & Sm. 342; 30 L. J., Ch. 127; 6 Jur. (N.S.) 1182; 3 L. T. 498; 9 W. R. 115.

It is not necessary now, in every case, to insert a charge of documents in a bill, as a foundation for the usual interrogatory concerning them. Perry v. Turpin, 1 Kay (App.) xlix.; 2 Eq. Rep. 669; 18 Jur. 594; 2 W. R.

Exceptions to an answer to the interrogatory concerning documents are now unnecessary, because the discovery may be enforced in cham-

Mertens v. Haigh, 1 John. & H. 231; 30 L. J., part of the interrogatories was unsupported by Ch. 33; 6 Jur. (N.S.) 1288; 3 L. T. 368; 9 W. R. corresponding statements in the bill, and was copied from interrogatories in an action which he had answered, and to which he craved leave to refer, allowed with costs. Hudson v. Grenfell, 3 Giff, 388: 8 Jur. (N.S.) 878; 5 L. T. 417.

When a defendant, after answer, has obtained an affidavit as to documents in the common form, if he finds that the inquiry in the common form is not sufficiently pointed to enable him to obtain discovery as to specific matters, his proper course is to file a concise statement of the specific matters, with respect to which he seeks discovery, with interrogatories, which it will be the duty of the plaintiff to answer fully ; and it will be no answer to the defendant to say that some of the matters given in the specific statement were comprised in, or that they were all referred to in, the answer, and that the first affidavit was sufficient. Newall v. Telegraph Construction Co., 35 L. J., Ch. 827; L. R. 2 Eq. affidavit was sufficient. 756; 14 W. R. 914.

A defendant having filed a concise statement, with interrogatories, under the above circumstances is not entitled, before the answer has come in, to take out a further summons for an affidavit of documents in the same special form as that in which he has interrogated; and such a summons will be dismissed as unnecessary.

A 'defendant will be required to answer an interrogatory which is pertinent to the case made by the bill, though it is not founded on any specific allegation in the bill, where the plaintiff has no knowledge on which to found such allegation. M' Garel v. Moon, 39 L. J., Ch. 367; L. R. 10 Eq. 22; 22 L. T. 355; 18 W. R. 568.

An interrogatory called for discovery of the names of the members of "the special committee appointed to transact the business in the plendings mentioned" :- Held, that this was sufficiently answered by denying that a special committee was appointed to transact the business in question; though there was a committee called a special committee, whose business it was to transact similar matters and which did, in fact, transact that particular business. Ib.

An interrogatory, if the discovery for which it calls may be material for the purposes of the suit, may be put, without introducing fictitious allegations or charges into the bill on which to found such interrogatory. Ib.

It is not necessary that there should be a distinct allegation in the bill upon which to found an interrogatory. It is sufficient if there is in the bill, and in the equities suggested by the bill, a sufficient statement to require the answer. Girdlestone v. North British Mercantile Insurance Co., 40 L. J., Ch. 230; L. R. 11 Eq. 197; 23 L. T. 392. When a question arises in a suit to which an

insurance company is defendant, as to the meaning of a particular term used in a policy, the company will, in reply to interrogatories, be required to set out the particulars of other policies effected with them, for the purpose of shewing the practice of the office with regard to the term in question. Ib.

Interrogatories as to Documents. ]-An interrogatory as to documents may be filed under the bers. Ih.

Exceptions to answer, in which the defendant practice, although the bill contains no charge of their being in the defendant's possessible to summon a defendant although the bill contains no charge of their being in the defendant's possessible to summon a defendant. Where it is possible to summon a defendant and the summon a dant at chambers for the production of documents, follow the usual course as to production of exceptions to an answer for insufficiency as to documents in chambers. Ib.

A plaintiff in a patent suit was required by Perry v. Turpin, 2 Eq. Rep. 669; 1 Kay (App.) xlix.; 18 Jur. 594; 2 W. R. 387.

new practice, generally discouraged. Luw v.

(App.) xx.

By the interrogatories of a bill, filed by a foreign merchant against his London agents. they were asked what were the powers and authorities given to them, and by what doen-ments they made out the same. They stated, that the powers and anthorities appeared from written correspondence, and that various letters had passed between the parties to which they referred :- Held, that the answer was insuffi-cient, and that they were bound to specify the documents containing their powers and authorities. Inglessi v. Spartali, 29 Beav. 564

The court will discourage exceptions to answer for want of answer to the common interrogatory for documents. Kidger v. Worswick, 5 Jur. (N.s.) 37.

ments, and the defendant, by his answer to that interrogatory, submitted that, inasmuch as the plaintiff might obtain discovery and production of documents by summons in chambers, he forebore to answer, whereupon the plaintiff excepted to the answer, the court made no order on the exceptions, except that the defendant's costs be costs in the cause. Ib.

Interrogatories to a bill having been filed. the defendant, by way of answer, after stating that the debt which was the subject-matter of the suit had been also the subject of an action, said that a considerable portion of the interrogatories filed in the suit was not only unsupported by any statement in the bill but were almost identical with interrogatories which had been filed in an action, and that he was advised he was not bound to answer such interrogatories, but if the court thought he was bound, then he craved leave to refer to his answer to the interrogatories at law. In answer to the interrogatories as to documents, the defendant said he was ready to make a full and complete discovery upon a summons being taken out by the plaintiff; and under these circumstances he abstained from further answering the last-mentioned interrogatories. Exceptions allowed with costs. Hudson v. Grenfell, 3 Giff. 388; 8 Jur. (N. S.) 878; 5 L. T. 417.

The court discourages the filing of interrogatories as to documents. If such interrogatories are filed it is a sufficient answer for the defendant to offer discovery according to the practice of the court by summons and affidavit in chambers. It has become the practice of the court to disallow exceptions to an answer in respect of such interrogatories, whether taken singly or together with other exceptions. Piffard v. Beeby, 35 L. J., Ch. 258; L. R. 1 Eq. 623; 14 L. T. 8; 14 W. R. 302.

When a defendant makes answer to an interrogatory as to documents, he is liable to

A plaintiff in a patent suit was required by interrogatories to set out a correspondence between himself and a third party, and also to Exceptions for insufficiency of answers to state the particulars of the infringement of his interrogatories as to books and papers under the patent on which he relied. He refused to answer these questions on the ground that the Landon Indisputable Life Policy Co., 10 Hare defendant might obtain an order in chambers to inspect the correspondence; and that he had sufficiently set out the particulars of the infringement in his bill :- Held that these answers were sufficient. *Hoffmann* v. *Postill*, L. R. 4 Ch. 673; 20 L. T. 893; 17 W. R. 901.

In determining whether a question is one of fact, and, therefore, to be answered, it makes no difference that it is asked with reference to a written document, Ib.

A defendant in a suit for infringement of a patent, in order to prove that there was no novelty in the plaintiff's patent, interrogated the plaintiff as to the inventions described in the specifications of previous patents, and asked him to shew in what respect they differed from his. The plaintiff declined to answer these interrogatories on the ground that the questions were not questions of fact, and that they related Therefore, where interrogatories upon a bill to the plaintiff's case; the defendant excepted comprised the common interrogatory for docuto the answer, and the exceptions were allowed.

The fact of a general affidavit as to documents having been filed is not a sufficient reason for refusing to answer an interrogatory inquiring as to particular documents. Catt v. Tourle, 22 L. T. 775; 18 W. R. 966.

A plaintiff is entitled to an answer as to whether or not certain documents (claimed by the defendant in his affidavit to be privileged) relate to a deed, and as to what are the grounds on which such privilege is claimed. Exceptions to answer for insufficiency allowed. Ib. The court ordered an examination on in-

terrogatories to ascertain whether a party had purchased property with knowledge of a decree, - v. Falmouth (Lady), 2 Kel. 22 Ch. Amendment of Bill-Effect of ]-A plaintiff,

without having required an answer to an original or amended bill, re-amended the bill by adding a co-plaintiff, but made no other alteration, and afterwards, within eight days of filing the re-amended bill, filed interrogatories going through the whole of the statements in the bill: -Held, that the interrogatories were irregular, and ought to be taken off the file. Southampton Boat and Pier Co. v. Rawlins, 3 N. R. 349; 10 Jur. (N.S.) 118; 9 L. T. 633; 12 W. R. 285.

After a defendant to an original bill had answered interrogatories, the plaintiff amended his bill, adding fresh statements and new defendants, but retaining most of the materials of the original bill. He then filed interrogatories, going through the whole of the statements of the bill as amended, and requiring each of the defendants to answer all the interrogatories:-Held, that an order made on the application of the original defendants, that interrogatories should be taken off the file, with liberty for the plaintiff to answer the new interrogatories within a limited time, had been rightly made. Drake v. Symes, 2 De G. F. & J. 81.

Semble, if a specific document is charged by a errogatory as to documents, he is many to security in the defendant's possession, and that alone, or accompanied by exceptions on specific information is required in respect of it, other grounds. But where a defendant declines and the answer is insufficient, exceptions would to answer such an interrogatory, submitting to be allowed, even though they might not be

A plaintiff filed no interrogatories to an original bill within the time in that behalf limited. The defendant put in a voluntary answer. Then the plaintiff amended the bill and filed interrogatories extending to the whole bill as amended, and not to the amendments alone. The defendant put in an answer to the interrogatories on the amendments only, and put in no answer to the interrogatories which went to the matter in the original bill, insisting that his voluntary answer must be taken to be a complete and sufficient answer to everything in the original bill. The plaintiff excepted :-Held, that the answer to the amendments only was sufficient. Denis v. Rochussen, 27 L. J., Ch. 368; 4 Jur. (N.S.) 298; 6 W. R. 265.

The court has power in such a case, on special application, to give the plaintiff leave to file interrogatories and compel a full answer to the original bill. Ib.

After exceptions for insufficiency to an answer had been allowed, the plaintiff obtained an order to amend his bill and interrogatories; and a new copy of the amended interrogatories, embracing much that was contained in the original interrogatories, was served upon the defendant :-Held, that as at the time of obtaining the order to amend the plaintiff had not had any answer to the bill, he was entitled, on such amendment, to serve the defendant with amended interrogatories; and a motion by the defendant to take tories; and a motion by the determine to case them off the file was refused. Nevery (Fiscent), v. Kilmorey (Eurl), 40 L. J., Ch. 371; L. R. 11 Eq. 425; 24 L. T. 87; 19 W. R. 469.
When a sufficient answer has been put in to

interrogatories founded on the averments in an original bill, amended interrogatories which are substantially founded on those averments need not be answered, though the bill has been amended and some new charges introduced as foundation for the amended interrogatories, Hill v. Northern Ry. of Buenos Ayres, 41 L.J.,

At What Stage. |- Interrogatories for examination of defendant may be filed after a written copy, and before a printed copy, of a bill has been filed. Lambert v. Lomas, 9 Hare (App.), xxix.; 22 L. J., Ch. 12; 16 Jur. 1008; 1 W. R.

A plaintiff having let the time go by for filing interrogatories does not, by amending his bill, become entitled afterwards to file them to the old bill. The proper course is to apply to the court for an extension of time. Denis v. Rochussen,

27 L. J., Ch. 368; 4 Jur. (N.S.) 298; 6W. R. 265. A plaintiff having omitted to file interrogatories for examination of the defendant within the time limited by the 16th order of the 7th August. 1852, moved, according to the 20th order, on notice, for leave to file interrogatories, with an affidavit, that, through press of business, the plaintiff's solicitor had neglected to file them in due time :-Held, that the plaintiff must pay the costs of this motion. Dakins v. Garratt. 4

allowed if the interrogatory as to documents interrogatories should be delivered. Empson v. had been general and the defendant had not Boutley, 2 Sm. & G. (App.), iii. answered it. Westminster Brymbo Coal and Coke Co. v. Chayton, 3 N. R. 111.

A plaintiff is bound to file his interrogatories within the time limited by the general orders although the bill has been demurred to, Harding v. Tingey, 34 L. J., Ch. 13; 10 Jur. (N.S.) 872; 10 L. T 323; 12 W. R. 817.

A plaintiff in an original suit failing to file interrogatories within the time limited for that purpose will, if the plaintiff in the cross-suit file interrogatories in due time, lose his right to an answer before he answers the cross-bill. Garwood

v. Curteis, 10 Jnr. (N.S.) 199; 10 L, T. 26; 12 W. R. 509.

Interrogatories having been filed too late, the defendant's solicitors refused to receive them. on the ground that the suit was a very hostile one, and that no indulgence would be given or expected. The defendant afterwards obtained an extension of the time for answering, but omitted to serve the order upon the plaintiff's. solicitors, who subsequently obtained an order nisi for a sequestration. The court discharged the order nisi, and directed that both parties should pay their own costs. Bignold v. Cobbold, 11 Jur. (N.S.) 152; 11 L. T. 665,

Leave to File. 1-The judges' elerks have nower. with the consent of all parties, to make orders for leave to file interrogatories. Anon., 4 Jur. (N.S.) 579, n.

Service.]-Delivery of a copy of the interrogatories to a bill by leaving it at the office of the defendant's solicitors, without being served on the solicitor personally :- Held, sufficient under the 12th section of the statute 15 & 16 Vict. c. Bowen v. Price, 2 De G. M. & G. 899; 22
 L. J., Ch. 179. Reversing 1 Drew, 307.

Service of interrogatories upon the defendant's solicitor before he has entered an appearance is invalid; but where the appearance was afterwards entered, and the defendant took subsequent steps to extend the time for filing his answer, the court declared that the service should be deemed good. Sankey v. Alexander. Ir. R. 7 Eq. 407.

Taking off the File, ]-When a plaintiff has interrogatories and wishes to have the cause heard on motion for decree, he will be allowed to take such interrogatories off the file. Hammond v. Hammond, 18 L. T. 553.

And on his own ex parte application. Stephens: v. Louch, 18 L. T. 552.

Tendency to Criminate.]-A party declining to answer interrogatories on the ground that his answer would subject him to penalties must swear to his belief that his answer would so subject him. Scott v. Miller, Johnson, 220; 28 L. J., Ch. 584; 5 Jur. (N.S.) 858; 7 W. R. 561. S. P., Fisher v. Ronalds, 12 C. B. 762.

Sufficiency of Answer. ]-Defendants, husband and wife, having answered a bill, seeking the accounts of a business in question in the suit extending over upwards of thirty years, in which the plaintiff had been a partner with the defendant, the husband, for the last ten years, Jur. (3.8.) 579.

The time within which the interrogatories obtained access to all the documents. The cought to be delivered under the 17th order of plaintiff amended his bill, introducing interrothe 7th August, 1852, having expired, the court, un- gatories as to minute particulars of the dealings der the 20th order, upon a motion, of which notice and accounts. The defendants, by their answer was given, enlarged the time within which such to the amended bill, stated that they had no means of ascertaining the particulars inquired after, except by the books in the defendants' the books in the possession of plaintiff and the documents, and that the plaintiff's professional accountant had examined them and made many extracts therefrom; and also that the books were ordinary business books, kept with regular entries; and that to set forth the accounts as required would subject the defenclants to an oppressive amount of labour; and plaintiff's exception to this answer: Held, that, though the answer was technically insufficient, yet the court, having regard to the bill and answer, was bound to consider what object the plaintiff could gain by a more full answer; and in the absence of an allegation that anything had been fraudulently or erroneously inserted in or omitted from the accounts, the court could not see any object to be gained by the plaintiff by a more full answer, and overraled the excep-tion. White v. Barker, 5 De G. & Sm. 746; 17

A father gave real estates to trustees in trust for his son for life, with a gift over if he charged or incumbered them. One of the trustees filed a bill for the administration of the trusts of the will, and afterwards filed a supplemental bill against the defendants, who were in possession of part of the estates, alleging that they claimed under a charge made in their favour by the tenant for life, which operated as a forfeiture. The defendants were interrogated as to the particulars of all charges in their favour, if any, of the property of the testator. The defendants stated in their answer that they claimed under no charge made by the tenant for life, but under a lease at a rack-rent which he had granted to a who had mortgaged the lease to them. The plaintiff excepted to the answer because the defendants did not set forth the date of the lease :- Held, that the plaintiff, being a trustee, was entitled to know the particulars of those who claimed to be his cestuis one trustent; and the exceptions must therefore be allowed. Hurst v. Hurst, 44 L. J., Ch. 111; L. R. 9 Ch. 762; 31 L. T. 264; 22 W. R. 939.

A bill for specific performance of a contract to sell certain premises and machinery, alleged that the vendors had, since the date of the contract. let the premises to third parties, and the vendors were required by the interrogatories to set out the names of such persons, the particulars of the sales, and an account of the rents of the premises. and also to state whether the plant was not being deteriorated by the user thereof by the tenants. The vendors having refused to give the discovery sought by the interrogatory :-Held, on exception to the answer for insufficiency, that the vendee was entitled to know to whom the property had been let, and for what term. Dixon v. Fraser. L. R. 2 Eq. 497.

Where the bill alleges that the defendant, in the course of a correspondence between himself and others, made certain representations respecting the subject matter of the suit, and one of the interrogatories requires him to set forth a list of the correspondence, an answer which merely states that the correspondence contains no such discovery as to what they were. The bill prayed representation is insufficient. Rishton v. Grissell, an injunction to restrain an action which the 14 W. R. 578.

Where a defendant is required by an interrogatory to set forth a list of all correspondence possession, which were eighty in number, and relating to a negotiation, and answers that if he wrote or received any letters on the subject he defendant, which were sixty in number; and has not preserved them, and that he has none alleged that the plaintiff had had access to all except those in the schedule, the answer is insufficient. S. C., 14 W. R. 789.

An interrogatory asked whether certain shares did not still remain unsold, and were they not still standing in the name of the defendant, or shares had been sold and that the certificates of some of them were in the possession of the they submitted that they were not bound to defendant, but did not state farther as to whose answer such interrogatories in detail. Upon the name they were standing in. An exception to name they were standing in. An exception to the answer for insufficiency allowed. *Eusey* v. *Webber*, 18 W. R. 1064.

The plaintiffs, by the interrogatories of their bill, which was to restrain an alleged piracy, required the defendants to set forth "whether the defendants employed any and what persons, and who, by name and address, in making personal inquiries for the purpose of obtaining original information for their directory, and to place against the name of each such person the name of each town, village and place visited by each such canvasser and agent, and the time during which he remained at each such town and village and place making personal inquiries for the purposes of the defendants' directory.' answer that "upwards of fifty persons had been employed as canvassers, &c., but did not set out the names and addresses of the canvassers. or the towns visited, &c., is insufficient. Kelly v. Wyman, 20 L. T. 300; 17 W. R. 399.

Where a defendant's acts of ownership and possession of land are denied, and he is interrogated as to the time and circumstances of such acts of ownership and such possessions, he will not be allowed, on the ground of desiring to avoid disclosing the evidence of his title, to answer by merely alleging acts of ownership from time immemorial and possession generally. Bute (Marquis) v. Lewis, 16 L. T. 82; 15 W. R. 479.

B. had acted for the testator during the life of the latter, with full and unrestricted powers of management; the wife of B. was the testator's daughter and sole executrix. The testator's widow was entitled to a legacy of 1,500L under her husband's will, and also to the furniture, effects, &c., of the testator. The testator's will was extremely brief and informal; and she on that ground filed a bill for the administration of the testator's estate, praying the usual account. The defendants, in answer to an interrogatory of the plaintiff, furnished an account of all dealings with the testator's property up to the date of the suit from a date six years prior to his death, and claimed the benefit of the Statute of Limitations as to the period antecedent to these six years :- Held, that the defendant was a trustee, and could not avail himself of the Statute of Limitations. Gray v. Bateman, 21 W. B. 137.

The plaintiff was rector of a parish of which the defendants were patrons, and he filed a bill against them, alleging that they had demised to him a moiety of the tithes of the parish, and that he had subsequently discovered that the whole of the tithes belonged to him as rector. The bill also alleged that the defendants were in possession of lands which belonged to the plaintiff in right of his living, and that they refused him all defendants had commenced against him for rent, lands part or parcel of the rectory, and that the defendants might be ordered to deliver up possession of the lands to the plaintiff, and deliver to him the documents relating thereto, and that they might account for the rents. The defendants answered as to the tithes, but declined to give any discovery as to the lands, or the documents relating to them. An exception to the answer on this point having been allowed by the vice-chancellor :-Held, that the defendants. not having demurred, could not protect themrelief as to them, was demurrable. Bates v. Christ's College, Cambridge, 8 De G. M. & G. 726; 26 L. J., Ch. 449; 3 Jur. (N.S.) 348; 5 W. R. 337.

Duty to Answer Fully, —A defendant objecting to answer a particular interrogatory merely states his ground of objection; but if he answers part of it, he must answer the whole. Gray v. Bateman, 21 W. R. 137.

A mortgagee in possession, defendant to a bill for redemption, admitting himself by his answer to be redeemable, cannot decline to answer interrogatories requiring him to set forth an account of the rents and profits of the mortgaged here-ditaments, the rule being that when a party answers he is bound to answer fully. Elmer v. Creusy, 43 L. J., Ch. 166; L. R. 9 Ch. 69; 29 L. T. 632.

The plaintiff's right to discovery and to production rest on the same principle. A defendant who submits to answer must answer fully; he cannot, by denial of the plaintiff's title, escape answering. Discovery of title-deeds, and of professional communications, forms an exception. Dissent from the doctrine laid down in Adams v. Fisher (3 Myl. & Cr. 526). Swinborne v. Nelson, 16 Beav. 416: 22 L. J., Ch. 331: 1 W. R. 155.

A defendant is not exempted from the duty of answering fully by the fact that, if he should answer the interrogatories in detail, he would be merely repeating statements contained in the affidavits and depositions previously filed in the cause. Turner v. Juck, 23 L. T. 800; 19 W. R.

The plaintiffs filed their bill, claiming to be entitled to the profits of a partnership as from a certain date, when, as they alleged, the defen-dants fraudulently attempted to dissolve the partnership; and they sought discovery of the profits of the partnership from such time, and the production of the books and documents relating thereto. The defendants put in their answers, alleging that the partnership had been legally dissolved, and that the plaintiffs had no further interest therein; and they refused to give discovery of the profits subsequently realised, or to produce the books and documents. Upon exceptions to the answers for insufficiency: -Held, that the defendants, having answered, must answer fully; and the exceptions were allowed. Clegg v. Elmondson, 22 Beav. 125; 2 Jur. (N.S.) 824.

Where a defendant, neither pleading nor demurring, answers the bill, he must answer fully; but there are exceptions to the rule, and

and it prayed also that it might be declared that which he swears establish his own title and do the plaintiff was entitled to all the tithes and not establish that of the plaintiff. Cases where not establish that of the plaintiff. Cases where the discovery would subject the defendant to penalties and forfeitures are also exceptions to the rule. Ib.

The expression "tending to make out the plaintiff's title" means his title to the relief which he seeks by his bill. Ib.

Questions of insufficiency of answer and production of documents rest on the same grounds, and must be dealt with in the same way. Ib.

A defendant electing to answer is bound to answer fully; and therefore, where an answer scless from giving discovery as to the lands on the ground that the bill, so far as it sought for effectual bar to the plaintiffs title, and the relicit as to them, was demurable. Bates v. defendant, upon the assumption that this deer Christ's College, Cumbridge, 8 De G. M. & G. was valid, claimed to be relieved from answering interrogatories as to the state of investment of funds, the subject of the suit :- Held, that, for the purpose of exceptions no part of an answer could be assumed as true, and that the plaintiff was therefore entitled to a full answer. v. Sutton, 1 Hem. & M. 514; 9 Jur. (N.S.) 1321; 9 L. T. 711 ; 12 W. R. 124.

A defendant answering must answer fully, and he cannot, by denying the plaintiff's title, refuse a discovery of the accounts which are consequential on a decree being made against him. Great Luxembourg Ry. v. Magnay, 23 Beav. 646.

A railway company, under the advice of the chairman and directors, bought up another line in which the chairman was principally interested, and the chairman was furnished with a number of paid-up shares to effect the object. In answer to a bill by the company, impeaching the transaction, on the ground of suppression and misrepresentation, and of ignorance on the part of the company of the chairman's interest, he insisted on the validity of the transaction on various grounds, and declined to set forth how he had dealt with the shares :- Held, that the answer was insufficient. Ib.

The rule that where a defendant submits to answer he must answer fully, does not apply where the matter of discovery is immaterial to the relief sought by the bill. Woodv. Hitchings, 3 Beav. 504: 10 L. J., Ch. 257.

The rule that a defendant who answers is bound to answer fully is not affected by the decision in Adams v. Fisher (3 Myl. & C. 526; 7 L. J., Ch. 289; 2 Jur. 508). Lancaster v. Ecors, 1 Ph. 349; 13 L. J., Ch. 269; 8 Jur. 133.

A plea of privilege of attorney having been overruled by the answer, the defendant not permitted to avail himself of his privilege from answering fully. Sheeles v. Shearley, 4 L. J., Ch. 5

A plaintiff, as personal representative of a deceased testator, stated by his bill that F., a defendant, had acted as his solicitor, and had in that character received various sums on account of the testator's estate; for which he had not accounted to him; and alleged that he had lately discovered, as the fact was, that the defendant F. had some time since prevailed upon him (the plaintiff) to execute a power of attorney to estate, and to employ another attorney under him; and the plaintiff charged that this power of attorney was a contrivance between F. and P., to enable F, to receive the assets without being where the defendant sets up a distinct and inde-pendent title in himself, which, if established, will destroy the plaintiff sittle, in that case he is not bound to produce or set out any documents attorney; and that the defendants had in their possession books and papers relating to the matstances under which, the alleged payment took ters mentioned in the bill, and by which the place.  $Hill_{\rm F}$ , Wates, 43 L. J., C. P. 380; L. B. truth of such matters would appear. The defendant F, by his answer, set out a power of attorney from the plaintiff to P., authorising him (P.) to get in the testator's estate, and to employ an attorney under him; and stated that he (F.) had never been employed by the plaintiff, but had been employed as an attorney and solicitor, solely by P., acting under the power of attorney; and had, in the course of such employment, received various sums on account of the testator's He denied the charges of contrivance and misrepresentation. He admitted the possession of certain documents relating to the testator's estate and affairs: but submitted that he was accountable to the plaintiff:—Held, that F. a banking company carrying on business in cocould not be compelled to produce the documents partnership, under 7 Geo. 4, c. 46. M.Kewan v.
Admitted to be in his possession. Adams v. R. M. 44 H. & N. 738; 28 L. J., Ex. 380; 5 Jun.
Fisher, 3 Myl. & Cr. 526; 7 L. J., Ch. 289; 2
(N.S.) 714; 7 W. R. 601. Jur. 508.

Exceptions to Answer. ]-One interrogatory contained six questions. The defendant answered five; but the answer to the sixth question was insufficient. The plaintiff excepted to the answer, the exception including not only the unanswered question but all the other questions which, it was admitted, had been answered :-Held, that the exception was wrong in form. Higginson v. Blockley, 25 L. J., Ch. 74; 1 Jur. (N.S.) 1104.

The ordinary questions as to particulars, in an interrogatory asking for an account of personal estate, are not to be regarded as separate questions; and an exception to the answer in respect of such an interrogatory need not specify which of them is unanswered. Zumbuco v. Cassarctti.

38 L. J., Ch. 503.

Where an interrogatory is too sweeping in its terms, an exception to the answer overruled on a mere technicality will be overruled with costs. Simpson v. Charlesworth, 14 L. T. 699; 14 W. R. 857.

Where an interrogatory, mixing up subject matters which could and ongo to be distinct, and exceptions to the answer are allowed only as to some portion of the answer to an interrogatory, or an exception is partly allowed and partly overruled, the defendant will not be made to pay the costs of those exceptions. Lunaton v. Waite, 15 L. T. 204; 15 W. R. 53.
After exceptions had been allowed to an

answer to an information, the court, being of opinion that the interrogatories were more extensive than the purposes of the suit required, referred it to the attorney-general to consider what course ought to be taken with respect to the exceptions, and stayed all proceedings in the snit in the meantime. Att.-Gen, v. Carlisle Corporation, 4 Sim. 275.

## 2, AT COMMON LAW.

### a. Parties Examinable.

Maker of Promissory Note-Payment to Testator. - In an action by excentors against the makers of a promissory note given to the testator, they pleaded, as to part of the claim, payment to the testator in his lifetime:—Held, that equity on a bill of discovery. Dobson v. Richard-they might interrogate the defendants as to son, 9 B. & S. 516; 37 L. J., Q. B. 261; L. B. 3 the time and place at which, and the circum- Q. B. 778; 16 W. B. 1010.

Foreigners.]-The court will order a plaintiff, though a foreigner resident abroad, to answer interrogatories. Pohl v. Young, 25 L. J., Q. B. 23; 1 Jur. (N.s.) 1139; 4 W. R. 84.

But when an order has been made that a foreigner shall answer interrogatories, and there has been no answer, but it does not appear that he was in this country when the order was made, estate, for which he had duly accounted to P. it being doubtful whether he is in contempt, a rule for an attachment will not be granted. Von Hoff v. Hoerster, 27 L. J., Ex. 299.

Officer of Bank. |-Interrogatories may be adnot bound to produce them, and that he was not ministered to a public officer suing on behalf of

> Although the effect of a compulsory windingup is to take all control over the affairs of the company out of the hands of its directors, they may still continue to be officers of the company, and may be ordered to answer interrogatories in an action begun after the commencement of the Madrid Bank v. Bayley, 8 B. & S.
>  29; 36 L. J., Q. B. 15; L. R. 2 Q. B. 37; 15
>  L. T. 292; 15 W. R. 159.
>  Whether they have ceased to be such officers or

not is a question for the discretion of the court. Ib. By the C. L. P. Act, 1854 (17 & 18 Vict. c. 125), s. 60, it shall be lawful for any creditor who has obtained a judgment in a superior court to apply to the court for a rule or an order that a judgment debtor should be orally examined as to any and what debts are owing to him :-Held, that, in an action in which a corporation was the defeudant, there was no power under this section toorder the oral examination of the directors of the corporation. Dickson v. Neath and Brecon Ry., 38 L. J., Ex. 57; L. R. 4 Ex. 87; 19 L. T. 702; 17 W. R. 501.

Clerk to Commissioners.] - Interrogatories: were allowed against the clerk to commissioners, for negligence by the commissioners. Mason v. Wythe, 3 F. & F. 153.

Town Clerk. ]-In an action against a corporation for malicious arrest, false imprisonment and malicious prosecution, the plaintiff proposed to exhibit interrogatories to the town clerk, asking whether he caused the plaintiff to be arrested, and if so, under what anthority he acted :-Held, that the interrogatories should be allowed; and if the answers to any of them would disclose anything tending to make the party interrogated criminally liable, or anything which he would be privileged on any other ground from disclosing, he must avail himself of such privilege by objecting to answer such interrogatories. M. Fadzen v. Liverpool Corporation, 37 L. J., Ex. 193; L. R., 3 Ex. 229; 18 L. T. 611; 16 W. R. 1212.

b. Principles for Allowance or Disallowance,

According to Practice in Equity. ]-In allowing interrogatories a court of common law is not confined within the same limits as a court of

The 17 & 18 Vict. c. 125, s. 51, is limited to the cases where a discovery would be given in equity; and semble, that it applies to eases only where the matters inquired into would be evidence in the cause, and does not give one party the power of asking the other how he intends to shape his case. Edwards v. Wakefield, 6 El. & Bl. 463; 2 Jnr. (N.S.) 762; 4 W. R. 710.

Interrogatories may be delivered as to such matters as may be interrogated to by a bill of discovery in a court of equity. Whateley v. Crawford, 5 El. & Bl. 709; 25 L. J., Q. B. 163;

2 Jur. (N.S.) 207; 4 W. R. 121.

In allowing a party to deliver interrogatories to the opposite party, the court will take as a guide the rules and principles acted upon in the courts of equity as to bills of discovery, although it will not consider itself to be fettered by those rules. Pye v. Butterfield, 5 B. & S. 829; 34 L. J., Q. B. 17; 11 Jur. (N.S.) 220; 11 L. T. 448; 13 W. R. 178.

The court allowed a plaintiff to interrogate a defendant as to allegations in his plea, the interrogatories being on matters in respect of which, according to the practice of the Court of Chanocry, discovery would be granted in equity, Hawkins v. Curr., 6 B. & S. 995; 35 L. J., Q. B. 81; L. R. 1 Q. B. 89; 12 Jur. (N.s.) 334; 13 L. T. 321; 14 W. R. 138.

Quære, whether the right to deliver interrogatories is limited to matters respecting which a discovery can be obtained in a court of equity. Martin v. Hemming, 10 Ex. 478.

As to Documents. ]-An interrogatory delivered under the Common Law Procedure Act, 1854, s. 51, and inquiring as to documents relating to the matters in dispute in an action, need not be limited to documents in the possession or control of the person interrogated, but may be extended to such as he has had at any time in his possession or control-to such, that is to say, as he may have parted with though he has once had them in his possession or power. Lethbridge v. Cronk, 44 L. J., C. P. 381; 33 L. T. 171; 23 W. R. 703.

- Lost Document. ]-If it be shewn prima facie that a document is lost, the defendant may be examined upon interrogatories as to the contents of it, but the answers are not available at the trial unless it be shewn in the usual way that the document cannot be then produced. Wolverhampton New Waterworks Co. v. Hawksford, 7 W. R. 244.

Contents of Written Instruments. ]-Interrogatories will not be allowed which ask for the contents of written documents. Herschfield v. Clark, 11 Ex. 712; 25 L. J., Ex. 113; 2 Jur. (N.S.) 239; 4 W. R. 292.

Interrogatories which are put for the purpose of contradicting a written instrument are inadmissible. Moor v. Roberts, 2 C. B. (N.S.) 671; 26 L. J., C. P. 246; 3 Jur. (N.S.) 1221; 5 W. R. 693.

If a party interrogated as to whether he has in his possession any deeds or writings relating to the lands in dispute, answers on oath that he has, but that such deeds relate exclusively to his own title to the lands, and do not shew any title in the opposite party, he cannot be compelled to state the contents of the deeds, or to describe them, his oath as to their effect being conclusive. Adams v. Lloyd, 3 H. & N. 351; 27 L. J., Ex. 499; 4 Jur. (N.S.) 590; 6 W. R. 752.

Where a defendant having been examined on interrogatories under s. 51 of the C. L. P. Act, 1854, as to letters in his possession relevant to the issues joined in the action, and having been required to set forth copies if he had them, submitted that he was not bound to set forth copies, the plaintiff could not compel the defendant to deliver copies under that section, but must apply to inspect and take copies under s. 50. Scott v. Zygomalas, 4 El. & Bl. 483; 24 L. J., Q. B. 129; 1 Jur. (N.S.) 63; 3 W. R. 163.

Common to Plaintiff's and Defendant's Case. Whatever is common to both a plaintiff's and a defendant's case may be inquired into by either party, though the answers may disclose the ease of his opponent; but neither party can interrogate the other as to matters which relate exclusively to his opponent's case. Whateley v. Crawford, 5 El. & Bl. 709; 25 L. J., Q. B. 163; 2 Jur. (N.S.) 207; 4 W. R. 121,

But where interrogatories administered relate as much to the plaintiff's case as to the defendant's, the latter is bound to answer them, although the answers may disprove his case. Bayley v. Griffiths, 1 H. & C. 429; 31 L. J., Ex. 477; 10 W. R. 798.

Relating Exclusively to Case of Interrogating Party.]—In actions against a land surveyor for negligence in the valuation and survey of estates, and against an attorney for negligence in not defending actions brought against the plaintiff : -Held, first, that the plaintiff might deliver interrogatories asking what steps the defendant Davies, 5 El. & Bl. 709; 25 L. J., Q. B. 163; 2 Jur. (N.S.) 207; 4 W. B. 121.

Held, secondly, that interrogatories asking the defendant what steps it was his duty to take under his instructions were not admissible, being

matter of law. Ib.

It is no objection to interrogatories that they seek to obtain from the plaintiffs admissions of conversations relating to the subject matter of the action with a servant or an agent of the defendant. Rew v. Hutchins, 10 C. B. (N.S.)

Interrogatories, cross-examining the plaintiff upon the terms and conditions of various prior transactions between the same parties, and not connected directly with the contract sued upon, were not allowed. Ib.

Nor as to the terms of any contract between the plaintiff and other persons. Ib.

Nor, in cross-examination of the plaintiff, to disprove a custom on which the defendant sup-

poses the plaintiff will rely. Ib.
Interrogatories asking whether the plaintiff has had a correspondence relating to the subjects in dispute, and asking for the dates and names

of the places and the correspondence, are allowable. Ib. The court will allow any interrogatories which are relevant to the matter in issue, and which

the party interrogated would be bound to answer if in the witness box. Zychlinski v. Maltby, 10 C. B. (N.S.) 838.

Interrogatories ought to be such as tend bona fide to support the ease of the party interrogating and to favour a complete inquiry into the truth of the issue which the court has to decide. The Mary or Alexandra, 38 L. J., Adm. 29; L. R. 2 Adm. 319; 18 L. T. 891; 17 W. R. 551. Fishing.]—The court will not allow In an action for breach of an agreement to interrogatories, the tendency of which is to discover how the plaintiff intends to shape his case, without furthering any case which the defendant terrogatories to the plaintiff as to the solvency has to set up. Moor v. Roberts, 2 C. B. (N.S.)

of a cause of action shewn to the court, and will 3 Q. B. 778; 16 W. R. 1010. be refused where the object is to ascertain what the plaintiff's cause of action is, or whether he has any. Morris v. Parr, 6 B. & S. 203; 34 L. J., Q. B. 95; 13 W. R. 337.

In trover, by the assignees of a bankrupt, the defendant obtained a rule nisi to administer interrogatories to the assignees to discover what case they intended to set up at the trial, and on what acts of bankruptcy they intended to rely: -Held, that the interrogatories were inadmissible; at all events, on the ground that Jur. (N.S.) 283; 13 L. T. 600; 14 W. R. they were fishing interrogatories, asking for a disclosure of the evidence in support of the plaintiffs' case. Edwards v. Wakefield, 6 El. & Bl. 463; 2 Jur. (N.S.) 762; 4 W. R. 710.

 Title.]—In trover a defendant will not be allowed to interrogate the plaintiff as to the nature of the title by which he claims the goods. Finney v. Forward, 4 H. & C. 33; 35 L. J., Ex. 42; L. R. 1 Ex. 6; 11 Jur. (N.S.) 878; 13 L. T. 296; 13 W. R. 85.

In trover for cotton, the defendant interrogated the plaintiff how and when he first became possessed of the cotton, and when and in whose hands it was when he first became possessed of This interrogatory was disallowed. Ib.

He also interrogated the plaintiff as to his dealings with the person from whom the defendant had obtained the cotton, but did not shew by his affidavit that any such dealings had taken place, or that he had made any inquiries of that person. This was disallowed. Ib.

- As to Damages. ] - In an action on a policy of assurance on a cargo of wheat, claiming for a total loss, the pleas denying the policy, the interest, the loading, and the loss, and also setting up an unreasonable delay in sailing, interrogatories were allowed, which went to support the latter plea, and also such as were directed to the question of damage, but not such as were merely calculated to disclose the case which the plaintiff would have to prove under the plea in denial. Zarji v. Thornton, 26 L. J., Ex. 214; 3 Jur. (N.S.) 72.

A defendant may interrogate a plaintiff for the purpose of ascertaining the damage he has the purpose of ascerdanting the damage he has sustained, so as to enable him to pay the real amount into court. Wright v. Goodlake, 3 H. & C. 540; 34 L. J., Ex. 82; 12 Jur. (N.S.) 14; 13 L. T. 120; 13 W. R. 349.

When money has been paid into court by a

defendant in an action to recover damages for 265. personal injuries caused by the negligence of the defendant, interrogatories as to the nature and extent of the injuries sustained, and generally as to the damages, are permissible. Frost v. Brooke, 32 L. T. 312; 23 W. R. 260.

When a defendant's object is to pay money into court in satisfaction of the plaintiff's cause of action, he will be allowed to interrogate the plaintiff as to the particulars of the damage sustained by him. Horne v. Hough, 43 L. J., C. P. 70; L. R. 9 C. P. 135; 22 W. R. 412.

court allowed the defendant to administer inof the company and the amount of damage of the company and the domain of damage of 1; 26 L. J., C. P. 246; 3 Jur. (N. 25 L. 25), which he had sustained by reason of the non-5 W. R. 693. Interrogatories will only be allowed in support 9 B. & S. 516; 37 L. J., Q. B. 261; L. J.

> - Validity of Patent. ]-In an action for the breach of an agreement to pay the stamp duty on letters patent, whereby they became void, and the plaintiff lost the profits thereof, the court refused to allow the defendant to administer interrogatories to the plaintiff for the purpose of shewing that the letters patent were of no value. Jourdain v. Palmer, 4 H. & C. 171; 35 L. J., Ex. 69; L. B. 1 Ex. 182; 12

> ---- Opponent's Case.]-Interrogatories will not be allowed where they relate wholly to matter which tends to support the case of the opposite party. Stewart v. Smith, L. R. 2 C. P.

293; 15 L. T. 580.

In an action for a malicious prosecution on a charge of stealing books, the court allowed interrogatories requiring the plaintiff to state whether or not certain books described were in his possession, and when, where, and from whom he bought them, and the price he paid for them. Ib.

In an action against a bank to recover damages for refusing to honour the plaintiff's acceptance, a cross-interrogatory was administered to the plaintiff, who resided abroad, asking whether he agreed with the particulars stated therein respecting the state of his balance, to which he simply replied, "I do not admit this to be correct." An application was made that the course might be postponed until the following term, on the ground that the answer was not satisfactory: -Held, that the information sought was within the knowledge of the bank, and could be shewn by their own books, and the application was therefore refused. *De Faria* v. *Lawrie*, 17 L. T.

Action for Wrongful Detention of Document. -In an action for wrongful detention of a document the plaintiff applied for liberty to deliver interrogatories with the declaration, upon a suggestion that defendant must have obtained a copy of the original from plaintiff's elerk, as he had shewn it only to him; and a paragraph had appeared on the following day in defendant's newspaper, containing matter leading to the inference that the writer had used the document in writing the paragraph :- Held, that there was not sufficient foundation for the application. Atter v. Willison, 7 W. R.

Settlement of Accounts. ]-In an action on common counts brought by surviving partners, to which the defendant pleaded a settlement of accounts with the deceased partner, and receipt of a bill of exchange by him according to the terms of that settlement, interrogatories may be put to the defendant as to the particulars of that settlement, and the time when and the place where it was entered into. Hawkins v. Carr, 6 B. & S. 995. .

Authority-Practice. ]-In an action on a bill of exchange by an indorsee against the acceptor, he was not allowed to interrogate the defendant as to whether or not on one previous occasion he had not authorised his bankers to pay a similar bill. Marris v. Bethell, 38 L. J., C. P. 377; L. R. 4 C. P. 765; 17 W. R. 736.

In an action for assault and false imprisonment against a county inspector of constabulary and two constables, the court allowed interrogatories to be administered to the inspector, to ascertain if the constables had acted under his command, or by his authority. O'Connell v. Barry, Ir. R. 2 C. L. 648.

Superfluous.]—The court will not allow in-terrogatories for the purpose of obtaining from the plaintiff information which the defendant has the means of obtaining from his own agents. Bird v. Malzy, 1 C. B. (N.S.) 308.

Tending to disclose Trade Secrets. ]-It is no ground for refusing to answer interrogatories in an action for the infringement of a patent, that the answers may expose the defendant's customers to actions. Tetley v. Euston, 18 C. B. 643; 25 L. J., C. P. 293.

It is no ground for refusing, in answer to interrogatories, to produce a correspondence which has taken place upon the subject-matter of the action, that the production of such correspondence would disclose the secrets of the trade of the party interrogated. The Don Francisco, 31 L. J., Adm. 205; 6 L. T. 133.

A plaintiff complained that the defendant had sold, under the plaintiff's name, sewing machines which had not been manufactured by him, and he sought a discovery of all the machines sold by the defendant, the price, the profit, the names of the purchasers, and other particulars. The defendant refused to answer, saying that he would thereby disclose the names of his customers and the secrets of his trade:—Held, that he was bound to answer. Howe v. M'Kernan, 30 Beav. 547.

And see cases, infra, D. II.

When privileged from Answering.] - The court will not, on a motion for leave to deliver interrogatories, entertain the objection that they are such as the party to be interrogated is privileged from answering. Such objection must be taken when the interrogatories are administered. Chester v. Wortley, 17 C. B. 410; 25 L. J., C. P. 117; 2 Jur. (N.S.) 287; 4 W. R. 325. S. P., Osborn v. London Dook Co., 10 Ex. 698; 3 C. L. B. 313; 24 L. J., Ex. 140; 1 Jur. (N.S.) 93 ; 3 W. B. 238.

Imputing Criminal Misconduct.]-It is no ground of objection to interrogatories that the answers, if given in the affirmative, would render the party interrogated liable to a criminal prosetion, though it may be ground for refusing to answer. Bartlett v. Lewis, 12 C. B. (N.S.) 249; 31 L. J., C. P. 230; 9 Jur. (N.S.) 202; 6 L. T. 388

In an action for a libel imputing a grave offence to the plaintiff, the court refused to allow the plaintiff to deliver interrogatories to the defendant, some of which the defendant was defendant, some of which are detendant was not bound to answer. Tupling v. Ward, 6 H. & N. 749; 30 L. J., Ex. 222; 7 Jur. (N.S.) 314; 4 L. T. 20; 9 W. R. 482. And see cases

Interrogatories are sometimes disallowed, on the ground that they tend to impute illegal conduct to the party interrogated. Baker v. Lane, 3 H. & C. 544; 34 L. J., Ex. 57; 11 Jur. (N.S.) 117; 11 L. T. 638; 13 W. R. 293.

Interrogatories in an action for libel, pointing to the publication of the alleged libel by the defendant in a newspaper as to which no declaration had been registered in pursuance of the 6 & 7 Will. 4, c. 76, ss. 6, 7, at the stamp office, were disallowed as tending to shew that the party interrogated had committed a criminal offence.

In an action against D. & B., as attorneys and solicitors, for not investing in a proper manner moneys intrusted to them, the plaintiff proposed to administer interrogatories to B, with a view of shewing that there was a partnership between him and D. in the business of attorneys and solicitors. B. objected to the interrogatories, on the ground that he had never been admitted as an attorney or a solicitor, and that they might. therefore, tend to criminate him, and expose him to an indictment under 6 & 7 Viet. c. 73, s. 2, for the misdemeanour of practising without a certificate. The interrogatories were allowed, the court considering that they were bona fide put to aid the action. Bickford v. D'Arcy, 4 H. & C. 534; 35 L. J., Ex. 202; L. R. 1 Ex. 354; 12 Jur. (N.S.) 816; 14 L. T. 629; 14 W. R. 900.

It is no objection to the delivery of interrogatories that the answers would criminate the party interrogated, but he may on that ground refuse Where, however, it appears to answer them. that interrogatories are not put bona fide, but with some sinister object, the court will in the exercise of its discretion disallow them.

77

The court will not refuse leave to deliver in terrogatories on the ground that the attorney of the party proposed to be interrogated swears that the questions, if answered, may tend to criminate his client. If they have that tendency, the objection must be taken by the client on oath. Osborn v. London Dock Co., 10 Ex. 698; oath. Osborn v. London Dock Co., 10 Ex. 598; 3 C. L. R. 313; 24 L. J., Ex. 140; 1 Jur. (N.S.) 93; 3 W. R. 238.

In the exercise of its discretion the court refused, in an action for libel, to allow interrogatories to be administered to the defendant where the direct tendency of them was to make the defendant criminate himself, and there were no special circumstances for allowing them to be put. Edmunds v. Greenwood, 38 L. J., C. P. 115; L. R. 4 C. P. 70; 19 L. T. 423; 17 W. R. 142.

Interrogatories, the answers to which may criminate the person interrogated, will not be allowed upon the common affidavit. Special circumstances must be shewn which render them necessary, and it is a matter for the discretion of the judge whether there is sufficient ground for allowing them to be put. Villeshoisnet v. Tubia, 38 L. J., C. P. 146; L. R. 4 C. P. 184; 19 L. T. 693; 17 W. R. 322.

When it was objected that certain interrogatories tendered by the plaintiff were of a criminatory nature, in a suit in the Admiralty Conrt, it was ordered that the interrogatories should be administered, but that, if the defendant stated upon oath his belief that an answer to any particular interrogatory would subject him to a penalty, he should not be compelled to answer it. The Mary or Alexandra, 38 L. J., Adm. 29; L. R. 2 Adm. 319; 18 L. T. 891; 17 W. R. tiff upon a common affidavit. Such affidavit

- Fraud. - It is no objection to interrogatories, that the answers, if given in the affirmative, will shew that the execution of a deed npon which the defence is founded was obtained by fraud. Goodman v. Holroyd, 15 C. B. (N.S.) 839.

### c. In Particular Cases.

Ejectment.]-A tenant withholding possession of demised premises after the termination of his lease, and defending an action of ejectment by his lessor, will not be allowed to administer interrogatories to him which seek to ascertain the fact that the title of the latter has expired. Wallen v. Forrest, 41 L. J., Q. B. 96; L. R. 7 Q. B. 239; 26 L. T. 290.

In an ejectment for overholding, on the expiration of a lease for three lives and forty-one years from the death of the survivor, where the point in dispute was when one of the lives in the lease had died, the plaintiffs were permitted to interrogate the defendants as to the date of the death of the cestui que vie, and also as to the reputation in the family on the subject. Read v. M'Jennett, Ir. R. 6 C. L. 267.

In ejectment on the title, the court will allow the defendant to exhibit interrogatories to the plaintiff as to the links through which he claims to be heir. Kettlewell v. Dyson, 9 B. & S. 300;

18 L. T. 285 : 16 W. R. 851. Semble, however, that the plaintiff will not be

allowed to exhibit similar interrogatories to the defendant. 1b.

A defendant held a dry dock and premises of Ex. 41; L. R. 9 Ex. 45. the plaintiff under a lease, which contained a provise empowering the plaintiff, if he should be desirous of building on the premises, and of closing the dock, "and should bona fide determine so to do," to put an end to the demise by giving notice in the way therein provided for. The plaintiff having put an end to the demise by giving notice according to this proviso, and brought ejectment, the defendant was allowed, with the view of testing the bona fides of the plaintiff's intention to build, to interrogate the plaintiff as to whether he had obtained from his the plaintiff was permitted to administer interroessors, the freeholders, any licence or authority to close the dry dock, and to build thereon. Winn v. Rose, 36 L. J., C. P. 306.

The statute applies to actions of ejectment.

Fliteroft v. Fletcher, 11 Ex. 543; 25 L. J., Ex. 1b.

94; 2 Jur. (N.S.) 191; 4 W. R. 268.

A defendant in ejectment is entitled to interrogate the plaintiff as to the character in which he snes, and the nature of the pedigree on which he relies, and as to links through which plaintiff

claims to be heir. 1b.

A defendant in ejectment may be allowed to deliver interrogatories to the plaintiff as to the character or right or title under which he claims to be entitled to the premises claimed by him in the action; yet the defendant in ejectment cannot be ordered to answer interrogatories of a similar character on the part of the plaintiff. Horton v. Bott, 2 H. & N. 249; 26 L. J., Ex. 267; Jur. (X. 5) 568; 5 W. R. 792. See this case referred to in *Lyell v. Kennedy*, 52 L. J., Ch. 385; 8 App. Cas. 217; 48 L. T. 585; 31 W. R. 618—H. L. (E.)

A defendant in ejectment cannot obtain an order to administer interrogatories to the plain- 18 W. R. 526.

must allege special circumstances. Pearson v. Turner, 16 C. B. (N.S.) 157; 33 L. J., C. P. 224;

10 Jur. (N.S.) 731; 10 L. T. 461; 12 W. R. 801. In ejectment by landlord against lessee to recover possession of premises, and enforce a forfeiture by reason of his having underlet, the court will not allow the landlord to deliver interrogatories to the lessee where the answers might subject him to a forfeiture of his interest. Pye v. Butterfield, 5 B. & S. 829; 34 L. J., Q. B. 17; 11 Jur. (N.S.) 220; 11 L. T. 448; 13 W. R. 178.

In ejectment a defendant will not be allowed to deliver interrogatories inquiring into the title upon which the claimant relies, unless it is made to appear that the defendant is ignorant of the nature of the claim which the claimant intends to set up, and is unable otherwise to prepare his defence. Staate v. Rew, 14 C. B. (N.S.) 209; 32 L. J., C. P. 160; 11 W. R. 595.

In ejectment on a forfeiture for breaches of the conditions in lease, the court granted leave generally to deliver interrogatories to the defendant as to the existence of the lease and the extent of the demised premises, subject to any objection, if valid, which might be taken by him to answering any of the interrogatories when administered, on the ground of their tending to disclose a forfeiture of his estate. Chester v. Wortley, 17 C. B. 410; 25 L. J., C. P. 117; 2 Jur. (N.S.) 287; 4 W. R. 325.

Although interrogatories as to the means by which a defendant proposes to establish an adverse title to a hereditament are not admissible, yet interrogatories seeking only to ascertain the character of his title and the quality of his possession may be allowed. Towne v. Cocks, 43 L. J.,

The rector of a parish claimed, in an action for money had and received against the patron of the living, one-half of the rent of the churchyard. and of the tithe rent-charge which had been received by the patron since his induction. The defendant having pleaded a title by prescription, and also, as to the rent-charge, an agreement under 6 & 7 Will. 4, c. 71, whereby it was agreed that the tithes should be commuted, and that the substituted rent-charge should be received in equal shares by the then rector and himself, gatories as to the period for which the defendant and his predecessors had received the rents and tithes, or tithe rent-charge, and as to the circumstances under which they had so received them.

Bill of Lading.]—Barley was consigned by A. to B., and was delivered by the shipowners to B. without production of the bill of lading. The plaintiffs (who were B.'s bankers), as indorsees of the bill of lading from him, three months afterwards (B. having in the meantime become bankrupt) brought trover against the shipowners. Upon an affidavit suggesting that the bill of lading was indorsed to the plaintiffs after the delivery of the barley to B., or that they, having the bill of lading in their possession, knowingly suffered the shipowners to deliver the barley to B.: the court allowed interrogatories to be administered to the plaintiffs as to the time when, and the circumstances under which, the indorsement of the bill of lading to them took place. Derby Commercial Bank v. Lumsden, 39 L. J., C. P. 72; L. R. 5 C. P. 107; 21 L. T. 673;

Libel.]—A defendant interrogated whether he upon R. dismissed the plaintiff, without other the publisher of the newspaper in which the cause assigned:—Held, that the plaintiff could is the publisher of the newspaper in which the libel appears is protected from answering, on the ground that he might criminate himself, since 32 & 33 Viet. c. 24, abolishes the statutory declaration as to the publisher, and re-enacts 6 & 7 Will, 4, c. 76, s. 19, which provides for the discovery of the publisher by bill, and his Bowden v. Allen, 39 L. J., C. P. 217; 22 L. T. 342; 18 W. R. 695.

To an action for libel, in sending to the "Times" newspaper a libellous extract from a letter, the defendant pleaded the general issue and a justification; a judge, upon the usual affidavit, allowed the plaintiff to administer to the defendant the following interrogatory: "Did you write and send to the 'Times,' for publication, a letter signed Z., accompanied by what purported to be an extract from the letter from a Halifax merchant?" The defendant had obtained a commission to Nova Scotia to examine witnesses upon an affidavit, which stated that the extract was from a letter he had received from a person in Nova Scotia with whom he had since communicated, and on whose information, believing the statement to be true, he had pleaded a justification, in support of which it was necessary to examine witnesses in Nova This affidavit was not before the judge. Scotia. but it did not appear whether the facts had or had not been stated to him. On a motion to set aside the order allowing the interrogatory :-Held, that whether such an interrogatory should be allowed or not was a matter for the discretion of the judge, with which the court would not interfere, unless he was shewn to have been clearly wrong; and that though some special circumstances should be shewn to the judge before he would be justified in allowing such au interrogatory, yet the circumstances appeared to be sufficiently special, and were, at any rate, not shewn not to be so. Inman v. Jenkins, 39 L. J., C. P. 258; L. R. 5 C. P. 738; 22 L. T. 659; 18 W. R. 897.

In an action for libel, a judge refused to allow interrogatories to be administered to the defendant, the object of the plaintiff being to rebut the possible defence of privilege by proving malice in the defendant :—Held, that the refusal was right. Davis v. Gray, 30 L. T. 418.

Interrogatories in libel will not be allowed

where the answers would enable the plaintiff to abandon the civil and institute criminal proceed-

ings against the defendant. Ib. The discretion vested in a judge will not be reviewed by the court except on very strong grounds. Ib.

In order to be able to interrogate a defendant as to the contents of an alleged libel, it is necessary that the plaintiff should shew, first, that defamatory matter has been published; and, secondly, that he has been injured there-by. Stein v. Tabor, 31 L. T. 444.

by. Stein v. Tabor, 31 L. 1. 111.

The plaintiff, in leaving the employ of the German master, was furnished by the defendant with a testimonial describing him as "an able, painstaking master," who had always "conscientiously fulfilled all the duties which had devolved upon him." Upon the strength of this, among other testimonials, the plaintiff was appointed private secretary to R. The defendant, hearing of the appointment, wrote a letter

not interrogate the defendant as to the contents of the letter to R.'s wife. Ib.

In an action for libel, the plaintiff interrogated the defendant as to the contents of a written communication made by the defendant a justice of the peace, to the lords commissioners of the great seal, concerning the plaintiff, who was also a justice of the peace; the defendant, by his answer, admitted that he had made a privileged communication, concerning the plaintiff, to the lords commissioners, but declined to answer as to its contents; the court, in the exercise of its judicial discretion, refused to compel the defendant to answer the interrogatory. Fitzgibbon v. Greer, Ir. R. 9 C. L. 294.

If, in an action for libel, the plaintiff puts an interrogatory to the defendant as to the contents of an existing written document, which he objects to answer upon the ground of the doenment being a privileged communication, the defendant's proper course is to move to discharge the order allowing the interrogatory to

be put. Ib.

In an action for libel alleged to be contained in a letter, which, since it had been received by the person to whom it had been addressed, had been returned to and was in the possession of the defendant who had written it, the plaintiff applied at chambers for inspection of such letter, in order to enable him to declare in the action. The judge made an order for such inspection, upon the defendant declining to make an affidavit that the production of the letter would tend to eriminate her :- Held, that the judge had no power to make such order, inasmuch as, although the plaintiff might have obtained such inspection if he had proceeded under the C. L. P. Act, 1854, s. 50, he was not entitled to it under 14 & 15 Vict. c. 99, s. 6 (under which the application must be considered as made), as a court of equity would not have granted discovery in this case, and the power of the common law courts under that section is limited to cases in which discovery could have been obtained in equity, and that section is not altered or extended by the C. L. P. Act, 1854, s. 50. Hill v. Campbell, 44 L. J., C. P. 97; L. R. 10 C. P. 222; 32 L. T. 59; 23 W. R. 336.

In an action for libel, an application was made, no application having been previously made for discovery, for inspection of a letter written by the defendant said to contain the libel; the defendant refused to state on oath that the production of the letter would tend to criminate her :- Held, that such an application could only be made under 14 & 15 Vict. c. 91, s. 6, and that, as inspection under that section was confined to cases in which discovery would be given in equity, the fact that a court of equity would not in such a case give discovery, prevented the common law courts from granting the inspection desired. Ib.

In an action for libel, on an affidavit that the libel was in a printed handbill to which there was no printer's name; that the plaintiff could not ascertain who was the printer, and that the defendant had been seen with a person who affixed some of the handbills, and was also seen posting one himself, the court allowed interrogatories to be administered to the defendant as to whether he had not been justrumental in to R.'s wife, withdrawing the testimonial, where- printing and publishing the libel. Greenfield v.

notice or handbill, on which the name of the printer did not appear. The defendant had been seen with the person who distributed the notices. and had himself posted up one of them. On an application to administer interrogatories to him directed to ascertain if and to what extent he gave instructions for the printing and circulation of the handbills :- Held, that the special circumstances took the case out of the ordinary rule that interrogatories which tend to criminate will not usually be allowed in an action of libel. 1b.

Slander.]-The court, in the exercise of its discretion, refused to allow a plaintiff in an action for slander, where the alleged slander consisted of various and wide imputations, to deliver interrogatories, interrogating the defendant as to whether he had spoken the words, or any and what other words conveying similar imputations, and when, where, and to whom he mpudations, and which, where, and to whom he had spoken them. Stern v. Sevastopulo, 14 C. B. (N.S.) 737; 32 L. J., C. P. 268; 10 Jur. (N.S.) 317; 8 L. T. 538; 11 W. R. 862.

In an action for slander, a defendant may be compelled to answer interrogatories as to the words uttered, if it is made out to the satisfaction of the court that the plaintiff cannot othertion of the court limit the plantiff earthof otherwise obtain redress. Atkinson v. Fosbroke, 35 L. J., Q. B. 182; L. R. 1 Q. B. 628; 12 Jur. (N.S.) 810; 14 L. T. 553; 14 W. R. 832.

Negligence.] — A passenger on a railway, having been hurt by a train, was accompanied to her home by two of the company's servants under the direction of a third, an inspector, Subsequently bringing an action for damages in respect of the injury received, she sought to administer interrogatories to the company: Held, that they might be interrogated as to the names of their inspector, of their other servants who accompanied her home, and of the driver of the engine drawing the train by which she was a passenger, but might not be asked whether any of the servants of the company witnessed the accident, and, if so, what were their names. Potter v. Metropolitan District Ry., 28 L. T.

In an action against a railway company for damages sustained by a passenger from a collision on the line, through the alleged negligence of the company's servants, he was not allowed, without an affidavit disclosing special circumstances, to administer interrogatories to the company as to what was the cause of the accident, or as to whether they possessed or had the care of that with which the train came into collision. Bechevraise v. G. W. Ry., 40 L. J., C.P. 8; L. R. 6 C. P. 36; 23 L. T. 808; 19 W. R. 229.

In an action for injury by the alleged negligence of the defendant, the court will not allow interrogatories to be administered to the plaintiff as to the circumstances under which the accident happened, the extent of injury, the medical attendance, and charges for it. Peppiatt v. Smith, 3 H. & C. 129; 33 L. J., Ex. 239; 11 L. T. 139.

valuer on the part of the plaintiff to ascertain a series of interrogatories proposed to be de-the sum to be paid by the latter, on the purchase livered is improperly drawn, or asks too much,

Reay, 44 L. J., Q. B. 81; L. R. 10 Q. B. 217; of the goodwill of a business. In an action 31 L. T. 756; 23 W. R. 732.
An alleged libel was contained in a printed reasonable skill in the conduct of the valuation :-Held, that the plaintiff was entitled to interrogate him as to the basis of his valuation. Turner v. Goulden, 43 L. J., C. P. 60; L. R. 9. C. P. 57.

> False Representation. - Interrogatories, in an action for a false and fraudulent representation on the sale of a business. Blight v. Goodeliffe, 18 C. B. (N.S.) 757.

> Seduction. - In an action for seduction, the plaintiff may interrogate the defendant as to whether he had not had connection with the daughter, whether he had not been informed by her that she was pregnant by him, whether he was not the father of her child, whether he had not offered to maintain the child, and whether he had not stated, in the presence of other persons, that he had no reason to believe she had had connection with any other man. *Hodsoll* v. *Taylor*, 43 L. J., Q. B. 14; L. R. 9 Q. B. 79; 29 L. T. 534; 22 W. R. 89.

> In an action for seduction, it is not allowable to interrogate the defendant as to his present means or what property he is possessed of. But it is allowable to interrogate him with a view of obtaining admissions from him as to his having had sexual intercourse with the plaintiff's daughter. Ib.

> Trespass. - In an action of trespass to a several fishery, the plaintiff was allowed to interrogate the defendant before defence filed. for the purpose of ascertaining whether the defendant, or any person authorised by him, had fished in the waters over which the several fishery was claimed. Acheson v. Henry, Ir. R. 5 C. L. 496.

> By Companies against Shareholders.]—Inter-rogatories were allowed to be delivered on behalf of a company sning for calls, to a defendant, whom they sought to prove to be a shareholder, whether he had executed the subscription contract of the company, the company having madeout a prima facie case of its loss; but it was. made part of the rule that the answers were not to be used at nisi prins, unless the loss was. proved. Wolverhampton Waterworks Co. v. Hawksford, 5 C. B. (N.S.) 703; 28 L. J., C. P. 198; 5 Jur. (N.S.) 736; 7 W. R. 244.

In Interpleader Issues. ]-Interrogatories may be delivered in an interpleader issue. White v. Watts, 12 C. B. (N.S.) 267; 31 L. J., C. P. 381; 6 L. T. 387.

# d. Form.

Discretion of Judge.]—When interrogatories appear to a judge to be framed carelessly, and with too much latitude, so as in reality to throw upon him the trouble of settling them, he is not bound to select the one or two which he may think proper and to reject the others only, but in sending the whole of them back to be reformed he exercises a reasonable discretion with which the court will not interfere. Phillips v. Lewin, 34 L. J., Ex. 37; 11 L. T. 512.

The court or a judge at chambers ought not to In Valuation. |- A defendant was engaged as settle interrogatories for parties. If, therefore, the court or judge ought to refuse the whole, even though some of them may be unobjectionable. Robson v. Crawley or Cooke, 2 H. & N. 766; 27 L. J., Ex. 151; 4 Jur. (N.S.) 75; 6 W. R.

This, however, must not be taken so strictly as to mean that the court or a judge will not alter a word here or there, or the like, in order to render perfect a series of interrogatories correctly drawn in general. 1b.

The court will, on a rule to allow a party to settled at chambers. Zarifi v. Thornton, 26 L. J.,

section at channers, Zarge v. Thornton, 26 L. J., Ex. 214; 3 Jur. (N.S.) 92. A. instructed B., as his broker, to purchase goods for him, which B. did, and delivered to A. a bought note. A paid the purchase-money, and received from B. a delivery order for the goods, which described them as deliverable to B.

An affid or his assignees by indorsement, and was indorsed by B. This document turning out to be null and void, A. brought an action against B. for money received to his use, and for not delivering the goods. The court gave A. leave to deliver interrogatories to B., with the view of ascertaining whether he entered into the contract as agent or principal, and if as agent, for whom, and by what authority. Thöl v. Leushe, 10 Ex. 704; 3 C. L. R. 317; 24 L. J., Ex. 142; 1 Jur. (N.S.)

Form and extent of interrogatories which may be exhibited to an excentor upon a plea of plene administravit. Peck v. Nolan, 14 Ir. C. L. R., App. 32.

#### e Affidavit to obtain.

Utility of Interrogation.]-The court or a judge should exercise the discretion given by the Common Law Procedure Act, 1854, s. 51, so as to take care that interrogatorics should be useful as well as relevant. Alexandra (Newport) Dock Co. v. Elliot, 23 L. T. 847.

On an application to the court for leave to administer interrogatories the affidavit must amminster interrogatories the anianty must shew, with greater particularity than is always requisite at chambers, the object for which the questions are to be asked. *Ib*. It is not necessary that all the plaintiffs should

join in an affidavit to ground a motion for liberty to administer interrogatories. Read v. M. Jennett, Ir. R. 6 C. L. 267.

Though there is no rule to preclude a defendant from being allowed to deliver interrogatories to the plaintiff before he has pleaded, yet if he seeks to be allowed to deliver them before plea, he must first disclose the nature of his defence, in order to shew that the interrogatories are for the purpose of supporting such defence. Genriey v. Plimsell, 42 L. J., C. P. 244; L. R. 8 C. P. 362; 29 L. T. 130.

Where, therefore, in an action for a libel the defendant pleaded a justification in a general form, he was not allowed to deliver interrogatories to the plaintiff until, either by affidavit or by particulars, he had first disclosed the matters on which his justification was founded. Ib.

A party, applying for leave to deliver interregatories, must shew the nature of his case so far as to enable the judge or the court to form

There should be an affidavit verifying the interrogatories. Ib.

Where there are several defendants the court will not allow the plaintiff to administer interrogatories to them unless the affidavits upon which the motion is grounded contain the averment that the plaintiff has a good cause of action against all. Doolin v. Diwon, 16 W. R.

By whom, ]-The facts that the plaintiff is, exhibit interrogatories, determine any question and always has been, residing in England and is of principle as to the right to exhibit them, but of very advanced years, are not such "unavoid-will leave the particular form of them to be able circumstances" as will enable the court to dispense with the affidavit of the plaintiff, and his agent or attorney, and to act upon one made by the plaintiff's attorney and his son, who has always had the management of the property in Adair v. Simpson, Ir. R. 1 C. L.

> An affidavit in support of an application by a plaintiff for leave to deliver interrogatories to the defendant must show that he has a good eause of action upon the merits. May v. Hun-kins, 11 Ex. 210; 3 C. L. R. 895; 24 L. J., Ex. 309; 1 Jur. (N.S.) 600; 3 W. R. 550.

> And must state that the party will derive benefit in the cause from the discovery which he seeks. But where a party sucs or defends in person, an affidavit of an attorney or agent will be dispensed with, Oxlade v. N.-E. Ry., 12 C. B. (N.S.) 350.

> The affidavit of the wife and the attorney of the plaintiff for discovery was admitted, under special circumstances, in lieu of that of the party himself. Burnett v. Hooper, 1 F. & F. 412, 467.

> In an action by an attorney, the application was made upon an affidavit of the plaintiff, describing him as attorney. The application had been heard before a judge, when the summons was indersed, by consent, "Disallowed, without prejudice to any future application": the objection that the attorney of the plaintiff ought to have joined in the affidavit, not having been taken at chambers, was waived. Whateley v. Crawford, 5 El. & Bl. 709; 25 L. J., Q. B. 163; 2 Jur. (N.S.) 207; 4 W. R. 121,

# f. At What Stage of Suit obtainable.

The court will not allow a defendant to deliver and court will not allow a defendant to deliver interrogatories before plea, except under special circumstances, as, for instance, where he makes out a case of urgent necessity. Martin v. Hemming, 10 Ex. 478; 24 L. J., Ex. 3; 18 Jur. 1002; 3 W. R. 29.

But interrogatories will be allowed to be administered to a defendant immediately after declaration, with leave to amend the breaches assigned in an action for infringement of a patent. Jones v. Platt, 6 H. & N. 697; 30 L. J., Ex. 305; 7 Jur. (N.s.) 978; 4 L. T. 411; 9 W. R. 696.
After appearance, but before declaration, the

plaintiff not knowing the precise cause of action, applied for leave to administer interrogatories, in order that he might be enabled correctly to de-clare. The court refused the application. Morris clare. The court refused the application. v. Parr, 6 B. & S. 203; 34 L. J., Q. B. 95; 11 Jur. (N.S.) 388; 11 L. T. 706; 13 W. R. 337.

A summons to deliver interrogatories to a plainan opinion on the propriety of the proposed interrogatories: Crownes v. Morrison, 6 El. & judge having disallowed some, the determinant of the proposed of the counsel, on the last day of Hilary Term, moved for a rule to allow them. The court, in order to spring assizes, made it part of the rule that it should not operate as a stay of proceedings. Zarifi v. Thornton, 26 L. J., Ex. 214; 3 Jur. (N.S.)

The court will allow interrogatories to be delivered by a plaintiff, after the defendant has pleaded, without a special affidavit. James v. Barnes, 17 C. B. 596; 25 L. J., C. P. 182.

When a plaintiff seeks to deliver interrogatories before a declaration, he must, for this purpose, do more than produce an affidavit in the terms prescribed by s. 2. Croomes v. Morrison, 5 El. & Bl. 984; 2 Jur. (N.S.) 163; 4 W. R. 282.

Rule for.]-The rule for leave to deliver interrogatories is only a rule to shew cause. Thol v. Leaske, 24 L. J., Ex. 142; 1 Jur. (N.S.) 47.

### g. Answer.

Sufficiency. 1-The answers to interrogatories may be insufficient by reason of containing, in addition to the information asked for, impertment or otherwise objectionable matter. Peyton v. Harting, 43 L. J., C. P. 10; L. R. 9 C. P. 9; 29 L. T. 478; 22 W. R. 61.

An order directing that a person interrogated shall be orally examined as to the matters concerning which he has refused or omitted to make

an affidavit is sufficient. Ib.

In an action by a principal against his agent, for negligence in the purchase of goods for the principal, the agent being interrogated touching certain matters connected with such purchase not within his own knowledge, but known to his partner at New York, declined to answer on the ground of ignorance as to such matters. Further interrogatories being administered, touching the same matters, he answered, stating that since action certain communications had passed between him and his firm at New York, with a view to his defence to the action, and that all his information as to the matters in question was derived from such communications, and submitting that he was privileged from disclosing such communications :- Held, on an application to the court to compel him to make further answer to the interrogatories, that he was so privileged, and that the application must be refused. Phillips v. Routh, 41 L. J., C. P. 111; L. R. 7 C. P. 287; 26 L. T. 845; 20 W. R. 630.

Where a party objects to the sufficiency of the answers, and seeks to have a vivâ voce examination, he must apply promptly. Chester v. Wort-

ley. 18 C. B. 239.

The jurisdiction of the court, in case of omission without just cause to answer sufficiently written interrogatories, to direct an oral examination of the interrogated party, as it is a jurisdic-tion to be exercised at the discretion of the court, will be exercised with caution, and with due regard to the nature and circumstances of the action. Swift v. Nun, 26 L. J., Ex. 365.

Where a party was sucd as administrator, and answered to written interrogatories that he had not taken out administration in this country, nor administered nor intermeddled with any of the effects in this country, the court refused a rule that he should be orally examined, there being no affidavit in support of the application, although he shewed cause in the first instance, and waived

the objection. Ib.

Where a party has substantially answered inprevent the plaintiff being thrown over the terrogatories, but there are defects or flaws in any of his answers which render them formally insufficient, but which the court has no reason to think were intentional, the proper course is to apply to have them amended at chambers : and a rule for his oral examination will be discharged. and the costs will be made his costs in the cause. Bender v. Zimmerman, 29 L. J., Ex. 244.

If a party does not answer interrogatories in due time, but the court sees that (although there is in strictness no sufficient excuse) there has been no intention to disobey the court, and the answers are ready for delivery, a rule for an attachment Windle v. Lane, 29 will not be made absolute.

L. J., Ex. 245.

When a defendant has to answer interrogatories in support of the plaintiff's right of action, he cannot excuse himself from answering by swearing to some matter of fact which involves the existence of the right of action; for that is the very question to be tried upon the whole of the evidence, and upon his answers to the interrogatories. Geary v. Buxton, 29 L. J., Ex. 280.

Oral Examination. - Where a party has neglected to answer at all without just cause, it may be advisable to apply for an order for his oral examination, instead of proceeding by way of attachment for contempt, at all events where there is a question whether, by reason of illness, or on account of co-parties to the action having sufficiently answered, or otherwise, the neglect is not altogether without just cause, and certainly is not wilful or contumacious in the sense of a defiance of the authority of the court. Turk v.

Syne, 27 L. J., Ex. 54.

The rule for an oral examination is only nisi in the first instance. Ib.

A defendant having answered interrogatories in a voluminous manner, introducing many additional and irrelevant topics to those contained in the intervogatories, the judge made an order directing him to appear and answer orally before the master, under the C. L. P. Act. 1854, s. 53: -Held, that where the answers contained such an amount of irrelevant matter as to amount to an importinent excess, the section was applicable. Peyton v. Harting, 43 L. J., C. P. 10; L. R. 9 C. P. 9; 29 L. T. 478; 22 W. R. 61.

In making an order under that section, it is not necessary to specify in detail the points as to

which an oral examination is to take place. Ib.
The C. L. P. Act, 1854, s. 46, enacts that upon the hearing of any motion or summons, it shall be lawful for the court or a judge at their or his discretion from time to time to order the production of documents or the oral examination of witnesses, before such court or judge or before a master:—Held, that the terms "hearing of any motion" included the application for a rule nisi and, consequently, that an order for the examination of witnesses might be made upon a motion for an attachment against a defendant for not answering interrogatories. Morganv. Alexander. 44 L. J., C. P. 167; L. R. 10 C. P. 184; 32 L. T. 34; 23 W. R. 321.

C. and P. contracted with a company to construct a railway in Tasmania, receiving as part payment the greater part of the share capital of the company. The plaintiff, as executor, claimed payment for surveys alleged to have been per-formed by his testator for the company in 1870 and 1871, and he had sued C. and P., as well as the company, in respect of such claim. Interrogatories administered to the company, with the view plaintiff to be answered within ten days. The of ascertaining their relations with the test-order with the interrogatories was served on the fator, were answered, but quite insufficiently, plaintiff sattorneys; and an order for further time by the secretary of the company, who had not become such secretary until March, 1872. Those persons who had been directors of the company in 1870 and 1871 had ceased to be such directors. and the present directors had no personal knowledge of the transactions forming the subjectmatter of the action. It was by the court ordered that C. and P. should be orally examined, and produce all documents in their possession having reference to the motion, and that the decision in the motion should stand over until the result of such oral examination should be ascertained.

Moline v. Tasmanian Ry., 32 L. T. 828. See Cockerell v. Van Diemen's Land Co., 16 C. B. 256: 3 C. L. R. 789.

When an oral examination is required of the interrogated party for having omitted, without just cause, to answer sufficiently written interrogatories delivered under 17 & 18 Vict. c. 125, ss. 51 and 53, semble, the proper course is to apply to a judge at chambers in the first instance as to the sufficiency of the answers to the interrogatories. Meadows v. Kirkman, 2 L. T. 251.

Attachment.]-When a rule had been granted, calling on a defendant to shew cause why an attachment should not issue against him for not answering interrogatories, the clerk to the plaintiff's attorney swore that on his calling at the defendant's residence he was told he was within, but would see no one; and that on its being explained that the object was to serve him with the rule, he was heard to say that it would not be seen, for that the plaintiff had got him tight enough. The court was of opinion that the contempt was complete on his neglecting to answer the interrogatories within the time mentioned in the statute, and made the rule absolute without requiring personal service. Scaffeld (Lord) v. Pratt, 5 L. T. 674. See S. C., 580.

A rule for an attachment for disobedience of

the order for not answering interrogatories may be granted on the application of a party interested in the suit in which the order was made, though he is not the person upon whose application it was granted originally. Madrid Bank v. Bayley, 36 L. J., Q. B. 15; L. R. 2 Q. B. 37; 15 L. T. 292; 15 W. R. 159.

- Discharge of Rule where Answers ready.] -Interrogatories were delivered to the defendant under a judge's order; and the time for answering the same was cularged until a peremptory order was made that the defendant should answer upon a certain day. A rule nisi for an attachment for not so answering having been obtained, upon canse being shewn, the answers being ready to be filed, the rule was ordered to be discharged if the answers should be filed within twenty-four hours; costs to be plaintiff's costs in the cause in any event. Rainsford v. Campbell, 2 L. T. 432.

Jurisdiction.]—A superior court has jurisdiction, under the Common Pleas at Lancaster Amendment Act (32 & 33 Vict. c. 37), to issue an attachment upon the omission to answer interrogatories ordered by the prothonotary in an action commenced in the Lancaster Court. Coston v. Blackburn, L. R. 8 Q. B. 54; 27 L. T. 117. In a cause in the Court of Common Pleas at

to answer obtained by them. The interrogatories not having been answered within the further time, a rule was obtained in the Court of Queen's Bench for an attachment against the plaintiff, on the ground that he had by not answering the interrogatories been guilty of a contempt; and that by force of 32 & 33 Vict. c. 37, ss. 6, 7, and 15, the proper mode of proceeding was by rule in any one of the superior courts. On cause being shewn, the court held the proceedings regular. and made the rule absolute. Ib.

Waiver of Right to have them answered. ]-Interrogatories having been delivered to a defendant, in an action of detinue, and still remaining unanswered, a judge's order was made by consent, whereby the plaintiff was to be at liberty to sign final judgment for damages and costs, on the terms that execution was not to issne if the goods detained were delivered up within a certain time. The plaintiff signed final judgment, and, the goods not being delivered up, obtained an order for the issue of execution for return of the chattels detained. An application under these circumstances having been made for an attachment against the defendant for not answering the interrogatories :- Held, that the consent to the final judgment was an abandon-ment by the plaintiff of his right to have the interrogatories answered, and that the application must therefore be refused. Hayne v. Pratt, 40 L. J., C. P. 119; L. R. 6 C. P. 105; 28 L. T. 809; 19 W. R. 437. See Dunn v. Moonan, 18 W. R.

### h. Using.

Examined Copy-Proof. ]-In an action by the administratrix of a wife to recover a sum of money from the defendant which he had recovered from a third person to hold at her disposal, in order to prove the amount the plaintiff offered in evidence an examined copy of his answers to interrogatories in a previous action in which the plaintiff had sued the representative of the husband, but which was discontinued :- Held, first, that the answers were admissible without proof of the iu-

terrogatories. Fleet v. Perrins, 9 B. & S. 575; 37 L. J., Q. B. 283; L. R. 3 Q. B. 536; 19 L. T. 147. Held, secondly, that an examined copy of the answers was admissible without proof of his. handwriting to the original answers. 1b.

At Trial.]—When interrogatories have been administered they cannot afterwards be used on the trial with a view to contradict the person to whom they were administered on his examination in court; on the ground that such would be an inquiry into the client's instructions to his attorney, which are privileged communications. Carwell v. Gees, 15 L. T. 217.

## i. Costs.

Discretion. ]-The costs of orders for interrogating the opposite party are in the discretion of the judge making the order. If the order is silent, they will not be allowed as costs in the v. Blackburn, L. R. 8 Q. B. 54; 27 L. T. 117.

In a cause in the Court of Common Pleas at successful. Smith v. G. W. Ly, 6 El. & Bl. 405; Lancaster an order was granted by the district 2 L. J., Q. B. 279; 2 Jur. (8.8). 668. S. P., prothonotary to administer interrogatories to the Elstob v. Honeywell, 20 L. T. 227.

# C. ACTION FOR DISCOVERY.

1. FOR DISCOVERY ONLY.

When it Lies. |- The plaintiffs were manufacwhen it hes. — The plaintins were manufac-turers, the defendants shippers and carriers. The plaintiffs were in the habit of sending goods abroad through the defendants. They had particular trade marks affixed to all their goods so They discovered that goods were shipped through the defendants with counterfeit marks identical with their own, upon which, on the refusal of the defendants to furnish them with the names and addresses of the persons so infringing their trade marks, they brought their action for discovery, to which the defendants demurred on the grounds that no litigation was intended against them—they were third parties to the contemplated action, and in the position of witnesses who might be called upon to give evidence in an action against those who had infringed the plaintiff's rights. Demurrer overruled with costs, and discovery ordered. Orr v. Diaper, 46 L. J., Ch. 41; 4 Ch. D. 92; 35 L. T. 468; 25 W. R. 23.

Bill of discovery lies in equity, though for matters sounding in trust. East India Co. v.

Erans, 1 Vern. 307.

Demurrer to a bill brought to discover the tenant to the precipe on a voluntary conveyance, allowed. Sherborne v. Clerk, 1 Vern. 273.

Equity will dismiss bill for discovery of

matters properly triable at law. Fens (Governors)

v. Hare, 2 Comb. 694.

After a decree of dismission affirmed on anpeal to the Lords, bill is brought for the discovery of a deed (said to be burnt pending the suit), which made out the plaintiffs title, and the bill so brought, that after such discovery the plain-tiff might apply to the House of Lords for relief; in demurrer the defendant ordered to answer, but plaintiff to proceed no further without leave of court. Barbon v. Scarle, 1 Vern. 416.
Persons claiming lands by a will, or other

voluntary disposition, and having the law on their side, are entitled, as against the heir-at-law, to the assistance of a court of equity for a discovery of the deeds and writings relating to the devised estate, and to have them delivered up as following the lands. Newcas Pelham (Lord), 3 Bro. P. C. 460. Newcastle (Duke) v.

Demurrer will lie to bill brought to discover whether there is such a person, or where he is, in order only to make him a party. Dineley v.

Dincley, 2 Atk. 394.

Demurrer to a discovery of a trading overruled; a demurrer good if confined to questions as to having committed an act of bankruptcy. Chambers v. Thompson, 4 Bro. C. C. 434.

Where a bill for a discovery against an assured alleged that he had been employed to procure the goods which were the subject of the policy : -Held, that a demurrer to the discovery would not hold, although the bill stated that the defendant had been paid and satisfied the full value of the goods, the object of the bill being to ascertain whether he was not a merc agent. Mills v. Campbell, 2 Y. & Coll. 391; 7 L. J., Ex. Eq. 2, 5.

General demurrer to bill by a widow and infant, customary heir of copyholder, for discovery of title of defendant in possession, allowed for defect of sufficient case for the interference of the court. Buker v. Booker, 6 Price, 379. there where in a suit for tithes, the title to the 522.

rectory is in issue to a cross-bill, praying a discovery of the title, the rector cannot demur, although no other title to set up. Bowman v. Lygon, 1 Anstr. 4.

Prayer of Process or Relief-Irregularity and Demurrer. - A bill proper for discovery only prays relief, yet a general demurrer was overruled, but without costs. Fry v. Penn, 2 Bro.

C. C. 280. Sed quære, see id. 319.
Plaintiff entitled to discovery only praying renef, General demurrer lies. Albretcht v. Sussman, 2 Ves. & B. 328; 13 R. R. 110.

Though plaintiff is entitled to discovery, if he prays relief to which he is not cutitled, demurrer will lie. Muckleston v. Brown, 6 Ves. 63; 5 R. R. 211.

A general demurrer holds where the plaintiff entitled only to discovery prays relief also.

Gordon v. Simkinson, 11 Ves. 509.

Demurrer to a bill for discovery, on the ground that the prayer of process contained words adapted to a bill for relief, allowed. Ambury v. Jones, Younge, 199.

A bill of discovery is demurrable if the words "stand to and abide such order and decree" are

inserted in the prayer of process.

Heriott, 6 Sim. 428; 5 L. J., Ch. 133.

The word "order," without the word "decree," in the prayer of process to a bill of discovery, does not render the bill deinurrable. Baker v. Bramah, 7 Sim. 17.

In a bill for discovery, prayer for such other relief as your orator may be entitled to, held not to change the character of mere bill for discovery.

Hodgens v. Scott, 2 Moll. 436. Where a bill prays for relief and discovery, the plaintiff being entitled to discovery only, a general demurrer allowed. Collis v. Swayne, 4 Bro. C. C. 480.

General demurrer allowed to a bill praying discovery and relief, where the relief is at law. Price v. James, 2 Bro. C. C. 319; Dick. 697.

Where the plaintiff is entitled to the discovery he seeks in support of an action, a prayer for general relief, or for relief that is consequential to the prayer for discovery, as an injunction will not sustain a demurrer. Brandon v. Sands. 2 Ves. J. 514.

Where the bill was for discovery, and to per petuate testimony, and plaintiff amended by striking out the discovery and relief, but the bill, in praying process, prayed that defendant might abide such order and decree as the court should think proper, it was held a bill for relief, and a demurrer was allowed. Rose v. Gannel. 3 Atk. 439,

A bill praying discovery, and concluding with the prayer for general relief, is a bill for relief: but if words adapted to a bill for relief are used. in the prayer of process only, it is a bill of discovery. Angell v. Westcombe, 6 Sim. 30.

A demurrer allowed to a bill of discovery containing a prayer for an injunction, on the ground that the prayer for an injunction was a prayer for relief, and therefore fatal to the bill as a bill of discovery. Andrews v. Lupton, 13 L. J., Ch. 201.
Bill by underwriters for discovery and com-

mission to examine abroad, and injunction to stay proceedings at law against them on policy in meantime, praying relief, is not a bill for discovery merely, but for relief, and not demurrable as a bill for discovery praying relief for which there was no equity. Allan v. Copeland, 8 Price, A bill for discovery concluded with a prayer that such other orders might be made upon the said defendants as the nature of the case might require:—Held, that notwithstanding the prayer, it was a simple bill for discovery, and that it was not necessary to come to the court to dismiss the bill for want of prosecution: but the prayer being nunsual, a motion to dismiss was refused, without costs. S. E. Ry. v. Nuhmarine Talegraph Ch., 18 Beav. 429; 2 Eq. Rep. 19; 23 L. J., Ch. 183; 17 Jun. 104; 3 W. R. 31; J. J. T. 104; 3 W. R. 31; 31 Jun. 104; 3 W. R. 31;

Amendment of Bill.]—No instance of a bill of discovery being allowed to be amended by adding parties as plaintiffs. *Cholmondeley* v. *Clin*ton, 2 Mer. 74; 16 R. R. 167.

On a plea to a bill of discovery, the vice-chancellor, being of opinion that a cestul que trust could not file such a bill without the trustee in whom the legal estate was vested, directed a case for the opinion of a court of law, on the question where the legal estate actually was, and ordered the plea to stand over till the return of the judge's cortificate. The parties not being able to agree on the case, a motion for leave to amend the bill by adding the trustee as a plaintiff, pending the vice-chancellor's order, refused. Z. 2. Mer. 71: 16 B. R. 167.

Before answer to a bill of discovery, motion to expunge amendments made with a view to converting it into a bill for relief allowed. Purker v. Furd, 1 Coll. 506.

After answer to a bill of discovery, motion to amend the bill by adding a prayer for relief, refused with costs. Butterworth v. Bailey, 15 Ves. 358.

Leave given to convert a bill of discovery into a bill for relief. Where, after answer, a bill for discovery and for a commission is allowed to be converted into bill for relief, the defendant is entitled to have leave to part in such an answer to the amended bill as he might have filed, if there had been no answer to the bill of discovery. Lonsadav. Templer, 2 Russ, 561.

Dismissal of Bill.]—If a cause comes to a hearing on a bill of discovery, it must be struck out of the paper; but the bill cannot be dismissed, not praying relief. Anon., Mos. 185. But see Gurish v. Donoran, 2 Att. 166; Barnard, 428.

Where a bill is for discovery merely, you cannot move to dismiss it for want of prosecution, but pray an order only on the plaintiff to pay defendant the costs of the suit to be taxed. Windloads v. King 1 At 12 288

Woodcock v. King, 1 Atk. 286.

A motion to dismiss a bill of discovery for want of prosecution is irregular.

Bennett v.

Harrap, 22 L. T. 647.

A bill for a commission to examine witnesses abroad in aid of an action at law, cannot be dismissed under the 93rd general order. Parr v. Howlin. San. & Sc. 124.

Plea.]—Plea of payment to bill of discovery overruled as issue triable at law. *Hindman* v. *Taylor*, Dick. 651.

Bill not suggesting wilful usury, but that defendant had miscomputed interest received by him, and praying discovery as to the fact; plea thereto overruled. Ann., 2 Eq. Abr. 70. S. P., Boscarquet v. Dashvood, id. 534; Cas. t. Talbot 32.

Plea of fine and long possession under it, is a good har to bill brought for discovery of deeds, declaring the uses of such fine. *Holt* v. *Lowe*, 5 Bro. P. C. 569.

Plea to discovery must deny possession of documents which would support the plaintiff's title,

Yonge v. Stiekey, 2 Jur. 104.
Plea that a writ of right has been tried, and determined against the plaintiff, a good plea for a bill of discovery of matter relating to the title.

Leicester v. Perry, 1 Bro. C. C. 305.

If the bill pray discovery only, a plea to the discovery and relief is bad. Asyill v. Dawson, Bunh. 70.

A plea that the plaintiff has no interest in the subject of the suit, is a good plea to a bill for discovery and a commission. Mendisabel v. Machado, 1 Sim. 68; 5 L. J. (0.8.) Ch. 20. And see S. U., 8 L. J. (0.8.) Ch. 57.

It is not by the practice of Exchequer required of a party charged by a bill to have deeds and documents, &c., in his possession, material to the case on the other side, that he should protect himself from producing them by plea. The court will take eare that he be not called on without good reason to produce his securities, for they watch with jealousy proceedings instituted for that purpose, and will require an unanswerable case to warrant their interference in making an order for their production. Vansittart v. Barder, 9 Price, 641.

A plaintiff has no right to a discovery of circumstances as evidence in support of his title, which is denicd by plea, unless in his bill he expressly charges those circumstances as evidence of his title. Britten v. Britten, 8 L. J. (0.8.) Ch. 150.

Relief, ]—On a bill to discover assets, equity can also give relief by decreeing payment of debt. Heath v. Pervival, 1 Stra. 408.

Defendant voluntarily entered into a bond to pay 5004, or marry M. within a twolvemonth. Under pretence of reading it, he carried it off without her consent. M. brought her bill, which, upon her death, was revived by her mother, the plaintiff:—Held, that the plaintiff is not only entitled to a discovery here, but rellef, by payment of the money with interest from the day of filing the original bill. Afkiss v. Flarr, I Atk. 287.

On a bill to obtain evidence for a defence at law, when the evidence is obtained, the court cannot proceed to give relief, although the party cannot have the effect of the evidence at law from objections of form. Lee v. Shoutbred, 1 Austr. 83.

The necessity of subig in equity for a discovery nucle the circumstances, will affect the court in the exercise of its jurisdiction to give relief also, but does not necessarily entitle the party to relief. But where the right to discovery or production of documents, in aid of an action, involves the same question as the right to recover at law, the court will give the relief as well as the discovery. Pearce v. Cresuick, 2 Hare, 288; 12 L. J., Ch. 25; 7 Jur. 340.

Upon a mere bill of discovery, filed in aid of

Upon a mere bill of discovery, filed in aid of proceedings at law, a court of equity will not, except in a very clear case, decide upon the legal right of the party seeking the discovery. Thomas v. Tyler, 3 Y. & Coll. 255; 8 L. J., Ex. Eq. 4.

Other Matters.]—Bill of discovery must state for what purpose discovery is sought, or demurable. Cardale v. Wathins, 5 Madd. 18.

Exceptions nune pro tune may be filed to answer to bill of discovery. Baring v. Prinsep, 1 Madd. 526.

Plaintiff in a bill for discovery only is not entitled as of course to two terms, to except to

the answer filed in the vacation. Hewart v. | with the order to amend. Corentry v. Bentley,

Semple, 5 Ves. 86. Scripte, 5 Ves. 86.
On a bill for discovery, the answer of the party interested cannot be dispensed with, though an infant; and although the person from whom his father purchased the right has answered, and denied any knowledge of the circumstances. Hardenatic v. Shafto, I Anstr.

A defendant to a bill of discovery is not entitled to the usual orders for time to answer, if the plaintiff is thereby deprived of an opportunity to try the action at law. A defendant is entitled to two orders for a month's time to answer an original bill, seeking relief. Bennett 272. v. Fitzpatrick, 1 Hog, 227.

Where a bill is brought for the discovery of concealments of a bankrupt's estate, the court will not allow defendants to look into their depositions taken by the commissioners before they nut in their answer. Boden v. Dellow. 1 Atk. 280

Abatement after answer to bill of discovery, suit cannot be revived. Gould v. Barnes, Dick. 133

The 125th order applies only to a bill of discovery, filed by a defendant in aid of his defence to an existing suit. As to all other bills of discovery the old practice is still applicable. Dingwall v. Hemming, 2 Ph. 212; 16 L. J., Ch. 267; 11 Jur. 177.

Costs.]—On bill for discovery and injunction, and commission abroad, defendant held entitled to costs of discovery and injunction as incidental thereto, but costs refused to either party as to commission. London Assurance Co. v. Hunkey, 1 Anstr. 9.

Bill by disinherited heir-at-law to have inspection of deeds dismissed without costs. Leman v. Alie, Ambl. 163.

If heir-at-law bring bill for discovery, it is not of course that he shall pay costs, but shall be allowed to amend and pray inspection of deeds.

Plaintiff pays the costs upon a bill of discovery. Simmonds v. Kinnaird (Lord), 4 Ves.

Rule that plaintiff in bill of discovery shall pay costs in all cases, is too general; he ought only where he files a bill in the first instance; not where compelled to it by defendant's refusal.

Weymouth v. Boyer, 1 Ves. J. 423.

The bill praying discovery and a commission, the defendant cannot have the costs of the discovery till the return of the commission. Anon., 8 Ves. 69.

Practice, that if the defendant to a bill of discovery and a commission examines in chief, instead of confining himself to cross-examination, he shall not have costs. Anon., 8 Ves. 70.

The proper time to pray for costs of discovery is after the commission is returned. Banbury -, 9 Ves. 103.

Abatement by marriage of feme plaintiff to bill of discovery, after answer:—Held, that defendant cannot have his costs. Dodson v. Juda, 10 Ves. 31.

Defendant to a bill of discovery is entitled to the costs of the discovery, immediately on putting in a full answer, and his right to these costs is not waived by his subsequently accepting the costs of an amendment, nor by his neglecting to not made such a case as entitles him to such dis-

2 Mer. 677.

Plaintiff on bill of discovery must pay all expenses of defendant in resisting motions in cause made by plaintiff. Noble v. Garland, 1 Madd. 344.

Costs of discovery refused, a commission having gone out, and defendant having taken the benefit of it, cannot have all the costs. S. C., 19 Ves. 376; G. Coop. 222.

Where plaintiff's bill in equity is ancillary to his legal title, and he fails at law, though defendant benefited by bill, plaintiff must pay costs in equity. Meyrick v. Whitshaw, 4 Madd.

Where bill prays relief against all defendants but one, against whom it only prays discovery, he cannot after answer obtain order for costs; such order discharged. Att.-Gen. v. Burch, 4 Madd. 178.

After answer put into a bill of discovery, the defendant does not waive his right to costs by entering a rule to dismiss. Hickey v. Duffey, Hayes, 353.

The landlord, having lost his counterpart, has a right to a discovery from his tenant; and the tenant, refusing to permit a copy of his lease to be made on the landlord's application, and at his expense, shall pay the costs of the bill of discovery. Perry v. Nanonham, 1 Moll. 72.
Order obtained by defendant in bill of discovery for payment of his costs is regular,

though plaintiff had previously become bank-rupt. Hibberson v. Fielding, 2 Sim. & S. 371. A defendant to a bill for discovery, and to per-

petuate the testimony of witnesses, is entitled to his costs of the discovery, although he has examined witnesses in chief. Shrine v. Powell, 15 Sim. 81; 9 Jur. 1054.

The costs of a motion for injunction on a bill for discovery only, if unsuccessfully opposed, must be paid by the defendant. Lovell v. Galloway, 3 W. R. 156.

An original cause and cross-cause for discovery were attached to V.-Ch. Knight Bruce's court. The original cause was heard before an answer to the cross-cause had been obtained. The defendant to the bill of discovery then put in his answer, and obtained at the Rolls an order of course for his costs, suppressing the fact that the bill of discovery was a cross bill. It was discharged for irregularity. Watts v. Penny, 11 Beav. 435; 18 L. J., Ch. 150; 13 Jur. 578.

## 2. DISCOVERY AND RELIEF.

Demurrer to Relief.]-Where a bill for discovery and relief is demurrable for want of equity as to the rollef, discovery cannot be granted. Mollish v. Richardson, 12 Price, 530. So settled by Lords Thurlow, Alvanley, and Eldon, in a variety of decisions. See also the Treatises of Lord Redesdale, and Cooper.

In a bill for discovery and relief, a plaintiff not entitled to relief is not entitled to discovery. The converse of the rule will not hold. Att. Gen. v. Brown, 1 Swanst. 294.

Plaintiff not entitled to relief cannot have discovery. Hodle v. Healey, 1 Ves. & B. 539; 22 R. R. 270.

Demurrer to discovery, for that plaintiff has serve the plaintiff with the order for costs of covery; on arguing the demurrer, the court discovery, until after he has himself been served being of opinion the plaintiff was not entitled to

Demnrer to bill for discovery and relief, if good as to the relief, is good as to the discovery also. Williams v. Steward, 3 Mer. 202.

General demurrer lies, the plaintiff being entitled to discovery but not to relief. Barker

v. Daeic, 6 Ves. 686.

Demurrer, both to the discovery and relief, if good as to the latter, shall be allowed as to both, though the plaintiff may be entitled to the discovery. East India Co. v. Neare, 5 Ves.

The rule that if the plaintiff is not entitled to the relief, though entitled to discovery, a general demurrer holds, does not preclude the defendant from demurring to the relief and answering as to the discovery. Hodgkin v. Longden, 8 Ves. 2.

General demurrer lies where the plaintiff, though entitled to discovery, is not entitled to relief. Speer v. Crawter, 17 Ves. 216.

The rule that the plaintiff being entitled to discovery only, and not to the relief, a general demurrer lies, does not prevent a demurrer to relief giving the discovery. Todd v. Gee, 17 Ves. 273; 11 R. R. 76.

Demurrer good to relief is good to discovery sought with a view to the relief. Baker v. Mel-

lish, 10 Ves. 544.

Where specific relief is prayed, the ground for which fails, the plaintiff, under the prayer for general relief, can have such relief only as is consistent with the facts clearly and fully stated in the bill. King v. Rossett, 2 Y. & J. 33.

Where relief is prayed, and discovery as auxiliary only to that relief, if the ground for relief fails, the discovery cannot be obtained.

If a bill prays relief and discovery, plaintiff cannot waive the relief and insist on the discovery. Anderson v. Dowling, 11 Ir. Eq. R. 590.

A plaintiff cannot by one bill obtain specific relief, and also a discovery on a matter distinct from that specific relief. Wood v. Hitchings, 3 Beav. 504; 10 L. J., Ch. 257.

A bill for a receiver pending a litigation as to probate, ought not to seek discovery in reference

to the merits on that litigation. Ib.

Demurrer to a bill by the heir-at-law for a discovery, seeking also relief, allowed; the relief sought being, first, that an issue might be directed to try the question in a different county, on an allegation of undue influence, an heir-at-law not being entitled to any issue, except by consent, and a bill in equity not lying to change the venne; secondly, for the production of title-deeds, without its being shewn how they can be of service in assisting him to recover at law; thirdly, to restrain the defendant (devisee) from setting up outstanding terms, unsupported by allegation that there are any outstanding terms which may be set up; fourthly, for an injunction to stay waste, &c., and for a receiver, there being no instance of the court so interfering as between heir-at-law and devisee, where their adverse rights are in litigation, and on the ground of negligence and delay, the bill having been filed more than two years after the death of the presumed testator, and no action yet brought, although the commission of the alleged acts of waste and destruction stated to have been would appear, prayed for a discovery, for a immediately after his death; fifthly, that the declaration that the clearing warrants amounted

relief, allowed the demurrer, though it was to the | plaintiff may be let into possession of copyholds discovery only. Jefferys v. Baldwin, Ambl. unsurrendered to the use of the will, that being mere legal relief, although he might have been entitled to the discovery, whether there were any copyholds unsurrendered. The bill also going on to pray, in the character of one of the next of kin, for an injunction from interfering with the personal estate and a receiver, the injunction asked being for an indefinite period, and no allegation of a suit depending in the Ecclesiastical Court. And although some of the discovery sought might have been proper to be obtained on a bill for discovery only, yet the demurrer allowed as to that also, upon the ground, that, to support a general demurrer to a bill seeking discovery and relief, it is sufficient to show that the plaintiff is not entitled to the relief he prays. Jones v. Jones, 3 Mer. 161.

General demurrer allowed to a bill praying

discovery and relief where the relief is at law. Price v. James, 2 Bro. C. C. 319; Dick. 697.

A. having dealings with B., C. and D., who traded under the firm of B. & Co., and having become indebted to them on several transactions, entered into a covenant with them for payment of the whole amount, B. and D. afterwards died, and C. retired from the firm, and assigned her interest to E. The business of the firm was eontinued by E. and F. under the firm of B. & Co., and A, continued his dealings with that firm, and made various payments to them. Upon a bill brought to restrain an action on the covenant brought by C. against A :- Held, that the subsequent payments by A, to E, & F, could not be applied in reduction of the money secured by the eovenant, unless it could be shewn that C. had assented to that arrangement, and that the bill, not being good for equitable relief, was not good for discovery in aid of the defence to the action. Jones v. Maund, 3 Y. & Coll. 347.

Bill for discovery, and a delivery of a settlement under which plaintiff claimed, and other title-deeds, and possession of the estate; demurrer to all the relief, and all the discovery, except of the settlement, for want of equity, and answer admitting the settlement, and offering to produce it, and denying that defendant had any other relative to plaintiff's title, the title being legal, the court would only order the settlement to be produced at the trial; the demurrer, therefore, going to all the relief, the defendant had leave

A demurrer to the relief will not extend to the discovery sought by the bill, although the specific relief prayed may be improper, if the bill states a clear case for equitable relief, to which the discovery sought may be ancillary, and likewise concludes with a prayer for general relief. An infor-mation having been filed by the attorney-general against A., for an account of his dealings and transactions with the government as an army agent, A. pleaded, in bar of the information, a settled account, by means of certain clearing warrants. This plea having been overruled, A. files his eross-bill against the the attorney-general and the secretary at war, alleging that the clearing warrants had been invariably treated as a settled account, but that he had only recently, and since the plea, been acquainted with the proceedings at the War Office, by which the clearing warrants were rendered conclusive. The bill then charging that the defendants had divers papers, &c., by which the truth of the several matters alleged

to a settled account, and for a perpetual quietus from all proceedings by the defendants. To this bill the defendants having demurred, on the ground that they were public officers, and also for want of equity, the demurrer was overruled. Dearer v. Alt. Gen. 1 Y. & Coll. 197.

A plaintiff may obtain a decree for discovery alone, in all of an action or of proceedings in another court; but if by his bill he prays for discovery, as incident to some further relief, and falls in obtaining such relief, he will not be entitled to discovery. Evan v. Acon Portveere, 6 Jun. (x.s.) 1361; 3 L. T. 347; 9 W. B. 347; 9 in the proceeding of the control of the control

A plaintiff filed a bill on behalf of himself alone as one of a corporation, against the corporation, their solicitor, and the attorney-general, praying an injunction against the corporation, for an account, and for discovery. The bill did not disclose a case of trustee and cestul que trust as between the plaintiff and the corporation. The corporation demurred to the bill for want of equity and for want of parties:—Held, that the demurrer must be allowed. Ib.

Plea. ]—If a bill pray discovery only, a plea to the discovery and relief is bad. Asgill v. Dausson, Bunb. 70,

Plea allowed as to the relief, therefore good to discovery also, according to general rule. Sutton v. Scarborough (Lord), 9 Ves. 71.

Where a defendant pleads to the relief only, he must give the discovery. King v. Heming, 9

Bill for account of goods landed at a certain quay, the plaintiff claiming a right of toll by prescription. Defendant denied plaintiffs title, and refused to discover the goods:—Held, he was not compellable till plaintiff land established his right at law. Northleigh v. Luscombe, Ambl. 612.

Where a defendant, to avoid putting in an account, pleads to all the relief and some of the discovery sought, if the plannith may be entitled to some relief which the plea does not specifically meet, it covers too much, and will simply be overruled. Hewitt v. Hewitt, 8 L. T., 630; 11 W. R. 849.

When a plea was in terms to the relief only, and the defendant by his answers did not give all the discovery sought by the bill, the plea was overruled. Juckson v. Ward, 22 L. T. 699.

Where bill is for discovery in aid of defence at law, and for equitable relief, plea of title in defendant in equity to whole bill is bad. Guit v. Osbaldeston, 5 Madd. 428. But overruled on appeal. S. C., 1 Russ. 158.

To bill to stay proceedings in action, brought by defendant as landlord, or account of dilapidations of buildings by plaintiff as tenant, and for discovery, whether defendant has not, since commencement of action, assigned his interest in buildings, defendant cannot protect himself from discovery by plea, that when dilapidations were committed defendant was entitled, and that they ever since continued out of repair. Badford (Dike) v. Macumana, I Price, 208.

Lost Deed—Oath.]—In what cases a man must make oath of the loss of a deed, when he brings a bill for relief or discovery touching the deed. Anon., 1 Vern. 59. Anon., id. 180. Godfrey v. Turner, id. 247. Nicholson v. Pattison. id. 310.

These and many other cases are conflicting on this point. See 1 Ch. Ca. 11, Id. 231.

### 3. DISCOVERY IN AID.

When it lies in Aid of Proceedings in Courts of Special Jurisdiction.]—Demurrer allowed to a bill of discovery in aid of the defence to a suit in a foreign court. Bent v. Young, 9 Sim. 180; 7 L. J., Ch. 151; 2 Jur. 202. And see Crowe v. Del Rio, id. 185. n.

This court will not compel a discovery in aid of an inferior court, nor in favour of a court which has itself the power of compelling a discovery. It.

Every foreign court is considered an inferior court; and semble, this court will not lend itself to compel a discovery in aid or defence of an action in a foreign court. ID.

The court will not entertain an action for discovery only in aid of proceedings in a foreign court. Bent v. Young (9 Sim. 180) considered and followed. Crowe v. Dol Rio (9 Sim. 185, n.) observed upon. Dreglas v. Perucian Gawo Cu, 58 L. J., Ch. 471; 41 Ch. D. 151; 60 L. T. 216; 37 W. R. 394.

A plaintiff filed a bill of discovery to obtain presention of documents in the defendant's possession in England, in aid of proceedings about to be taken for the recovery of land in India:—Held, that the property claimed being in India, and the defendant being capable of being sued in India, an English court was not the proper tribunal to decide upon the plaintiffs claim, and a bill of discovery could not be maintained in aid of such a claim. Releier v. Stilisbury (Maryuis), 2 Ch. D. 378; 24 W. R. 843.

A foreign judgment cannot be questioned in the courts in this country. Therefore, a bir for a discovery, and a commission to examine witnesses abroad, in aid of the plaintiff's defence to an action brought in this country on a foreign judgment, is demurrable. Martin v. Nicholits, 3

Denurrer allowed to discovery sought concerning the proceedings before the delegates, and held, that the sentence in the delegates could not be read, as the demand was for real estate, and they proceed there by different laws, and in matters too relative to the personal estate only. Baker V. Pritchard, 2 Ath. 837.

Under an act, certain moneys were to be distributed on petition. A reference being directed to ascertain the persons entitled, one who was not a party to the reference went in thereunder and failed. He afterwards filed a bill, on the ground that he was in want of discovery and evidence, which he could not obtain in the reference. The court, though it held that the bill was not demurrable, nevertheless stayed the proceedings therein until the master had made his report. Hyde v. Etwards, 12 Beav, 253. Aftirmed, 1 Mac. & G. 410; 1 H. & Tw. 552.

Semble, the order of reference ought to have contained a direction for production of documents, and for the examination of parties. Ib.

Courts of equity will not be ancillary to arbitrators, by permitting the party to take relief from them, coming to court for discovery. Street v. Rigby, 6 Ves. 821.

Courts of equity have jurisdiction to entertain a bill for discovery merely, in aid of a compulsory reference to arbitration, under the 17 & 18 Vict. c. 125, s. 3, and this jurisdiction is not affected by the powers given by the 7th section, of compelling discovery independently of the assistance of courts of equity. British Empire Skipping

A submission made a rule of the Court of Chancery under s. 17 of the 17 & 18 Vict. c. 125, is not within the provisions of s. 50, as to discovery. Anglo-Australian Bank, In re, 10 L. T., 369.

A bill of discovery in aid of the jurisdiction of the Ecclesiastical Court is not admitted, because they are capable of coming at that discovery themselves. Dunn v. Coates, 1 Atk. 288.

A will was proved in spiritual court, but executor of former will brought his bill in equity to discover by what means the latter will was obtained, and whether testator was not incapable, &c., and for account. Demurrer to jurisdiction overruled. Andrews v. Powys, 2 Bro. P. C. 504.

The old rule that the court would not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court is not applicable to a bill for discovery in aid of proceedings in the Probate Court, that court not having the same power of compelling discovery as the Ecclesiastical Court had. Fuller v. Ingram, 28 L. J., Ch. 482; 5 Jur. (N.S.) 510; 7 W. R. 302.

An heir-at-law having been cited to see proceedings commenced in the Probate Court for the purpose of proving the testator's will in solemn form, filed several pleas denying the validity of the will, and filed a bill of discovery in aid of his pleas, and moved for an injunction to stay proceedings until answer. Interrogatories not having been filed, the motion was refused, with costs, but leave was given to move on a future day, after the interrogatories should have been filed. 16.

A court of equity will compel a discovery and production of documents in aid of proceedings at law to try a disputed right under the Tithe Commutation Act, notwithstanding special provisions are contained in that act for those pur-Morris v. Norfolk (Duke), 9 Sim. 472; 9 L. J., Ch. 273; 4 Jur. 1007.

Whether a party who has presented an appeal to the Privy Council, can sustain a bill for discovery of further evidence of the matters to be adjudicated upon by the Privy Council, quere. Wood v. Hitchings, 3 Beav. 504; 10 L. J., Ch. 257.

When it Lies in Aid of Proceedings at Law.]

—Money paid in part; receipts lost. The whole recovered at law. No discovery after a verdict. Barbone v. Breut, 1 Vern. 176.

Bill to discover who is tenant of the freehold in order to bring a formedon, will not lie. Stapleton v. Sherrard, 1 Vern. 212; 2 Ch. R. 255.

Bill of discovery lies to aid proceedings here or at law, as to a civil right, not indictment or information, nor by a lord for discovery whether this or that person is capable to answer an heriot. Montague (Lord) v. Dudman, 2 Ves. 398.

Bill to discover who was owner of a wharf and lighter to enable the plaintiff to bring action of damages his goods had sustained by the negligence of the lighterman, defendant demurred; demurrer overruled. Heathcote v. Fleete, 2 Vern. S. P., Morse v. Buchworth, id. 443.

A demurrer will not lie to a bill merely for a discovery to enable the plaintiff to go to law, on the ground that the plaintiff had not brought his action. Moodalay v. Morton, 1 Bro. C. C. 469; Dick. 652.

Company and their secretary, praying a com- treasury of Portugal, came into the possession of

Co. v. Somes, 3 Kay & J. 433; 26 L. J., Ch. 759; mission to examine witnesses in India, and that the defendants might discover by what authority plaintiff was dispossessed of a lease for supplying Madras with tobacco (the plaintiffs intending to bring an action), overruled. Ib.

Bill for discovery of fraud in a policy of insurance, to defend an action at law, and that the policy might be declared void, and be delivered up to be caucelled. Demurrer thereto overruled. French v. Connelly, 2 Anstr. 454.

After judgment by default in an action upon a dividend under a commission of bankruptcy, the assignees filed a bill for discovery, and to have the proof of the debt expunged. Demurrer allowed, the course being by petition. Clarke v. Capron, 2 Ves. J. 666.

Bill for an account under covenant upon sale of good-will not to carry on the trade. The usual course a bill of discovery for purpose of an action, Scott v. Macintosh, 1 Ves. & B. 503.

After an order in bankruptcy, for liberty to bring an action, with special direction for a production of papers, and not to set up the bank-ruptey, a bill of discovery cannot be filed. Cooke v. Marsh, 18 Ves. 209.

Demurrer of a married woman to a bill of discovery against her and her husband, in aid of an action for debt on her account, allowed. Barron v. Grillard, 3 Ves. & B. 165.

A plaintiff at law may be forced, in equity, to make a full discovery, with respect to the different items that make up the sum for which he brings his action at law. Lumpridaye v. Rutt, 1 L. J. (o.s.) Ch. 13.

After a verdict at law, a bill, with proper charges, may be sustained for the discovery of documents necessary to a fair decision. Field v. Beaumont, 1 Swanst. 209.

A., being in possession of an estate, under a decree, in 1783, B. filed a bill against him to recover the estate, and brought a writ of right for the same purpose; A. then filed a cross-bill against B., seeking for a discovery of matter relating to B.'s pedigree, and praying that B. might elect whether he would proceed at law or in equity, and that, if he elected the former, he width the novatually restricted from prehe might be perpetually restrained from proeeeding at law to recover the estate. B. demurred, because the bill sought a discovery of matters constituting his ease at law, and because the order for putting him to his election ought to be obtained on motion and not at the hearing. Demurrer overruled. Loundes v. Daries, 6 Sim.

Bills of discovery are permitted for the purpose of obtaining from the adversary at law a discovery of matters which, being admitted by him, may aid the defence to the action, but not for the purpose of obtaining evidence; accordingly a bill of discovery does not lie against a person who may be a witness for the defendant in the action. Portugal (Queen) v. Glyn, West, 258; 7 Cl. & F. 466. Reversing Glyn v. Soares, 1 Y. & Coll. 644; 5 L. J., Ex. Eq. 49.

Don Miguel, when de facto King of Portugal, effected a loan, for the purposes of his government, by issuing scrip or bonds, for which certain bills of exchange were drawn upon the plaintiffs, bankers in England, by whom, as the agents of one R., the first parts of those bills were accepted. The second parts having been indorsed "to the treasurer-general of the Royal Treasury of Portugal, value in account of the negotiation of the Demurrer to a bill against the East India royal loan of Portugal," and remitted to the the government of Donna Maria, after her estab- | were directed to admit that the plaintiff was the lishment as queen. Her government repudiated assignee of the patents, and that they (the dethe loan, but the bills, purporting to be indorsed fendants) had used the alleged inventions, and by the individual who was treasurer under Don the plaintiff was ordered to produce certain Miguel were presented for payment by one of her agents in England, and he, on payment being refused, brought an action against the acceptors :-Held, that the acceptors could not sustain a bill that bill had reference only to the acts by which for a discovery in aid of their defence against the it was alleged that the patents had become void Queen of Portugal. Ib.

In a suit for an account and to restrain an action, the plaintiff is not entitled to inspect any portion of books, &c., which do not relate to the matters in question in the suit. If he requires to inspect any part with a view to his defence in the action, he must file a bill of discovery. Rawson v. Samuel, 9 Sim. 442; 4 Myl. & C. 330; 8 L. J., Ch. 71. And see S. C., 3 Jur. 6, 54, 603, 947. Semble, that a bill of discovery in aid of an

action for a mere personal tort cannot be sustained. Glyn v. Houston, 1 Keen, 329; 6 L. J., Ch. 129.

A, having accepted a bill payable at his country bankers' town agents, deposited with the former an acceptance of a third party, with a note stating that it was intended to meet his own acceptance. The country bankers not communicating the fact to their town agents, the bill was dishonoured. A. became bankrupt, and his bankers received the money on the second acceptance, and applied it to their own use. The against the country bankers for the amount they had received, but his only witness dying, he made default in going to trial, whereupon the defendant moved for judgment as in a case of a nonsuit, which was refused by the court, unless he could produce the note delivered by A. when the bill was deposited. The defendant then gave notice of proceeding to trial by proviso, upon which the plaintiffs filed a bill for an injunction and a discovery, to which the defendant demurred, on the ground that the plaintiffs had not made out such a case as would entitle them to a discovery in equity :- Held, that inasmuch as the plaintiffs had made out such a case as afforded a reasonable ground for argument in a court of law, it was properly filed, and the demurrer was overruled. Thomas v. Tyler, 3 Y. & Coll. 255; 8 L. J., Ex. Eq. 4.

Upon a mere bill of discovery, filed in aid of proceedings at law, a court of equity will not, except in a very clear ease, decide upon the legal right of the party seeking the discovery. Ib.

It makes no difference in the principles upon

which the court deals with a motion for the production of documents, that, the bill being filed for discovery in aid of a defensive proceeding, the case made by it consists not in assertion of an affirmative title in the plaintiff, but solely in the suggestion of specific defects in the title of the defendant, Smith v. Beaufort (Duke), 1 Ph. 209; 13 L. J., Ch. 33; 7 Jur. 1095. Affirming 1 Hare, 507.

A bill having been filed by an assignee of certain alleged patent inventions for an injunction to restrain the infringement of the patents, and for an account of the profits made by their use; the defendants by their answer, insisted that the patents were originally invalid; and also that if originally good, they had been made void by subsequent acts of the patentee. By the decree made at the hearing of the cause, the bill decree made at the hearing of the cause, the bill 42 L J., Ch. 45; L. R. 15 Eq. 142; 27 L. T. 410; was retained for three years, with liberty for the 21 W. R. 157.

plaintiff to bring an action, and the defendants | Held, also, that identity is as good a subject

deeds at the trial, and to admit their execution.

The defendants then filed a bill of discovery against the plaintiff, but the discovery sought by subsequently to their creation. The defendants, afterwards, finding the necessity of a discovery as to the original invalidity of the patents, applied to the court for permission to file another bill of discovery which would relate to such original invalidity; and the court granted the permission desired. Whether it was regular to file the first bill of discovery, without leave of the court, quære. Few v. Guppy, 1 Myl. & C.

Where, at the hearing, the bill is retained, and liberty is given to the plaintiff to establish his right at law, it is not the practice to direct, by the order, a production of the books and papers in the parties' possession relating to the matters, nor to give leave to the defendant to file a bill of discovery in aid of his defence. The rule is the same when the order directs certain admissions to be made on points not in controversy, but it is different in the case of an issue being directed. Semble, Few v. Guppy, 13 Beav. 457.

Where, at the hearing, liberty is given to a party to establish his right at law, the defendant must obtain the leave of the court to enable him to file a bill of discovery. Semble. Ib.

Where an action is brought in the name of a party having the legal title, a bill of discovery in aid of defence must be filed against the party alone. Semble. Ib.

The province of discovery in equity is not to compel a defendant there, who is a plaintiff at law, to discover in what manner he intends to make out his case at law; the plaintiff in equity is entitled to the discovery only of anything in the possession of the defendant in equity which will enable him to establish his own case. Ingilby v. Shafto, 33 Beav. 31; 32 L. J., Ch. 807; 9 Jur. (N.s.) 1141; 8 L. T. 785.

Executions for insufficiency to an answer to a bill of discovery in which a defendant was interrogated as to the grounds upon which he rested his claim at law, and as to documents "relating to matters in the bill mentioned," were

overruled with costs. Ib.

Though a party may now at law examine his opponent, he is still entitled to a discovery in equity in aid of his case at law. Where the plaintiff in a bill of discovery in aid of a defence at law has a bonâ fide case, verified by affidavit, shewing that information may be given by the answer, which may assist him in wholly or par-tially destroying the case made against him at law, he is entitled to that discovery, and to an injunction until the discovery is given. Lovell v. Galloway, 17 Beav. 1.

A bill for discovery only (in aid of an action) to obtain from persons, who were mere overholding tenants, certain underleases alleged to be in their possession, or in that of some "one or other" of them, and from the descriptions contained in which documents the plaintiff desired to identify his property, is not demurrable on the ground of multifariousness. Brown v. Wales,

Gaming Transactions. ]- Equity has no jurisdiction under 9 Anne, c. 14, or 18 Geo. 2, c. 24, to enforce discovery, prayed by common informer, of money won at play. Holloway v. Eq. R. 590. Shakspeare, 1 Smith, 121.

A bill for discovery of money won at play, by a common informer, will not lie till he has commenced some suit for relief. Mynd v. Francis,

I Anstr. 5

Bill for discovery of money won at play, under 9 Anne, c. 14, s. 3, does not lie at suit of common informer suing for penalties. Orme v. Crockford, M Clel. 185; 13 Price 376; 27 R. R. 719.

A bill lies to have discovery of the consideration of a security alleged to be given for money lost at play, and to have it delivered up. Andrews

v. Berry, 3 Anstr. 634.

Action on bills of exchange ; bill to have them delivered up as being given on a gaming transaction; demurrer was overruled. Newman v.

Franco, 2 Anstr. 519.

In a bill of discovery to support an action by a common informer, for money won at play, it is sufficient to state that the defendants, or some of them for the benefit and on account of all, played and won. In such a bill it is not necessary to state the nature of the action brought; it is enough to say that an action was brought on the statute 9 Anne to recover the money, and to show by the facts that an action on the statute lay. Cowan v. Phillips, 3 Anstr. 843. But see Orme v. Crockford, 13 Price, 376; McClel. 185. Upon an action brought to recover a sum of

money lent upon the security of an I O U, and upon a bill filed to discover whether the money had not been lent for the purpose of gaming :— Held, that the defendant was bound to state by his answer whether it was so lent, it still being a question open to argument in a court of law whether money lent at play, or for the purposes of play, is recoverable in an action at law. Wilhinson v. D Eungier, 2 Y. & Coll. 363.

The enforcing the Gaming Acts is not confined to the interest of private persons, but is of great consequence to the public; and though gamesters call gaining debts debts of honour, the merit belongs to the informer. Fleetwood v. Jansen, 2

Atk. 467.

Against whom. ]-A bill of discovery in aid of the defence to an action at law cannot be maintained against a person interested in the action, unless he is a party to the record at law. Kerr v. Rew, 5 Myl. & C. 154; 9 L. J., Ch. 148; 4 Jur. 525.

In an action on a policy on marine insurance brought by the agent in whose name the policy was effected, the person named in the declaration as the real person assured is not to be considered a party to the record at law, so as to be liable to a bill of discovery. Ib.

A., a foreign merchant, caused an insurance of a ship to be effected by B., a broker in London, in his (B.'s) name. The ship was lost. An action was brought against the underwriters by B., stating in the declaration A.'s interest. The defence was, that the ship was unseaworthy; and in aid of that defence, a bill of discovery

for discovery as devolution, and that, under such | was supported on the ground that A. was not a circumstances, a lessor may ask an overholding party to the record at law, and could be lessee of what the property demised consists. Ib. examined by the defendants at law as a witness. 14.

A bill of discovery in aid of a defence at law will not lie against one who is not a party to the record at law. Anderson v. Dowling, 11 Ir.

A bill for a discovery in aid of a defence at law, cannot be sustained against a person for whose benefit the action is brought, if he is no Party to the record at law. Portugal (Queen) v. Glyn, 7 Cl. & F. 466; West, 258. Reversing Glyn v. Soares, 1 Y. & Coll. 644.

A foreign prince admitted to sue in the name of an agent in a court of law in this country, for a discovery in aid of the defence at law. Ib.

Bills filed by or against underwriters, as they pray some relief, do not form an exception to the rule. Ib.

A person who may be a witness for the defendant in an action cannot be made a party to

a bill of discovery. Ib.

If in a bill for discovery in aid of the defence

to an action, a plaintiff who is not a party to the record at law be joined with co-plaintiffs, the defendants in the action, the bill is demurrable, Certain bills of exchange, the second parts of which were made payable to the order of the treasurer of the Royal Treasury of Portugal, were accepted by bankers in London, on behalf of a customer who was substantially interested in such bills as one of the subscribers to a loan raised by the government of Portugal under the regency of Don Miguel. After the expulsion of Don Miguel, and the establishment of Donna Maria as Queen of Portugal, the second parts of the bills in question were indorsed by the treasurer of the Royal Treasury of Portugal (the same individual who filled that office at the time when the bills were drawn) to an agent of the Queen of Portugal, and by that agent were presented for payment to the bankers. The bankers refused payment, on the ground that they had reason to doubt whether the indorsee was the officer to whose order the bills were meant to be payable, and whether he had any property or interest in the bills; an action was thereupon brought by the indorsee against the acceptors to recover the amount. To a bill filed by the bankers, the acceptors, and by the customer on whose behalf they accepted the bills, against the indorsee, and the Queen of Portugal, praying for a discovery in aid of the defence to the action, a commission to examine witnesses abroad and an injunction, a demurrer was allowed on the ground of misjoinder of plaintiffs who were defendants in the action, but who had no interest except as agents in the subject matter of the suit, with a plaintiff who was no party to the action, but substantially interested in the subject matter of the snit. Whether the bill was not demurrable, on the ground of the Queen of Portugal having been improperly made a defendant, quere, Glyn v.

Soares, 3 Myl. & K. 450.

Bill for discovery in aid of an action. Demurrer by merc witness allowed. Fenton v. Hughes, 7 Ves, 287,

If a person who is not a party to an action is made a party to a bill of discovery in aid of the was filed against B. and A. by the underwriters, defence to the action, he may demur, notwithto get the benefit of A.'s answer. To this a standing the bill charges that he is interested in demurrer was put in for want of equity, which the subject of the action. The cases of London (Bishop) v. Fytche (1 Bro. C. C. 96), and Fenton | the costs of the suit, all further proceedings were v. Hughes (7 Ves. 287), observed upon, and the stayed. Wilmat v. Maccabe, 4 Sim. 263. reports of those cases corrected. Living v. A. being entitled under a will to the stayed. Thompson, 9 Sim. 17; 8 L. J., Ch. 357; 3 Jur. certain articles of plate for her life, pawned them

A person complaining of a libel in a newspaper may file a bill against the printer and publisher to ascertain the names of the proprietors, for the purpose of bringing his action against the proprietors alone. Dixon v. Enoch, 41 L. J., Ch. 231; L. R. 13 Eq. 394; 26 L. T. 127; 20 W. R. 359.

H. & S. insured their factory and its contents with a fire assurance company for 5,098L, and, on a fire happening in February, 1875, sent in a claim for 14,4051., which the company, suspecting fraud, refused to pay. Shortly afterwards H. & S. filed a liquidation petition, and W. was appointed trustee. In May, W. commenced an action on the policy against the company, and the trial was set down for July 17. On June 30 the company, having pleaded to the action, filed a bill of discovery against W. and H. and S., and for an injunction, restraining W. from prosecuting his action. The bills stated the grounds on which the company suspected the claim to be fraudulent and excessive, and that H. & S. had insured the same property with other companies for 8,000%, and that, without the discovery prayed for, the company could not defend the action :- Held, that the bill could not be sustained against H. & S., because they were not parties to the action but were witnesses, and that to grant the motion against W., who had no information to give, and against whom no case was made, would be in effect to restore the old common injunction. Manchester Fire Assurance Co. v. Wykes, 33 L. T. 142; 23 W. R. 884.

Plea.]-Plea of matter, which would be a good plea to the action at law, is not a good plea to a bill for discovery leading to legal relief. Hindman v. Taylor, 2 Bro. C. C. 7.

Bill of discovery in aid of an action of covenant; plea, a clause in the articles that any dispute should be referred. Plea overruled, discovery being of course while an action is brought and can be maintained. Mitchell v. Harris, 2 Ves. J. 129; 4 Bro. C. C. 311.

A plea to a bill of discovery in aid of an action, which confesses and avoids some of the facts stated in the bill as the grounds of the action, and traverses others, will be overruled. Robertson v. Lubback, 4 Sim. 161; 9 L. J. (o.s.) Ch. 138.

Bill of discovery in aid of an action of ejectment. Plea, that the plaintiff had contracted to purchase the estate, and that the defendant had a lien on it for the unpaid purchase-money. Semble, that the plea is no defence to the discovery; but that the proper mode of protecting the equitable interest of the defendant is for a cross-suit for relief. Drake v. Drake, 3 Hare, 523; 13 L. J., Ch. 406; 8 Jur. 642.

Plea to a bill for discovery filed after a demurrer to a plea at law allowed. Stewart v. Nagent (Lord), 1 Keen, 201; 6 L. J., Ch. 128.

Defendant brought an action for a libel against the plaintiffs; the plaintiffs pleaded a justifica-tion, and filed a bill of discovery, and a commission to examine witnesses abroad in support of their plea. The defendant pleaded to the bill, that he had discontinued the action. Plea overthat he had discontinued the action. Plea over-ruled, as defendant night commence another L. J., Ch. 257; [1895] I Ch. 33;; 12 R. 92; 72 action; but upon defendant afterwards under-taking not to being execution. taking not to bring any other action, and to pay A defendant cannot protect himself from

certain articles of plate for her life, pawned them with B., who kept an open pawnbroker's shop. Bill was filed by the representatives of the testator, after the death of A., against B., for a discovery of the particular articles pawned in order to enable the plaintiffs to proceed in an action at law for the recovery of them. To this discovery the defendant pleaded, that certain articles of plate were deposited with him for certain sums of money bona fide lent and advanced thereon to A.; but he did not by his plea (though he did by his answers) aver that he had no other articles of plate in his possession. For this defect in point of form the plex was overruled. The defendant then insisted on the same point by his answer in bar to the discovery, but the court thought, that where a plea to a bill of discovery was overruled, the defendant could never insist on the same thing by answer. Houre v. Parker, I Cox, 224; I Bro. C. C. 578.

Extent and User of Discovery.]-Where a bill of discovery in aid of a defence to an action at law contains a prayer for relief, in addition to the ordinary prayer, the defendant is not bound to give any further discovery than that which is incidental to the relief sought by the bill. Desborough v. Curlewis, 3 Y. & Coll. 175; 2 Jur. 740.

On a bill for relief in equity, which seeks also to restrain an action at law, the plaintiff is not entitled to a discovery in aid of his defence to the action, but only to a discovery incidental to the relief in equity. Rawson v. Samuel, 8 L. J.,

A defendant to a mere bill of discovery in aid of an action at law, will not be ordered to produce, upon the trial of the action, or upon any proceeding incident thereto, documents which he admits by his answer to be in his possession. Brown v. Thornton, 1 Myl. & C. 248; 5 L. J., Ch.

Where bill seeks relief, as well as discovery, the court will not, on motion, aid the plaintiff in proceeding at law without authority and control of court; any such proceedings must be under a decree: therefore, in such a case, a motion that defendant should produce deeds, &c., at the trial of ejectment was refused. Aston v. Exeter (Lmd), 6 Ves. 288. S. P., Hylton v. Morgan, Id.

# D. OBJECTIONS TO DIS-CLOSURE.

# I. IRRELEVANCY OR IMMATERIALITY.

### 1. GENERALLY.

### a. Questions.

The true tests as to whether questions are to be answered or not are whether the answers might eriminate the defendants, and whether they are relevant and material to the plaintiff's ease. Mant v. Scott, 3 Price, 477.

A party ought not to be compelled to answer interrogatories as to matters not relevant to the issue in the action, even though such matters might be admissible in cross-examination as going

L. J., Ch. 127; 6 Jur. (N.S.) 1182; 3 L. T. 498; 9 W. R. 115.

A defendant cannot protect himself from answering a particular interrogatory on the ground that the whole bill is demurrable. Ib.

The original bill sought to set aside an appointment on the ground of frand. The plaintiff then amended his bill, and inquired as to the mode in which the appointment was executed and attested :- Held, that the plaintiff's case being one of legal validity and equitable invalidity the inquiries were irrelevant, and therefore need not be answered. Codrington v. Codrington, 3 Sim. 519.

Upon quare impedit brought against the plain-tiff, he filed the present bill to discover whether the clerk presented to him by defendant had not given a general bond of resignation in order to set up that bond as a defence at law for having refused him institution. To this bill defendant demurred, first, on account of legality of such bond; secondly, that the discovery was immaterial. Demurrer overruled, London (Bishop) v. Fytche, 1 Bro. C. C. 96.

The answer need not set forth an account where the ground upon which it is prayed is denied, as where the bill charged a dealing in pictures by commission, and the answer denied that, and stated that the defendant sold them to the plaintiff in the course of his trade.

Donegal (Marquis) v. Stewart. 3 Ves. 446.

Questions respecting proceedings in a foreign court relating to infringements of the plaintiff's patent, are immaterial. Hoffmann v . Postill, L. R. 4 Ch. 673; 20 L. T. 893; 17 W. R. 901.

When discovery of particular fact sought by bill would not, from general denial in answer of circumstances on which that fact would depend. avail plaintiff if set forth, defendant need not answer it. Askam v. Thompson, 4 Price, 330.

To bill (also praying discovery), stating that partnership subsisted between plaintiff in equity and deceased, principal of a banking firm, in another concern, in which plaintiff was chief manager, and that cheques were drawn under special circumstances, founded on mutual understanding, &c., answer denying privity of defendants, or that they were in any way concerned with plaintiffs as partners, or otherwise, sufficient to prevent injunction to stay defendant's proceeding at law to recover amount of cheques paid by them on account of plaintiff in equity, Ib.

A company filed a bill against a solicitor and a mining agent, seeking to make them account for profits alleged to have been made by them on the sale to the company of a collicry, which was sold in the name of W., while it really belonged to the defendants, who were alleged to be in a fiduciary relation to the company. defendants were interrogated as to the cheques drawn by them on a banking account opened for the purposes of the purchase of the colliery, and as to the profits made on the sale :- Held, that they ought not to be compelled to answer these interrogatories, as they were immaterial to the real question in the suit, namely, whether a fiduciary relation existed between them and the company at the date of the purchase of the colliery by the defendants, Great Western Colliery Co. v. Tucker, 43 L. J., Ch. 518; L. B. 9 Ch. 376; 30 L. T. 781

Three persons carried on business as bankers

answering on the ground that the information in partnership. A, one of the partners, died, sought is immaterial to the relief sought against having by his will appointed B, one of his that particular defendant. March v. Keith. 30 partners, and H. S. and T. B. S., executors, and L. J., Ch. 127; 6 Jur. (N.S.) 1182; 3 L. T. 498; J. S. one of his residuary legatees. After his death, H. S., one of his executors, was admitted into the partnership. J. S., one of the residuary legatees, filed a bill against B., and H. S., and T. B. S., for the administration of the testator's estate. Interrogatories, but not founded on the necessary and pointed allegations, were contained in the bill, whether the business had not been carried on with A., the testator's, capital : what were the profits gained since his death : what was the present capital : and what had been drawn out since A.'s death. The third partner in the firm was not a party to the suit :—Held. that B. and H. S., the new partner and executor of A., were not bound to answer those interrogatories. Simpson v. Chapman, 20 L. J., Ch. 88; 15 Jnr. 714.

Action for Infringement of Patent. ] - Au interrogatory was filed in support of a bill to restrain an infringement of patent rights, whereby the defendant was required to set out the names and addresses of all persons from whom he had received sums of money as licences for using articles which, the plaintiff alleged, were infringements of his patent. It was admitted that he had received sums of money from various persons. some of whom resided abroad :- Held, that the interrogatory was pertinent to the relief sought by the bill, and as such ought to be fully answered. Crossley v. Stewart, 1 N. R. 426; 7 L. T. 848.

When a plaintiff's right to relief at the hearing is clear, assuming the title stated by the bill, the defendant, by his answer denying that title, is in certain cases protected from discovery. De La Rue v. Dickinson, 3 Kay & J. 388.

In a suit to restrain an alleged infringement of a patent, the defendant, by his answer denying the fact of the infringement, is protected from making any discovery immaterial to that question, and which, when that question is decided, would be given under the decree. Ih.

It is not necessary to set up a defence of this nature by plea. Ib.

See further as to interrogatories, ante, B. I. 6 (cols. 810 et sea.). See also, B. II. 1, a (col. 833), and 2, b (col. 846).

### b. Documents.

The court accepts the oath of a defendant whether documents are relevant; but the plaintiff has a right to judge for himself whether they will assist his ease, and is entitled to the production of all relevant documents, except such as the court can clearly see to have no bearing on the issue. Munsell v. Feeney, 2 John. & H. 320; 4 L. T. 437; 9 W. R. 610.

A defendant, by his plea to a bill for establishing a partnership in a newspaper, denied the alleged partnership, and it was accompanied by an answer admitting documents, which he desired to protect from production. He also admitted that the books of the business were in his possession :- Held, that such documents were not protected from production. Ib.

The answer, in addition to admission of documents, raised the question of lapse of time under the statute and other issues :- Held, that the plea was bad in substance and form, and was overruled. Th.

A plaintiff filed a bill for partnership accounts,

The defendant, who positively denied that there sought, the court will act upon Ord. XXXI. was any partnership, scheduled certain documents, including the accounts kept by him in his business, which was the same business as was alleged by the plaintiff to be a partnership business, and refused to produce them, on the ground that they related exclusively to his own business. and did not contain any entries which could support the plaintiff's case:—Order made for production. Forrier v. Atwool, 12 Jur. (N.S.) 365; 14 L. T. 278; 14 W. B. 597—L.J.J.
A. filed a bill against B., alleging an agree-

ment by B. to pay him a sixth of the profits of B.'s business, and praying for an account of such profits, and for payment of such share, B, by his answer admitted an agreement to pay to A. a twelfth of the profits, but alleged an agreement by A. to accept B.'s statement of the profits, and not to investigate B.'s books and accounts :-Held, that upon these pleadings A. was not entitled to the production of B.'s books and accounts before the hearing. Turney v. Bayley, 3 N. R. 695; 4 De G. J. & S. 332; 33 L. J., Ch. 499; 10 L. T. 115; 12 W. R. 633. Reversing 34 Beav. 105.

Motion by defendants to a bill for partnership account for a production of the accounts before answer, refused. Pickering v. Righy, 18 Ves. 484.

A witness had been served with a subpoena duces tecum to attend an examination before the master, and bring with him certain documents which were in his possession. He was examined. but refused to produce the documents, swearing that they were not properly in his enstedy. a motion to the court for an order for their production, the court considered that it was bound to exercise a discretion not so to order, unless some reason was shewn for thinking it probable, that they would be evidence between the parties; and, in this instance, not so supposing, it refused to compel the documents of a third party to be produced, in a state of uncertainty whether they could be so for any valuable purpose between the parties. Phelps v. Prothero, 12 Jur. 667.

A defendant, who is called upon by the bill to set forth a list of papers, relating to "the matters aforesaid," need not set forth a list of papers relating to transactions which are mentioned in the bill only by way of inducement, but do not form any part of the case made by the bill. Agar v.

Bective, 1 L. J. (o.s.) Ch. 132.

The plaintiffs in a suit to set aside a lease were held entitled to an answer as to the defendant's receipts from the property,-notwithstanding that the defendant denied the plaintiff's title to any relief at all, and that the accounts sought were not material to the plaintiff's ease at the hearing. Robson v. Flight, 3 N. R. 183.

Tithe collector's books admitted by the answer of the rector to be in his possession or power, and to relate to the matters in the bill mentioned, but which, as he stated, would not in any manner assist or make out the plaintiff's case, ordered on motion to be produced for the usual purposes.

Newton v. Berresford, Younge, 377.

And see cases, aute, cols. 712 and 784, 785.

### 2. WHERE MATERIALITY DEPENDS ON RESULT OF OTHER ISSUES.

Generally. -- When the materiality of discovery depends upon the determination of a question in dispute, and the discovery sought is calculated to cause considerable trouble, or to prove oppressive and vexations to the party from whom it is to the hearing, when the answer denies the

r. 19, and postpone the discovery until the question has been determined. Wood v. Anglo-Italian Bank, 34 L. T. 255.

In an action claiming an account of profits made by the defendants as agents of the plaintiffs, where the defendants denied the agency, the court declined to order production of the invoices of goods sold by third parties to the defendants, and re-sold by them to the plaintiffs, until after trial of the question of agency. Verminch v. Edwards, 29 W. R. 189.

A person having filed his bill to establish his

title by heirship to real estate, and being entitled to production by the defendant of a pedigree by which the descent of both parties from a common ancestor was traced, was held entitled to see only such parts as were material to his title. Kettlewell v. Barstow, 41 L. J., Ch. 718; L. R. 7 Ch. 686; 27 L. T. 258; 20 W. R. 917.

The defendants objected to produce other documents on the ground that they did not relate to any issue or matter to be tried at the hearing, but were documents to the production of which the plaintiff would be entitled by way of consequential relief if he succeeded on the trial of any of the issues, but not in any other event:-Held, that these documents were protected. Ib.

The widow of a testator carried on his business under a direction in the will that the executors should allow her to carry it on, and to have, while carrying it ou, the use of the capital employed in it, and of his other personal estate. After her death, the plaintiffs, who had supplied her with goods for the purposes of the business. filed a bill against the testator's personal repre-sentative, claiming a lien on the funds employed in the trade, and by their interrogatories asked for accounts of the testator's personal estate and of the personal estate employed in the business. The executor declined to set forth the accounts. on the ground that if it should be decided at the hearing that the plaintiffs had no such lien as they claimed, the discovery would be useless :-Held, that the executor was bound to give the account. Thompson v. Dunn, L. R. 5 Ch. 573; 18 W. R. 854.

A bill was filed to set aside an agreement

which, according to the allegations in the bill, had been entered into upon the representation of the defendant that the value of a plaintiff's share in a business was but 10,000L, and that a debt of 32,000l. owing to the firm was of no value whatever. One of the interrogatories required the defendant to state what sums he had received in respect of the debt of 32,000%. to which he answered that, although he had received from the debtors more than that amount, he had not received it in respect of that debt. Another interrogatory required him to set out fully the assets and liabilities of the partnership at the date of the agreement, which he answered by referring the plaintiff to the books of the partnership. The plaintiff excepted to both these parts of the answer:—Held, as to the first of these interrogatories, that it was sufficiently answered, and, as to both interrogatories, that the plaintiff was not entitled to the accounts until he had established his right to open them. Lockett v. Lockett, 38 L. J., Ch. 290; 17 W. R. 96.

An answer expressed in general terms to an interrogatory as to accounts is sufficient if it shews enough for all the purposes of the suit up the trial of that right is one of the objects of the

plaintiff. 1b. A plaintiff filed a bill to establish that a business carried on by three of the defendants in partnership belonged to the estate of her late husband, having been commenced and carried on with assets which the first two of them, who had carried on her husband's business in partnership with her till they commenced the new business, had abstracted from the old business. The interrogatories required these defendants to set forth whether they, or any of them, had drawn out of the new business any money for their or his own account in respect of capital advanced, profits, or otherwise, and to set forth the particulars of the moneys so drawn out. The third defendant declined to answer this interrogatory, submitting that the plaintiff was not entitled to this discovery till she had established her right to a decree :-Held, that the interrogatory must be answered. Stull v. Browne, 43 L. J., Ch. 568; L. R. 9 Ch. 364; 30 L. T. 697; 22 W. R. 427.

Where a bill prays alternative relief, and the plaintiff would only be entitled to the discovery asked for under one of the alternatives, which is not the one principally relied on by the bill, and the information desired could not be material for the purpose of determining to which of such alternatives the plaintiff is entitled, such discovery will not be compelled before the hearing. Lett v. Parry, 1 Hem. & M. 517.

The court will make interlocutory orders for production only for security or discovery, and will not anticipate the decree. Lingen v. Simpson, 6 Madd. 290.

A defendant cannot excuse himself from answering fully on the ground that the giving the discovery sought would anticipate the decree, such discovery being the same as that which would be ordered at the hearing if the plaintiff obtained a decree. Chichester v. Donegul (Marquis), L. R. 4 Ch. 416; 17 W. R. 544; 20 L. T. 44.

Jurisdiction of Court under Ord. XXV. r. 2.] The court has jurisdiction under Ord. XXV. r. 2, to make an order for an action to be set down for the determination of certain points of law, and can postpone inspection of documents under an order obtained therefor until after such points have been determined. De Carteret v. Land Securities Co., 7 R. 16; 70 L. T. 323; 42 W. R. 104-C. A.

Semble, that Ord. XXXI. r. 20, is not to be construed so narrowly as to mean that the right to discovery or inspection is determined by the making of the common order, or that the court is by the order for discovery or inspection made in the common form rendered powerless to make a subsequent order for questions of law to be determined before inspection. Ib.

Postponed until prima facie Case made out. In a suit by an alleged next of kin to an intestate, against the solicitor to the Treasury, to whom administration had been granted :-Held, that the defendant was not bound to make an affidavit of documents until a prima facie case had been made out by the plaintiff. Lane v. Gray, 43 L. J., Ch. 187; L. R. 16 Eq. 552.

Until Title established.]-A., claiming to be

right of the plaintiff to have an account; and refused, because he had not established his title. Llayd v. Wait, 12 Sim. 103.

Bill by one co-heir against another, who set up testator's will in his favour, but acknowledged the deeds to be in his hands. He shall produce the deeds to plaintiff, though the validity of the will has not yet been tried at law. Floyer v. Sydenham, 9 Mod, 99; 2 Ch. Ca. 4; Sel. Ch.

Before Questions of Fact determined. - In an action to restrain the sale of goods under an alleged infringement of plaintiff's trade-mark, and claiming damages for false representations by defendant that his goods were goods of the plaintiff's manufacture, or in the alternative an account of profits, it was ordered that the questions of fact arising in the action should be tried by a special jury before a judge :-Held, that the plaintiff, who had not made his election between damages and profits, was not entitled, before he had succeeded in establishing his title to relief. by the verdict of the jury upon the questions of fact in the action, to discovery as to the sales effected by the defendant and production of his books for that purpose. Fennessy v. Clark, 57 L. J., Ch. 398; 37 Ch. D. 184; 58 L. T. 289

Documents relating to Amount of Damages only.]-Where it is possible to deal separately with the questions of the liability of the defendant and of the amount of damages, the court will not order the production of documents which will assist the plaintiff in establishing the amount of damages only, and which do not bear upon the question of the defendant's liability, until the question of liability has been deter mined. Schreiber v. Heymann, 63 L. J., Q. B. 749.

Upon an application to inspect documents in an action for work and labour, it appeared that the questions in the cause were, whether the defendant was liable to pay commission to the plaintiff, and, if so, to what amount. The documents of which inspection was sought related to the second question only. The defendant had offered, in the event of the first question being decided against him at the trial, to refer the question of damages, granting an inspection of the documents at the reference :- Held, that as the question of liability was severable from that of the amount of damages, and the discovery related to the latter question only, inspection ought not to be granted. Elkin v. Clarke, 21

W. R. 447. A person who had acted as the foreman of a manufacturer's business filed a bill against the manufacturer, alleging that under an agreement between them the plaintiff was to have a weekly salary of 30s., and in addition one-sixth of the profits of the business, and praying an account and payment of one-sixth of the profits of the business to him accordingly. The defendant, by his answer, denied the truth of the plaintiff's case, but admitted a right on his part, under a different agreement, however, to that set up by him, to a weekly salary of 30s. (originally) and to one-twelfth of the profits of the business, coupled, however, with an agreement on the part of the plaintiff that the latter should take the statements of the defendant as to the profits to be true, and should not demand or question heir to a mortgagor, filed a bill to redeem. The the business transactions, or be entitled to exanswer denied that he was heir. A motion by amine or investigate the business books. The him for production of the mortgage deed was defendant made the usual affidavit as to docu-

ments, in which he admitted the possession of by an affidavit in answer, admitted that he had documents relating to matters in the cause, but declined to produce them for the reasons appearing on his answer :-Held, that he was not compellable to produce them upon an interlocutory application before the hearing, their production not being relevant to the issue whether or not the plaintiff was entitled to a decree or an account, although their production might be material on the question of the amount payable to him if the account was directed. Turney v. Bayley, 4 De G. J. & S. 332.

When Question as to Damages only. ]-A defendant is entitled to inspect documents in the plaintiff's possession bearing upon the amount of Jamages, though there is no issue to be tried. Pap. v. Lister, 40 L. J., Q. B. 87; L. R. 6 Q. B. 242; 24 L. T. 70; 19 W. R. 455.

A defendant, in an action for breach of promise of marriage, applied for leave to inspect letters written by him to the plaintiff. The defendant admitted the promise to marry, and said he was advised and believed that it was necessary for him on the trial, and to prepare for the trial, to have the letters produced, and that he would derive advantage from the production. The plaintiff objected to the production of the letters on the ground that the defendant might refer to some of the letters in mitigation of damages:— Held, that he was entitled to inspection.

After Judgment-Discretion. ]-In an action for breach of promise judgment for the plaintiff had gone by default, and the question of damage had been referred to the master. The plaintiff claimed the right to inspect and take copies of her letters to the defendant, as being material to the question of damages :- Held, that the matter was one for the discretionary jurisdiction of the court or judge, and not of right. Ludds v. Walthew, 32 W. R. 1000.

Comparison of Handwriting.]—In a suit involving a question of disputed handwriting, the hearing of a summons for production of documents is not the proper stage for ordering the production of writings for purposes of comparison, inasmuch as by the Common Law Procedure Act, 1854, s. 27, disputed writings may be compared only with writings "proved to the satisfac-tion of the judge to be genuine," and this proof can only be furnished at the hearing. Wilson v. Thornbury, 43 L. J., Ch. 356; L. R. 17 Eq. 517; 22 W. R. 509.

### II. INJURY OR OPPRESSION.

Difficulty—Documents Numerous.]—Discovery by a railway company of the contents of books, in the possession of themselves and their agents, extending over a series of years, to shew the receipt of goods specifically described, delivered to them for carriage, ordered. Hall v. L. & N. W.

Ry., 35 L. T. 848.

In a suit by a contractor against a railway company in respect of works done for them, a motion was made by the defendants, that the plaintiff should produce all written communications which had passed between certain persons, naming them, and all account books, documents, papers, and writings relating to the contracts in the bill mentioned. The defendants' solicitor in the bill mentioned. The defendants' solicitor plaintiff's patent, and asking for an account of made an affidavit in support of the motion, that his dealings and transactions, and seeking to he believed that the plaintiff had documents as make him answerable for the profits received by stated in the notice of motion; and the plaintiff, him in consequence of the infringement:—Held,

in his possession a great mass of documents relating to the works in question, but stated, that to ascertain which of them came within the terms of the motion would be productive of great expense and inconvenience to him. The vicechancellor made an order according to the terms of the motion, but upon an appeal by the plaintiff against that order, the Lords Justices varied it, by directing that the plaintiff should, on or before the 20th March, 1853, make affidavit of all documents, &c., in his possession or power, and that the rest of the appeal motion should stand over, with liberty to apply for an extension of the time. Macintosh v. G. W. Ry., 22 L. J., Ch. 182; 16 Jur. 1012; 1 W. R. 19—L.JJ.

But see Purker v. Wells, ante, col. 813.

Documents Abroad.]—See ante, cols. 728,

Inquisitorial. |-Policies of insurance having been effected by a certain firm, on goods alleged to have been purchased and shipped by them in September, 1829, and an action having been brought on these policies, the underwriters filed a bill of discovery against the firm, alleging that no such purchase had been made; and afterwards obtained an order to amend their bill, upon a suggestion supported by affidavit, that the firm had not sufficient capital to make the purchase. The underwriter has a right to the most extensive discovery relative to the particular transaction which is impeached, but the court will interpose to prevent him from making general inquisitorial inquiries. Janson v. Solarte, 2 Y. & Coll. 132; 6 L. J., Ex. Eq. 75.

Where all the parties (including the plaintiff) interested under a will and in the partnership of a deceased relation finally settled their respective claims by a deed of arrangement, and more than twenty-four years afterwards the plaintiff, as next of kin to one of the parties, and upon the ground of his mental incapacity at the time of the execution of the deed, filed a bill for a discovery of all the partnership accounts antecedently to the arrangement, and for a declaration that the deed was not binding as against such party :- Held, upon exceptions to answer. that the plaintiff was not entitled to the discovery sought. Kay v. Hargreares, 14 L. T. 281.

Vexatious.]-The court will take care that the production of documents by a defendant, by which discovery is sought, shall not be vexatious and improper. Mansell v. Feeney, 2 John. & H. and improper. 320: 9 W. R. 610: 4 L. T. 437.

Application to Produce after Interrogatories fully Answered.]—Where the parties to an action are rivals in trade and interrogatories are administered by the one to the other of them, if the court or a judge is satisfied that such interrogatories have been fully and sufficiently answered, and that it would be oppressive and vexatious to compel production of books of account, no order for that purpose will be made. Att.-Gen. v. North Metropolitan Tramways, 72 L. T. 340-C. A.

As to Dealings and Transactions.]-Upon a bill charging the defendant with infringing the that the defendant must answer the interroga-; tories, though he disputes the title of the plaintiff, and insists that the discovery will be an act of oppression upon him, and that there was little probability that the court at the hearing would direct an account upon the facts if disclosed. Swinborne v. Nelson, 22 L. J., Ch. 331; 1 W. R.

Bankers required to set out particulars of certain bills and notes which they claimed to include in their mortgage security, and also of securities received from a debtor alleged to be primarily liable upon the bills; but they were not required to set out dealings between themselves and the latter to support a charge in the bill of secret partnership between themselves and him. Bridguater v. De Winton, 3 N. R. 24; 9 Jur (N.S.) 1270; 9 L. T. 568; 12 W. R. 40.

Names of Customers. ]-Although in considering whether the rule that a defendant who submits to give discovery must make full discovery is to be applied, the court does not in general weigh nicely the materiality of the discovery sought; still, if the discovery is such as might be used for purposes prejudicial to the defendant irrespectively of the suit, the court will look narrowly to the question whether there is a reasonable prospect of its being of material service to the plaintiff at the hearing. Currer v. Pinto Leite, 41 L. J., Ch. 92; L. R. 7 Ch. 90; 25 L. T. 722; 20 W. R. 184.

The defendants in a suit to restrain the infringement of trade-marks having scaled up certain parts of entries and letters admitted to relate to the matters in question in the cause, were ordered by the duchy court of Lancaster to unseal the names of customers and of places, and the prices, forming parts of such entries, and to unseal the portions of letters and copies of letters which contained the names of the writers and of which the letters were sent, and the places to and from which the letters were sent, and the places to and from which the letters were sent, and the description placed, on the goods referred to in such letters : -Held, on appeal, that they ought not to be compelled to disclose the names of customers, or the names of persons to or from whom letters were sent or received, or any prices, inasmuch as such discovery might be used in a manner prejudicial to them in their trade, and was not likely to assist the plaintiffs in making out their case

The court ought not to compel discovery of matters useless to the plaintiff for any purposes of the hearing, but which may be injurious to the defendant in case the plaintiff fails at the hearing. Heugh v. Garrett, 44 L. J., Ch. 305; 32 L. T. 45—L. JJ.

at the hearing. Ib.

The defendant was agent to the plaintiffs for the sale of patent ruffles according to the terms of an agreement. The plaintiffs believed that of an agreement. The pathens of the agreement, and accordingly filed a bill against him for an account. The defendant, by his answer, submitted that the inquiries made by the interrogatories as to the names of the persons to whom he had sold the goods, and as to the quantities and particulars of such sales, were wholly immaterial to the questions at issue. The plaintiffs took out a summons for the production of documents, and the defendant ad-

mentioned in the first part of the first schedule to his affidavit as relating exclusively to these transactions with the plaintiffs, but declined to produce certain other documents mentioned in the second part of the first schedule, on the ground that in them were contained the whole of his business transactions, except those contained in the documents he had agreed to produce. The plaintiffs accordingly took out a further summons to produce the documents contained in the second part of the first schedule, upon which the chief clerk made an order to produce the documents required. On this summons being adjourned into court it was held, that the defendant was bound to produce all the docu-ments in question :- Held, on appeal, that the defendant must be allowed to seal up the names and addresses of his customers, and was only bound to produce the entries shewing the quantities of goods sold, and the prices. Ib.

Where a defendant who was the surviving partner in a firm of commission wine merchants, being required to set out in his answer an account of the partnership assets, liabilities, and dealings for the six mouths preceding the death of the deceased partner, set out the account in a book which he referred to in his answer, but refused to set it out in his answer, on the ground that he would thereby disclose private matters, and the plaintiff excepted for insufficiency, the court allowed the exception, and held that the defendant ought to have set out the account in a schedule to his answer, and that the objection, that the names of the customers were privileged. did not apply to such a case. Telford v. Ruskin, 1

Dr. & Sm. 148; 20 L. J., Ch. 867; 8 W. R. 575. A plaintiff complained that the defendant had sold, under the plaintiff's name, sewing machines which had not been manufactured by him, and he sought a discovery of all the machines sold by the defendant, the price, the profit, the names of the purchasers, and other particulars. The defendant refused to answer, saying that he would thereby disclose the names of his customers and of the marks to be placed, or which had been the secrets of his trade :- Held, that he was bound to answer. Howe v. McKernan, 30 Beav, 547.

In an action against licensee under a patent for account and royalties, defendant was held bound to answer plaintiff's interrogatory as to names of enstomers. Ashworth v. Roberts, 60 L. J., Ch. 27; 45 Ch. D. 623; 63 L. T. 160; 39 W. R. 170.

Private Matters.]-Where a plaintiff files a bill founded on the alleged agency of the defendant, which is in question in the suit, the defendant will not be compelled to answer interrogatories as to what appear to be his private transactions. Great Western Colliery Co. v. Tucker, 43 L. J., Ch. 518; L. R. 9 Ch. 376; 30 L. T. 731.

A., being indebted, conveyed lands to his son, who was then living with him, in fee, for an expressed consideration of 11,000%. A bill was afterwards filed to have this conveyance set aside as a fraud on A.'s creditors, and alleging that no money was ever paid by the son; and interrogatories were exhibited to him, asking whether he had at that time any resources of his own, and what they were, and the amount and value and annual income thereof. He stated that he had private resources, partly his own and partly his wife's, consisting of farming stock, furniture, &c., but mitted the possession and relevancy of the without stating the value or annual income :—
documents, and agreed to produce the documents. Held, that this was insufficient, the question of Newton v. Dimes, 3 Jur. (N.S.) 583.

paid the balance by a cheque on his bankers :-

Demurrer by defendant to discover his personal estate in his lifetime overruled. Smithier v. Lewis, 1 Vern. 398. S. P., Angell v. Draper, ib. There can be no confidence in an iniquitous secret. Gartside v. Outram, 26 L. J., Ch. 113; 3 Jur. (N.S.) 39; 5 W. R. 35.

Trade Secrets. ]-See aute, col. 851, and Ashworth v. Roberts, col. 821.

As to Practice of Insurance Company. ]-1862, a policy was granted upon the life of A., who about the same time went to reside in India, On account of his bad state of health an additional premium was charged, but the Indian extra rate was not charged by the company, who alleged that they did not know of his departure for India. In 1868, the days of grace having expired, the company declined to reinstate the policy except upon the terms of payment of the Indian extra rate for the period that had elapsed since the policy was effected, relying upon the condition contained in the policy, that it should be void if the assured should go beyond Europe without obtaining permission of the directors on payment of a premium adequate to the extra The assured filed a bill in equity, praying a declaration that he was entitled to the benefit of his policy upon payment of the premium originally charged, with liberty to reside in India without extra premium: and interrogated the company as to their practice with regard to similar cases at the time his policy was issued, calling upon them to take ten policies immediately preceding and immediately subsequent to the date of his policy, upon the lives of persons about to start for India in the Civil Service, and to state whether any such licences and extra payments were given or made in such cases, and the form of the respective policies :- Held, that the company was bound to give the discovery sought by the interrogatory, for the purpose of enabling the plaintiff to establish the ease of conduct and waiver in similar cases raised by the equity of his bill. Girdlestone v. North British Mercantile Insurance Co., 40 L. J., Ch. 230; L. R. 11 Eq. 197; 23 L. T. 392.

Mortgaged Bonds—Disclosure of Numbers. ]-

value being material to the plaintiff's case, agents in London, to bring out a loan on the Nowton v. Dimes, 3 Jur. (N.S.) 583. English market, and to issue scrip certificates to Newton v. Dimon, 3 dur. (x. x. y oco. ) and Another interrogatory went to discover how the consideration money, 11,000\(\text{A}\), had been paid, being subscribers, and to exchange such sorth for the consideration money, 11,000\(\text{A}\), had been paid, bonds upon the amount subscribed being fully the replied that 4,000\(\text{A}\) was money of his own the interrogatory and that he had the replied that the control of th from K. & F. the sums subscribed. Held, insufficient, as it was not shown how he quently bonds in the hands of K. & F. were Herd, insumerion, as N. In his father's hands at pleided by the president of the government to that time, or how the came to have such a balance E. & Co., but the validity of this security was at his bankers as to meet the cherue. It is the defendants to an action brought to reflict a bill against K. K. F, E. & Co., and cover from them the excess upon a bill paid cover from them the excess upon a maker the with the issue of the loan. Upon motion that Common Law Procedure Act, 1854, s. 3, for a compulsory reference to arbitration. Upon examination in the cause, should produce certain motion for production of documents:—Held, documents, to the production of which E. & Co. that the plaintiffs were not entitled to see the objected:—Held, that the serip certificates and that the pharms were no climated by the de-decounts of the prices actually paid by the de-fendants to their workmen in reference to the entered must be produced, but not the bonds, work in respect of which the bill in dispute had been sent in, but that the plaintiffs were entitled by knowing the numbers of the bonds, use their to see the returns as to labour done and materials information to the prejudice of E. & Co., their used. British Empire Steam Shipping Co. v. mortgages, and the knowledge of the numbers Somes, 3 Kay & J. 483; 26 L. J., Ch. 759; 3 Jun. (X.S.) 883; 5 W. R. 813. suit. Costa Rica Republic v. Erlanger, 44 L. J., Ch. 281; L. R. 19 Eq. 33; 31 L. T. 635; 23 W. R. 108.

# III. TENDENCY TO CRIMINATE.

# 1. General Principles.

Protection in every Stage of Proceedings.]. Protection generally, in every stage of the procooding, against answering any question having a direct tendency to criminate the party, or subjeet him to penalty, &c., or forming one step-towards it. Paxton v. Douglas, 19 Ves. 225; 16-Ves. 239; 12 R. R. 175.

Fact forming Link in Chain of Evidence. -Toa bill stating defendant's marriage with a partieular woman, plea, she is his sister, protects him. from discovery of any fact forming a link in the chain. Claridge v. Hoare, 14 Ves. 65.

Transfer of stock under an agreement to

satisfy the deficiency in the accounts of a banker's clerk, though he is not a party, amounts to a composition of felony, to prevent a prosecution. Defendant, therefore, may protect himself by plen from discovering not only the broad leading fact, but any fact, the answer to which may form a step in the prosecution. S. C., 14 Ves. 59.

The protection extends not only to the question which directly may tend to criminate, but to every link in the chain of proof. Macvallum v. Turton, 2 Y. & J. 183.

A defendant is not bound to discover the principal fact or any one of a long series or chain of facts which may contribute to establish a criminal charge against himself, and he cannot waive his right by any agreement. Lee v. Read, 5 Beav. 381; 12 L. J., Ch. 26; 6 Jur. 1026.

Bill by an ecclesiastical rector against an

occupier for an account of tithes : the defendant, by his answer, not only insisted on a modus, but alleged that the plaintiff was simoniacally presented, and stated certain facts as evidence thereof. The occupier afterwards filed his crossbill against the rector, to establish the modus, and for a discovery of various matters with reference to the purchase of the advowson by the rector's father, and calculations made of the value of the tithes and moduses: a lease alleged A foreign government employed K. & F., as to have been granted by the preceding incumbent

objected to make answer, would, if confessed, furnish evidence, or lead to evidence, in support of a charge of simony, or would aid the proof of the charge, and would subject the defendant to forfeiture and penalties. Exceptions being taken to the answer for insufficiency, they were, on argument, overruled, on the ground that a party protecting himself from a discovery which may subject him to a penalty is not bound to answer a single link in the chain of evidence. Southall -, Younge, 308.

On a bill to set aside a usurious contract, defendant may demur to a discovery of what interest he agreed to take, for he cannot set forth that without discovering the very interest he has taken. Chauncey v. Tahourden, 2 Atk. 393.

Legal and Illegal Matters mixed together. ]— Where a plaintiff by his bill seeks a discovery of matters which might subject the defendant to a criminal prosecution, and also seeks other legitimate discovery, it is his duty to separate the two: for if they be so mixed up or connected, that, either by inference or exclusion, they may lead to a disclosure which might subject the defendant to prosecution, he is not bound to answer any portion of it. Lichfield (Earl) v. Bond, 6 Beav, 88; 12 L. J., Ch. 329; 7 Jur. 209.

A bill sought, as against stock brokers, a discovery of certain sales of stocks and shares. The defendants, by their answer, stated that some of them were illegal time bargains, and refused to give a discovery of any of the transactions :-Held, that they were bound to answer as to the legal matters. Fisher v. Price, 11 Beav. 194; 18

L. J., Ch. 235.

The whole object of a bill of discovery being criminatory, a general demurrer does not cover too much, because some of the interrogatories, separately considered, may relate to matters not directly criminatory. Glyn v. Houston, 1 Kecn, 329; 6 L. J., Ch. 129.

Refusal to Discover not an Admission. ]-Party demurring to the discovery, or witness refusing to answer facts tending to criminate himself, no admission to the truth of the fact. Lloyd v. Passingham, 16 Ves. 59.

Refusal to answer, on the ground that it tends to criminate the witness, does not amount to an admission. Symes, Ex parte, 11 Ves. 523.

How claimed.]-A party cannot protect himself from producing a document on the ground that its production would tend to criminate him. unless he pledges his oath that, to the best of his belief, its production would tend to criminate him. Webb v. Etsat. 49 L. J., Ex. 250; 5 Ex. D. 108; 41 L. T. 715; 28 W. R. 336; 44 J. P. 200—C. A. Party not bound to make discovery which

might expose him to a penalty; but must state on oath his belief that such would be the result. The Mary or Alexandra, 38 L. J., Ad. 29; L. R. 2 Adm. 319; 18 L. T. 891; 17 W. R. 551.

Objection, when to be taken. |- It is no objection to an application for an order for discovery of documents that the documents might tend to eriminate the party from whom the discovery is oriminate the party from whom the discovery is subornation of Perjury.]—A debtor of a bank-sought. The proper time to take the objection rupt, sued at law by the assignees, filed a bill for

to the rector's father; and the collection of the davit of documents.

Allhusen v. Labouchere tithes and moduses by the plaintiff and his father daring the incumbency of the preceding vicars.

Reafern v. Reafern (60 L. J., P. 9: [1891] P. The rector, by his answer, stated that the matter labout distinguished. Spakes v. Grovenou ach charned by the occupier's bill, and to which he week that the labour of the procedure of the proc 2 Q. B. 124; 76 L. T. 677; 45 W. R. 545

2. CRIMINAL CHARGE OR PROSECUTION.

Defendants not bound to answer, to charge themselves criminally. Mountague v. -Cary 9.

No person bound to answer what has tendency to criminate him. Symes, Ex parte, 11 Ves. 525.
Defendant cannot be obliged to discover facts tending to inflict on him corporal or pceuniary

punishment. Selwyn v. Honeywood, 9 Mod. 419. Where, in aid of defence to action for libel, discovery would subject plaintiff at law to indictment, he is not bound to answer; but because bill sought commission to examine abroad, to which plaintiff in equity was entitled, demurrer to whole bill was overruled, with liberty to amend. Thorpe v. Macauloy, 5 Madd. 219.

A bureau delivered for the purpose of repairs to a person who discovered money in a secret drawer, which he converted to his own use : this amounts to a felony, and upon that ground a demurrer to a bill of discovery was allowed. Cartwright v. Green, 8 Ves. 405; 7 R. R. 99.

Bigamy. ]-Plea to discovery tending to convict of bigamy, allowed. Hatfield v. Hatfield, 5 Bro. P. C. 103.

Perjury. ]—The bill alleged that the defendant had procured an order vesting the legal estate of certain lands in himself, by false statements, and that the Master's report in his favour had been obtained on evidence untrue, and fraudnlently concocted. The bill interrogated the defendant as to the tenancies of the lands in question, requiring him to set forth the names, terms, rents, &c.; and it also prayed a discovery of the alleged fraudulent documents. The defendant refused to discover the precise terms of the tenancies, or to state what documents he had employed; he admitted that he had let the premises, and that an order of the Court of Chancery had been made vesting the legal estate in him; he denied all fraud; denied the plaintiff's beneficial title, and affirmed his own; and declared that the documents which he had made use of had been prepared with a view to litigation, but not to this litigation, and after litigation had commenced: and that they did not support, or tend to support the plaintiff's title, but that, on the contrary, they supported his, the defendant's, title. The defendant also, at the bar, insisted that the effect of the diseovery of documents would be, on the plaintiff's own showing, to expose the defendant to a prosecution for perjury:—Held, that the answer was insufficient on both points. Chadwick v. Chadwick, 16 Jur. 1060.

— In the Cause.]—It is no answer to a motion for production of documents in the custody of a defendant, that they tend to support an indictment pending against the defendant for perjury committed in the eause. Rice v. Gordon, 13 Sim. 581; 13 L. J., Ch. 104; 7 Jur. 1076.

to the production of documents is in the affi- discovery, whether they had not signed his

certificate on consideration of his giving evidence | The defendant by his answer submitted, that

Fraud. ]-The court will not compel a defendant to answer allegations which may subject him to penalties. Where the chairman of a joint-stock company, with a knowledge that the company had been dissolved, and that the managing committee had determined to buy up the shares, sent his shares into the market, and sold them as good and available shares, the court protected him from answering the allegations, noon the ground that there existed a reasonable probability that he might be indicted for the fraud. Maccallum v. Turton, 2 Y. & J. 183.

Discovery compelled, whether devise was obtained or prevented, by undertaking of devisee or heir to do certain acts in favour of individuals, and relief upon the ground of fraud.

Stickland v. Aldridge, 9 Ves. 519; 7 R. R. 292.
The bill stated that a testator intended to republish his will, but was prevented from so doing by the fraud of the heir-at-law. A deniurrer to so much of the bill as required him to discover whether the testatator did not intend to republish his will, was, under these circumstances, overruled. *Dixon* v. *Olmius*, 1 Cox, 414. *See* 9 R. R. 286, n.; 20 R. R. 235, n.

Discovery in case of adverse title or fraud. Chadwick v. Chadwick, 22 L. J., Ch. 329; 16 Jur. 1060; 1 W. R. 29.

Bill to be relieved against fraud, defendant must answer discovery. Manningham v. Bolingbroke, Dick. 533.

Conspiracy. ]-Bill against a corporation, trustees for a charity, for a discovery and injunction against a resolution depriving the plaintiff of his office of schoolmaster, charged to have been proonice of scholamster, charged to may been pre-cured by five of the members, including the bailiff, from improper motives, with reference to a parliamentary election. Demurrer by those five, on the ground that no title was shewn to discovery against them, and ore tenus, that the charge would be the subject of a criminal prose-cution overruled. Dummer v. Chippenham Cor-poration, 14 Ves. 245.

Under Foreign Enlistment Act. ]-An incorporated company demurred to a bill, because the discovery thereby sought might subject it to criminal prosecution under the Foreign Enlistment Act, 59 Geo, 3, c. 69 (to prevent the enlisting of his majesty's subjects for foreign service, and the fitting-out, in his majesty's dominions, wessels for warlike purposes without his licence). The court held that a corporation was not liable to be indicted under that act, and overruled the demurrer. Sicilies (King) v. Wileox, 1 Sim. (N.S.) 334; 19 L. J., Ch. 488; 14 Jur. 751.

Barratry.]-Bill by a certificated conveyancer to enforce an agreement by the defendant, an attorney and solicitor, to pay the plaintiff a commission equal to half the net profits upon all matters of professional business introduced to him by the plaintiff; the bill averting part performance of the agreement and charging (in effect) that after introducing matters of (in effect) that after introducing matters of spanish subjects resident in Spania. A having business to the defendant, the plaintiff had entered into a mercantile contract with the regarded the receipt in certain cases of the stipulated commission upon the net profits, died, and A. went first to France, and afterwards

Cerement of the averments in the bill were true, he was Crew, 2 Austr. 504. And see Baker v. Pritchard, liable to the penalties enacted by the 32nd section of the 6 & 7 Vict. c. 73, and to other pains and penalties under the statutes and laws in force concerning common barratry and maintenance, and therefore that he was not bound to answer, and he refused to answer interrogatories founded upon those averments: -Exceptions to the answer allowed, the court being of opinion that the agreement as averred was not one which would expose the defendant to the penalties alleged in the answer, And the argument that the tendency of the admissious which the defendant might have occasion to make would be to expose him to such pains and penalties as alleged :-Held, to be one of which, upon this form of answer, the defendant could not avail himself. Scott v. Miller, 1 Johns. 220; 28 L. J., Ch. 584; 5 Jur. (N.S.) 858; 7 W. R. 470.

> Misconduct as Attorney.] - Discovery was refused in an action against an attorney for alleged negligence and misconduct as attorney for the plaintiff; the object of the application being to compel the production of his books for the purpose of inspecting entries therein, upon which it was surmised were founded the items of a bill of costs which had been delivered by the attorney to the plaintiff. Con v. Brockett, 18 C. B. (N.S.) 241.

> Assault and False Imprisonment. ]-Demurrer to a bill for discovery, in aid of an action, brought by the plaintiff to recover damages for an assault and false imprisonment, allowed, the whole object of the bill being to obtain a discovery of matters, which, if established, would have subjected the defendant to penal consequences, Glyn v. Houston, 1 Keen, 329; 6 L. J., Ch. 129.

> Libel, |-In an action for false and malicious libel the plaintiff delivered interrogatories to prove the publication. The defendant in his answer objected to answer on the ground that to do so "might tend to criminate" him :-Held, a The solution of the state of th

And see ante, cols. 855-7.

Incest. ]-To a bill stating defendant's marriage with a particular woman, plea, that she is his sister, protects him from discovery of any fact forming a link in the chain. Claridge v. Houre, 14 Ves. 65.

Act of Bankruptoy.]—Demurrer to a discovery of trading overruled. A demurrer good, if confined to questions as to having committed an act of bankuptey. Chambers v. Thompson, 4 Bro.

Discovery from Wife of Party Liable. ]-A married woman may demur to a discovery that may subject her husband to a charge of felony. Curtwright v. Green, 8 Ves. 406; 7 R. R. 99.

Offence under Foreign Law. ]-A. and B. were

to enforce the agreement. A pleaded that the agreement was illegal and void by the laws of Spain, as, at the time it was entered into, B. held an office of trust and confidence under the Spanish government, and the plea averred that the entering into the agreement was a crime against the laws of Spain, subjecting the parties to pains and penalties, and a criminal prosecution. The plea was allowed, though B. was dead, and therefore no longer subject to pains and penalties. Heriz v. Riera, 11 Sim. 318; 10 L. J., Ch. 47; 5 Jnr. 20.

See further, cols, 851, 852,

## 3. FORFEITURES.

Discovery tending to forfeiture not enforced. Firebrass's Cuse. 2 Salk. 550.

An interrogatory embracing two points: as to one, it was answered; as to the other, not. exception to the whole may be sustained. Where deeds existed in which, in the event of the court deciding one way, the plaintiff would have no interest, but if it decided another way he would, the defendant cannot protect himself against discovering in whose possession they are; nor can he, because discovery might have the effect of making estate go over away from him. Hambrook v. Smith, 17 Sim. 209; 21 L. J., Ch. 320 : 16 Jur. 144.

The rule that no man is obliged to accuse himself, implies, also, that he is not bound to discover a disability in himself. Smith v. Read,

1 Atk. 526.

Of Lease. - Where in any action the sole issue raised is whether there has been a forfeiture of a lease by breach of covenant, the court will not grant discovery of documents or leave to adgrant discovery of documents of leave to ac-minister interrogatories. Where in any action that issue is raised together with other issues, the court will make no order either for the discovery of documents or the administration of interrogatories with regard to that issue. Seaward v. Dennington (44 W. R. 696) overmled. Mexborough (Earl) v. Whitwood Urban Council, 66 L. J., Q. B. 637; [1897] 2 Q. B. 111; 76 L. T. 765; 45 W. R. 564—C. A.

Discovery tending to forfeiture of lease re-fused. Func v. Atlee, 1 Eq. Abr. 77.

Demurrer lies to a bill for discovery of an assignment of a lease without licence, if it does not expressly waive the forfeiture. Uwbridge v. Staveland, 1 Ves. 56.

Where a tenant had cut down timber, and a bill was brought against him for a discovery, he demnrred, for that as being waste, his answer would subject him to a forfeiture. Demurrer allowed. Att.-Gen. v. Vincent, Bunb. 192.

Under Will.]—Testator, after giving certain benefits to his heir, revoked them in case she should ever dispute his will, or his competency to make it, or should not confirm it when required, or should not resist any proceeding by the result of which a greater benefit might be attainable by her than was intended by the will. A bill against the heir and others to establish the will and carry the trusts into execution contained statements, and interrogatories founded Bunn v. Bunn, 4 De G. J. & S. 316.

came to England. After he had left Spain, he fre- on them, relating to the testator's sanity and to quently wrote to the plaintiffs (who were resident the heir having refused to confirm the will in France, but had taken out administration to Held, that the heir was not bound to answer in France, but had taken our mammacant and in the many of the interrogatories reasons. By in this country, promising to settle with them any of the interrogatories reasons from the profits of the contract, but tor's sanity, notwithstanding the revocation for B.'s share of the profits of the contract, but tor's sanity, notwithstanding the revocation for B.'s share of the profits of the contract, but tor's sanity, notwithstanding the revocation for B.'s share of the profits of the contract of the profits of the contract of the profits of the contract of the profits of the profits of the contract of the profits of th an admission in her answer which subjected her to its operation, if it were valid. Turner, 14 Sim. 218; 8 Jur. 703.

The bill alleged that an estate was devised under a power to the defendant for life, or until he should alienate by forfeiture or otherwise, that the execution of the power was invalid, and that the plaintiff was entitled to the estate in default of appointment. One of the inter-rogatories to the bill was, whether the defendant had not in his possession the title-deeds of the estate; and if not, in whose possession were they? The bill also asked that the defendant might set forth a schedule to the deeds in his possession, and that he might state in whose possession those deeds were which he had parted with. The defendant admitted that some of the deeds were in his possession, and set forth a schedule of them; and he stated that he had had other deeds, but refused to answer in whose possession they now where, as it might subject him to a forfeiture of the estate :- Held, that as in one event the documents might assist the plaintiff at the hearing, he was entitled to production: held further, that the estate having been given to the defendant until alienation, he could not protect himself from discovery, on the ground of forfeiture. Hambrook v. Smith, 17 Sim. 209; 21 L. J., Ch. 320; 16 Jur. 144.

A., by will, gave an estate to his wife dur. vidnit., with a limitation over in case of her second marriage; the remainderman brought a bill of discovery of her second marriage, to which she demurred as subjecting her to a forfeiture. Demurrer overruled; for this is not a condition but a limitation over of an estate, and, therefore, no forfeiture. If it had been a condition for a breach of which a forfeiture would have been incurred, such a demurrer would have been allowed. Chauncey v. Tahourden, 2 Atk. 392.

On a bill by executor for discovery of defendant's marriage, who demurred, as it would be a forfeiture of his legacy, which was given conditionally if she married with consent of trustees under the will. Demurrer allowed, as he cannot answer the marriage without shewing at the same time it was against consent. Ib.

Under Marriage Act.]—The husband charged with procuring his marriage with a minor, by falsely swearing that the consent of her parent had been given, cannot be compelled to discover the facts relating to such charge, upon an information under the Marriage Act (4 Geo. 4, c. 76, s. 23), seeking the forfeiture of his interest in the wife's property, and a settlement of the same upon her and her issue. Att. Gen. v. Lucus, 2 Hare, 566; 12 L. J., Ch. 506; 7 Jur. 1080.

Under 13 Eliz. c. 5, and 27 Eliz. c. 4.]—The penalty and forfeiture clauses of the 13 Eliz. c. 5, and 27 Eliz. c. 4, cannot be used by defendants in equity who are parties to deeds which it is sought to impeach under those statutes, as exempting them from giving discovery, or from the necessity of making the common affidavit as to documents, even though among such documents may be the deeds sought to be impeached. of Seat in Parliament.]—S. gave a bond to the action, the Court of Chancery before those pay 800% a year to H. during S.'s enjoying the acts would not have allowed interrogatories to -, or whilst anybody held it in trust for him. H. puts the bond in suit; S. brings a bill for injunction, and a cross-bill is brought by H. to discover whether E. held the office in trust for S. S. insisted, in his answer, he was not obliged to discover what would subject him to incapacities of the several acts to vacate a seat in parliament on a member's accepting a place : he is not obliged to make the discovery; and he did right in answering, for he could not have demurred to this matter, because then he would have admitted the facts to be true. Honeywood v. Selwin, 3 Atk, 276.

Where Liability Statute barred. ] - Where Statute of Limitation had run against recovery of penalty for usury, the usurer cannot protect himself from discovery by demurrer founded on liability of subjecting himself to forfeiture.

Tulbot v. Smith, 1 Ridgw. L. & S. 360.

Protection does not extend to Collateral Matters.]—Plea on the ground of forfeiture must be confined to protect against a discovery of the aet causing it, and not extend to matters collateral. Weaver v. Meath, 2 Ves. 108.

Though the forfeiture is not waived, a copyholder cannot by demurrer protect himself from answering those parts of the bill which do not allege acts or circumstance tending to produce forfeiture. Durham (Bishop) v. Rippon, 4 L. J. (o.s.) Ch. 32.

In Foreign Country.]—A plea of penalties to which the defendant's answer may expose him in a foreign country, is a good plea to the discovery, if the law of the foreign country clearly appears. United States of America v. M. Pac, 57 L. J., Ch. 129; L. R. 3 Ch. 79; 17 L. T. 229; 19 W. R. 377.

The United States of America, under an act of Congress, took proceedings in America for the seizure and confiscation of the real estate there of a defendant, an agent in this country of the late Confederate States; and, pending those proceedings, they filed a bill here for the recovery of moneys and goods which had come to his hands as such agent, alleging that all property of the late Confederate States was now vested in the plaintiffs. The defendant pleaded, in bar to the discovery and relief sought by the bill, that the acts alleged in the bill were identical with those in respect of which the proceedings had been instituted abroad, and that his answer to the interrogatories would expose him to the confiscation of his estate abroad under such proceedings :-Held, that the plea was good as to the discovery sought by the bill. Ib.

Held, that the plea was bad as to the relief; there being no connection between the subjectmatters of the suit here and the proceedings abroad. Ib.

Duplossis, Park. 144, and Smith v. Read, 1 Atk. | 37 W. R. 479.

#### 4. PENALTIES.

# a. Generally.

be administered. *Hunnings* or *Hemmings* v. *Williams* or *Williamson*, 52 L. J., Q. B. 273; 10 Q. B. D. 459; 48 L. T. 581; 31 W. R. 336; 47 J P 390

Possibility of Liability Sufficient.]—The rule of law is, that a man shall not be obliged to discover what may subject him to a penalty, not what must only. Harrison v. Southcote, I Atk.

A man is not bound to discover what may subject him to the penalty of an act of parlia-ment. Bird v. Hardwicke, 1 Vern, 109,

Admission of Liability.] - If a defendant makes statements in his answer sufficient to shew that he has incurred penalties, he cannot refuse to produce documents referred to in it, on the ground that they afford evidence of his being subject to the penalties. Ewing v. Osbaldiston, 6 Sim. 608

Penalty Imposed by Covenant. - If a party covenant not to do a particular act, he cannot protect himself from discovery, if he has done the act, by alleging that there was a penalty attached to the performance of such act. French v. Macale, 2 Dr. & War. 269; 1 Con. & L. 459; 4 Ir. Eq. R. 568.

By indenture a farm was demised at yearly ent, with a covenant by tenant, that if, during the last three years of the term, he should sow more than seventy acres of clover in one year, he should pay an additional rent of 101. a year for every acre above seventy, for the remainder of the term:—Held, that the additional rent was in the nature of stipulated damages, entitling plaintiff to a discovery in aid of an action at law; and a plea that the discovery would subject defendant to penalties, was over-ruled. Jones v. Green, 3 Y. & J. 298.

Waiver—Of Penalty.]—In a bill to stay waste, a plaintiff is not entitled to discovery unless he waives the double penalty. Boteler v. Allington, 3 Atk. 457. And see Att.-Gen, v. Conroy, infra, col. 904.

— Of Right of Refusal.]—The right not to discover for fear of penalties attaching, may be waived by agreement. East India Co. v. Athyns, 1 Comb. 346; 1 Str. 168. South Sea Co. v. Bumsted, 1 Eq. Abr. 77.

#### b. In Various Cases.

Pound-breach-Treble Damages.]-An action ; for pound-breach and rescue of chattels distrained for nonpayment of tithe rent-charge, in which the plaintiff claims treble damages: under 2 Will. & M. sess. 1, c. 5, s. 4, is a penal action, and the plaintiff is therefore not entitled to an affidavit of documents. Jones v. Jones, 58

Fraudulent Removal of Goods by Tenant-Double Value.]—An action for double the value of goods fraudulently removed by a tenant, Effect of Judicature Acts. ]-The Judicature brought under 11 Geo. 2, c. 19, is a penal action, Acts and Rules have only altered the procedure and the plaintiff is not entitled to administer and not the rights of parties, and discovery of interest parties of the defendant. Hobbs and not the rights of parties, and discovery of interrogatories will not be allowed [Halon, 9 L.J., Q. B. 562; 25 Q. B. D. 232; 63 in cases where, as when a penalty is the gist of [L. T. 25]. 8. 682; 64 J. F. 252—0. A.

Under Patents, Designs and Trade Marks Act.]—An action under s. 58 of the Patents. Designs and Trade Marks Act, 1883, is an action to recover a penalty, and therefore in such an action interrogatories cannot be administered to the defendant. Adams v. Batley (18 Q. B. D. 625) distinguished. Saunders v. Wiel, 62 L. J., O. B. 37; [1892] 2 Q. B. 321; 4 R. 1; 67 L. T. 207; 40 W. R. 594—C. A.

For Breach of Dramatic Copyright.]—By 3 & 4 Will, 4, c. 15, s. 2, if any person shall, during the continuance of the sole liberty of representing's dramatic piece, represent such piece without the consent of the author, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40s. :- Held, that this section did not impose a penalty upon the offender so as to puse a penarry upon the offender so as to preclude the plaintiff, in an action to recover the specified amount, from administering interrogatories to him. Adams v. Batley, 56 L. J., Q. B. 393; 18 Q. B. D. 625; 56 L. T. 770; 35 W. R. 437—C. A.

Pollution of River-Proceeding to Restrain. ]-An application by a sanitary authority to a county court judge for an order under s. 10 of the Rivers Pollution Prevention Act, 1876. requiring a person to abstain from the commission of an offence under the provisions of that act, is not a penal proceeding, inasmuch as until the order has been made and has been disobeyed no question of penalty can arise, and the proceeding is therefore civil and not criminal, and one in which discovery and interrogatories may be allowed. Derby Corporation v. Derbyshire County Council, 66 L. J., Q. B. 701; [1897] A. C. 550; 77 L. T. 107; 46 W. R. 48; 62 J. P. 4—H. L. (E.)

Proceedings by Common Informer.]—In an action for penalties by a common informer, leave will not be granted to a plaintiff to call upon the defendant for discovery of documents,

Whiteley v. Barley, 56 L. J., Q. B. 312.

The general rule is that in an action for penalties by a common informer, leave will not be given to the plaintiff to administer interroga-tories. Martin v. Treacher, 55 L. J., Q. B. 209; 16 Q. B. D. 507; 54 L. T. 7; 34 W. R. 315; 50 J. P. 356-C. A.

Broker's Qualification. ]-A broker in the city of London must answer a bill of discovery in aid of an action brought against him by his employer, for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corporation on his admission. Green v. Weaver, 1 Sim. 404; 6 L. J. (O.S.) Ch. 1; 27 R. R. 214.

The fact of persons assuming to act as brokers in the city of London, induces a belief in parties employing them that they are duly qualified, and they cannot protect themselves from a discovery of dealings between themselves and their principals by alleging that they may be subject to penalties for acting as brokers without having to penature for aging as of occas we was the first been admitted uncler the provisions of the 57 Geo. 3, c. 60. Robinson v. Kitchen, 21 Beav. 365. Affirmed, 8 De G. M. & G. 88; 25 L. J., Ch. 441; 2 Jur. (N.S.) 294; 4 W. R. 344.

See also Davis v. Read, 5 Sim. 443.

For Evading Customs or Duties. ]—An information charging a distillation of larger quantities of spirits than the distillers acknowledged, or spirits than the distincts action age, prayed for an account of all duties due to the Crown, the attorney-general waiving all penalties and forfeitures:—Held, that the defendants were bound to answer all the charges fully. Att.-Gen. v. Conroy, 2 Jones, 791.

An information for an account of spirit duties, charged a distiller with having claudestinely abstracted spirits from his distillery, which he afterwards sold to certain persons at a reduced price, no duty having ever been paid in respect of such spirits:—Held, that the defendant was bound to answer fully the statements in the information, and could not protect himself on the ground that the disclosure might tend to criminate him. Att.-Gen. v. Daly, Hay. & J. 379.

Where bill on policy of insurance charges exportation of prohibited goods absolutely, and no others, and in interrogatory inquires what goods were exported, plea of penaltics attaching on such exportation allowed. Duncalf v. Blake, 1 Atk. 52.

For False Return to Income Tax Commissioners. ]-A bill sought a discovery of the returns made by the defendant to the commissioners of property tax, the object of the plaintiff being to shew that the defendant represented that the profits of his business were less than what he had stated to the plaintiff, who had purchased it. A demarrer was allowed. Mitchell v. Kvecker, 11 Beav. 380; 12 Beav. 44; 18 L. J.,

Ch. 294; 13 Jur. 797. Whether a discovery of income-tax returns could, under any circumstances, be compelled, quære. Ib.

Under Stamp Acts. ]-The court, in compelling a plaintiff to exhibit evidence to which the defendant is entitled to have access, will not compel him to lay himself open to a prosecution under the Stamp Acts. Whitaker v. Izod. 2 Taunt. 115.

Other Instances. ]-Plea to discovery, that it may subject defendant to penalties of a statute, and also of articles of impeachment exhibited against him by the commissioners, and therefore void. Nobkissen v. Hastings, 2 Ves. J. 84; 4 Bro. C. C. 252.

Bill not suggesting wilful usury, but that the defendant had miscomputed interest received by him, and praying discovery as to the fact. Plea thereto overruled. Anon., 2 Eq. Abr. 70.

# c. Ecclesiastical.

Plea allowed to discovery of a marriage, which would subject one of the parties to punishment in the Ecclesiastical Court, the other being dead.

Brownsword v. Edwards, 2 Ves. 243.

Though parties may demur to discover anything which may prove illicit cohabitation, or what may subject them to pains, penalties, or ecclesiastical censures, &c., a charge against persons of a conspiracy or attempt to set up a bastard child, is not demurrable unto, that not being per sc an indictable offence. Chetwynd v. Lindon, 2 Ves. 450.

Though a defendant is not bound to answer what may subject him to ecclesiastical penalties, as whether he is not married to a woman he cohabits with, or whether he is an alien, &c., he Semble, a man may contract himself out of the must in a proper ease answer whether he hath protection given by the rules of the court. Ib. or hath not a legitimate son. Finch v. Finch, 2 Ves. 491.

allowed. Hincks v. Nelthorpe, 1 Vern. 204.

discover whether the clerk presented to him by defendant had not given a general bond of resignation in order to set up that as a defence at law for having refused him institution. To this bill defendant demurred, first, on account of legality of such bond; second, that the discovery was immaterial. Demurrer overruled. London (Bishop) v. Fytche, 1 Bro. C. C. 96.

Action on a general bond of resignation; bill for discovery whether the advowson was not sold with promise to procure an immediate resignation. Demurrer to the discovery overruled.

Gray v. Hesketh, Ambl. 268. B., a purchaser under a decree, of the first presentation to a living, of which A. is seised for life of the advowson, afterwards takes a conveyance from A. of the second presentation to the same living, and sells the first presentation to the present incumbent. To a bill by A., to set aside this transaction on the ground of fraud, praying a discovery, B. puts in an answer refusing to make the discovery required, as tending to subject him to forfeiture, on account of simony. B. having afterwards died, the suit is revived against his executor, who is held entitled to the same protection that was claimed by B. Parkhurst v. Lowton, 1 Mer. 391; 15 R. R. 359. And see Att.-Gen. v. Sudell, Prec. in Ch. 214; and Southall v. ---, Younge, 308.

Plurality of Livings. ]-Boteler v. Allington, 3 Atk. 452.

## d. Under Stock-Jobbing Acts.

Extent of Discovery.]—Plea of the Stock-Jobbing Act to a bill for discovery of stock transactions overruled, as the 2nd section of the act requires parties to make a discovery whereon to found an action. Bancroft v. Wentworth, 3 Bro. C. C. 11.

Discovery in support of an action to recover money under the Stock-Jobbing Act, statute 7 Gco. 2. c. 8, confined to those clauses, as to which it is expressly given, with protection from the penalties, and therefore not extended to the 5th and 8th sections. Bullock v. Richardson, 11 Ves.

The 7 Geo. 2, c. 8, s. 8, imposed a penalty of 5001, upon parties buying or selling stock of which the sellers are not possessed at the time of the contract; and by s. 9, every broker shall keep a to penaltics under 7 Geo. 2, c. 8; they also book of his transactions in the public stocks, and claimed the benefit of the Statute of Francis: shall produce it when thereunto lawfully re-quired. A broker having, as indorsee of a bill, agreement, must answer the allegations in the brought an action upon it against the acceptor, he, before pleading, moved upon an adelpton, the before pleading, moved upon an adelpton that the bill was believed to have been indorsed that the bill was believed to have been indorsed to the broker in payment of differences in respect to the broker in payment of differences in respect of illegal agreements in stocks; and that he should be ordered to produce his book for the should be ordered to produce his book for the defendant's inspection. The court refused the rule, on the ground that the defendant had no defendants, by their answer, stated that some of interest in the book, and also, that its production them were illegal time-bargains, and refused to might expose the broker to penalties. Pritchett give a discovery of any of the transactions:—v. Smart, 6 D. & L. 702; 7 C. B. 625; 18 L. J., Held, that they were bound to answer as to the

Bill to establish an agreement for a separate! The plaintiff, having employed the defendant maintenance. To such part as prayed a discovery as his broker in buying and selling shares in of hard usage, defendant demurred. Demurrer railway companies, filed a bill against him accusing him of fictitious and fraudulent sales, and other transactions with respect to the shares. Simony.] — Upon quare impedit brought The defendant refused to answer the interrogaagainst the plaintiff, he filed the present bill to tories on that subject, on the ground that the tories on that subject, on the ground that the transactions charged were illegal, and might subject him to penalties under the Stock-Jobbing Act, 7 Geo. 2, c. 8 :- Held, first, that shares in railway companies are not included in the abovementioned act. Secondly, that as no penalties could be incurred by the defendant in consequence of answering the bill, he could not protect himself from answering by the fact that the transactions in question were illegal, or that the demand was a purely legal one. Williams v. Trye, 2 Eq. R. 766; 23 L. J., Ch. 860; 18 Jur. 442; 2 W. R. 314. And see Billing v. Flight, 1 Madd. 230; Roberts v. Alliatt, 1 M. & M.

> Claim of Protection-Sufficiency.]-The defendants who were stockbrokers, being interrogated as to the particulars of certain transactions between them and the plaintiff, declined to answer, on the ground that, by reason of the Stock-Jobbing Act, and of their having been the brokers of the plaintiff, they were advised and believed that the discovery of any of the parti-culars inquired after would tend to subject them to the forfeiture and penalties imposed by that act :- Held, that this statement was sufficient toprotect the defendants from discovery. Short v. Mercier, 3 Mac. & G. 205; 20 L. J., Ch. 289; 15 Jur. 93. Affirming 2 De G. & Sm. 635

An allegation, in answer to a bill against brokers, partners, for an account of dealings in stock, that discovery would expose the defendants to penalties under the Stock-Jobbing Act, is sufficient to protect the defendants from the discovery. Robinson v. Lamond, 15. Jur. 240.

Only some Transactions Illegal. ]-The plaintiff made a verbal agreement with the defendants, who were stockbrokers, for the allowance of a portion of the commission to be received from customers whom he should introduce; disputes arose, and the plaintiff filed his bill asking for discovery, for an account of all transactions, and for payment of such share of the commission as he should be declared entitled to. The defendauts, by their answer, admitted that business had been done for the plaintiff, and for other persons introduced by him; that part of it was real, and that other part was fictitious, and consisted of time-bargains, that discovery would subject them bill relating to it, notwithstanding they sug-

A bill sought, as against stockbrokers, a dis-covery of certain sales of stocks and shares. The legal matters. Ib.

# e. Gaming.

The forfeiture of securities under the statute 9 Anne, c. 14, s. 1, for moneys lent at play, is not a penalty of such a nature as to protect a party from discovering whether the consideration of the security on which he brings his action was not moneys lent at play. Sloman v. Kelly, 4 Y. & Coll. 169.

To a bill charging that certain securities were given for money lent at play, and interrogating as to the consideration given for the same, the defendant, without insisting on any protection from answering, stated that they were given for money lent :--Held, that the answer was insufficient. S. C., 3 Y. & Coll. 673; 9 L. J., Ex. Eq. 17.

Equity has no jurisdiction, under 9 Annc, c. 14, or 18 Geo. 2, c. 24, to enforce discovery prayed by common informer of money won at play. Holloway v. Shakspeare, 1 Smith, 121.

Upon an action brought to recover a sum of money lent upon the security of an IOU, and upon a bill filed to discover whether the money had not been lent for the purpose of gaming Held, that the defendant was bound to state by his answer whether it was so lent, it being still a question open to argument in a court of law, whether money lent at play, or for the purposes of play, is recoverable in an action at law. Wilkinson v. L' Eaugier, 2 Y. & Coll. 366.

On allegations that on several occasions since 1846 the defendant induced the plaintiff to pay to him large sums of moncy without any legal consideration, or for a consideration which was invalid and failed, and that the plaintiff had since that time been induced by the defendant, without any legal consideration, to accept, indorse and sign bills of exchange and promissory notes, I O U's, and cheques for large sums of money, and on numerous other allegatious, interrogatories were founded, the second of which was, whether it was not the fact that on several occasions since 1846 the defendant induced the plaintiff to pay to him, and whether or not he obtained and received from the plaintiff large sums of money, and whether or not without any legal consideration, or for some and what consideration, which was invalid or wholly failed. The defendant answered three of the interrogatories, not including the above, and stated that if he were to answer further than he had done. he should subject himself to a criminal prosecution, and to penalties or punishment, and there-fore he declined to answer further. On exceptions to the answer for insufficiency, the court allowed them, with costs. Sidebottom v. Adkins,

3 Jur. (N.S.) 631; 5 W. R. 748. Where a bill charges a defendant with acts which would subject him to a criminal prosecution for gaming, under a statute, the defendant need not plead the statute, but may demur to the bill. Flenning v. St. John, 2 Sim. 181.

See also Fisher v. Ronals, 12 C. B. 762; Orme v. Crockford, 13 Price, 376; Mclel. 185; 27 R. R. 719; Cowan v. Phillips, 3 Anstr. 843; Lichfield v. Bond, 6 Beav. 88.

# f. Under Regulations of Companies.

Demurrer to information as subjecting defendant to pains and penalties. East India Co. v. Campbell, 1 Ves. 246.

Bill by the East India Company, claiming from a part owner of a ship, freighted by them, the command, to be paid or allowed under the King v. Burr, 3 Mer. 693.

charter-party and a by-law, to the company, one moiety to their use, the other to be paid or returned to the person who shall give the company information, and make proof; the deed being, on settling the account, cancelled through ignorance of the fact, demurrer to the discovery, because it might subject the defendant to penalty, covering not only the direct charge, but also circumstances of mere inducement, as the execution and cancellation of the deed, and to the relief generally for want of equity, and for defect of parties, viz., the other part owners, particularly one who executed, and the informer, was overruled. East India Co. v. Neave, 5 Ves. 173.

African company hires the defendant's ship to freight. Defendant covenants not to trade in any of the goods in which the company deal, and in such case covenants to pay double the value for all such goods, with liberty to the company to deduct the same out of the freight. The company bring a bill to discover whether the defendant did trade in any of the said goods. Though this be a penalty, yet it being the defendant's own agreement, the defendant is bound to discover. African Co. v. Parish, 2 Vern. 244.

Party agreeing not to plead or demur to discovery, bound by it, though it tends to subject him to penalty. South Sea Co. v. Bumsted, 1

Eq. Abr. 77.

The right not to discover for fear of penalties attaching, may be waived by agreement. East India Co. v. Athyns, 1 Com. 346; 1 Stra. 168.

# g. Lapse of Time, Effect of.

Although it is a settled rule that a court of equity will not compel a defendant to make a discovery which will subject him to pains and penalties; yet if between the filing and hearing of the plea, the time for string for the penalties expires, the plea will be overruled. Trinity House Corporation v. Burge, 2 Sim. 411; 7 L. J. (O.S.) Ch. 44; 29 R. R. 126.

Where the Statute of Limitations had run against the recovery of the penalty for usury, the usurer cannot protect himself from discovery by demurrer founded on liability of subjecting himself to forfeiture. Tulbot v. Smith, 1 Ridgw.

L. & S. 360. If bill be for discovery of matters penal at common law, or by statute, the defendant need not demur or plead, but it will be admitted on exceptions; but when the time for suing a penalty expires between the first and second answers, and exception is taken to the second answer for not discovering, the exceptions shall be allowed, and the party is bound to discover. Williams v. Farrington, 3 Bro. C. C. 38; 2 Cox,

# 5. ILLEGAL TRANSACTIONS.

Not generally an Objection to Discovery. ]-This court will entertain a bill for a discovery, and to perpetuate evidence in aid of a defence to an action at law on a contract, although the discovery and evidence are to establish that the contract was void, as corrupt, illegal, and unconstitutional, and that both parties were in pari delicto. Longfield v. Andrey, 1 Hog. 300.

Demurrer to bill of discovery, in support of an action to recover the expenses of the entertainment given by the plaintiff under an agreement with the defendant, to introduce him to a woman double the sum received by him for the sale of of fortune, with a view of marriage, allowed.

A covenanted servant of the East India Company, being senior merchant, and acting as agent of the company, as resident or chief at one of their factories, is incapable of forming any con-tract whatsoever in which the company is interested, so as to derive profit to himself or any otherwise however than for the advantage of the company; and if such contract be actually made between him as a merchant dealing for himself and the company's board of trade in India, in which undue advantage is taken by him, by means of his knowledge and influence as resident at the factory, he cannot demur generally for want of equity to bill by company for discovery and relief. Henchman v. East India Co., 1 Bro. P. C. 85.

This court will not compel nor enforce any discovery respecting a contract made in evasion, and contrary to the intent and meaning or policy of a statute. Where the bill stated several distinct matters of agreement, all of which might be described as partnership transactions, and the prayer was "for an account of all and every the said several co-partnership transactions and that the defendant might be decreed to pay the sum found to be due," the defendant having demurred to the prayer for an account of "all and every the said co-partnership transactions, &e," to several of which the defendant had fully answered, and did not pretend that an account should be refused:—Held, that the demurrer covered too much and was overruled by the answer; but as the court would not enforce any discovery in respect of the contract, called in the bill "the partnership," it being against the policy of the law, and the plaintiff being particeps criminis, it was ordered that the defendant should be at liberty to file another demurrer, confining it to so much of the bill as sought relief or discovery touching the partnership, and that the parties should abide their own costs. Fitzgeruld v. Arthure, 1 Ir. Eq. R. 184. And see id. 189, n.

Demurrer allowed to a bill for discovery and injunction against an action, the effect being a contract for participation in an illegal transaction, the result of combination of wholesale grocers, by the title of the "Fruit Club," acting by a select committee, of which the defendants were members, to purchase all imported fruit, though not strictly forestalling, regrating, or monopoly. Consins v. Smith, 13 Ves. 542; 9 R. R. 217.

When a defendant inears no penalties, he cannot resist a discovery by alleging the illegality of the transaction. Williams v. Trye, 18 Beav. 366; 23 L. J., Ch. 860; 18 Jur. 442; 2 W. R. 314.

Fraud of Agent.]-O. had been formerly a clerk of G. & Co., wool-brokers, and in that position had acquired information, and made extracts from the accounts, shewing that G. & Co. had misbehaved in their business, to the injury of persons employing them; and one person who had so employed them had recovered before an arbitrator substantial damages on the evidence of O. G. & Co. filed a bill to restrain O. from making further disclosures, on the ground that he acquired his information when occupying a confidential relation to them. O, in defence, filed an answer, and also a cross-statement, setting out the fraud in distinct terms, and exhibited interrogatories, on which he required a discovery from G. & Co. They refused to All communications pass answer; but held, that they might be compelled torney and his client, with relation to business to

to give the discovery sought. Gartside v. Ontram, 26 L. J., Ch. 113; 3 Jur. (N.S.) 39; 5 W. R. 35.

There can be no confidence in an iniquitous secret. Ib.

Immoral Consideration.]-Demurrer allowed to bill after verdict at law on bond, praying discovery, if consideration was not an illicit connection. Franco v. Bolton, 3 Ves. 368. See 6

R. R. 71, n.
A. B. being sued at law by the trustee of a woman to whom he, A. B., had granted an annuity in consideration of future illicit cohabitation, pleaded the illegal nature of the contract, and filed his bill against the trustee for discovery in aid of his defence :-Held, overruling the denurcer of the trustee, that A. B. was entitled to such discovery. Benyon v. Nettlefold, 3 Mac. & G. 94; 20 L. J., Ch. 186; 15 Jur. 209. Reversing 17 Sim. 51.

# 6. MAINTENANCE AND PRETENDED TITLES.

Maintenance is an indictable offence at common law, and the defendant in an action in which he is charged with supporting a previous plaintiff in litigation in which he had no common interest is entitled to refuse to answer interrogatories on the ground that they may criminate him. Alabaster v. Harness, 70 L. T. 375.

Demurrer allowed to bill of discovery tending to show maintenance of suit on the part of the defendant. Wallis v. Portland (Duke), 8 Bro. P. C. 161; 3 Ves. 494; 4 R. B. 78.

The bill prayed a discovery whether the defendant had not contributed to the expenses of a suit to try a general question against them. It appeared that by the course of that suit in evidence, no general right could be bound by it. A demurrer was allowed. London Corporation v. Ainsley, 1 Austr. 158.

Bill for tithes, praying discovery whether

defendants had not associated together in their defence; demurrer was allowed. Haywood, 1 Anstr. 82.

A defendant not bound to answer that which tended to accuse him of maintenance or of buying pretended rights within 32 Hen. 8, c. 9. Sharp v. Carter, 3 P. W. 375.

Plea of the statute 32 Hen. 8, c. 9, s. 3, against buying and selling pretended titles; and also that there was not any mortgage as mentioned in the bill, to a bill that the defendant might redeem a mortgage upon a covenant in a lease from the defendant to the plaintiff:—Held, good, though a negative plea. *Hitchins* v. *Lan*der, Coop. 34; 14 R. R. 214.

See further as to maintenance, Penrice v. Parker, Finch, 75; and Bradlaugh v. Newdigate, 11 Q. B. D. at p. 7.

# IV. LEGAL PROFESSIONAL CONFIDENCE.

#### 1. GENERALLY.

Privilege belongs to Client. ]-A witness not compelled to discover matters of which he obtained knowledge in professional confidence. The privilege not of the attorney but the client, its principle and limitation. Parkhurst v. Lowten,

All communications passing between an at-

privileged, such privilege being the privilege of the client and not of the attorney. Herring v.

Cloberry, 11 L. J., Ch. 149.

Distinction between the extent of privilege as to discovery of the solicitor and that of the elient. There are cases where the solicitor would and client would not be protected. Greenlaw v. King, 1 Beav. 137; 8 L. J., Ch. 92.

A solicitor, in the presence of his client, objected to produce a document, on the ground of professional confidence. The court, being of opinion that the document was not privileged as regarded the client himself, ordered its production. Cameron's Coalbrook Ry., In re, 25 Beav. 1.

The privilege of not disclosing communications between solicitor and client belongs to the client alone and his representatives, as against third

parties, not inter se. Gresley v. Mousley, 2 Kav & J. 288; 2 Jur. (N.S.) 156.

All the communications between the plaintiff's ancestor and his solicitor, viz., the defendant's testator, being asked for :-Held, that if the executors, being served, would consent, an order should be made for production. Ib.

In an action for libel contained in a circular, the defendants justified, giving full particulars of the justification. The plaintiff administered interrogatories as to certain communications referred to by the defendants, which they objected to answer upon the ground that by so doing they would disclose facts and information obtained by them in confidence, and acting in their capacity as solicitors for a client :-Held, that the defendants were not bound to further answer the interrogatories, the privilege claimed not being their privilege, but that of their clients. Proctor v. Smiles, 55 L. J., Q. B. 527—C. A. It is the privilege of the client and not of

the attorney. Wilson v. Rastall, 4 Term Rep. 754, 8; 2 R. R. 515.

Presumption from Claim of Privilege.]-There is no presumption of fact to be made against a party who enforces the rule against the disclosure, by his solicitor, of knowledge professionally acquired. Wentworth v. Lloyd, 10 H. L. Cas. 589; 33 L. J., Ch. 688; 10 Jur. (N.S.) 961; 10 L. T. 767.

The refusal of a client to allow his solicitor to disclose professional communications, is not to be treated in the same manner as if he had kept a material witness out of the way, Ib.

Legal Adviser, Who is-Pursuivant of Heralds' College.]-A pursuivant of the Heralds' College is not in the position of a legal adviser, and communications passing between him and the person employing him in reference to pedigrees in the Heralds' College are not privileged, and he is entitled to be examined in reference thereto. Stude v. Tucker, 49 L. J., Ch. 644; 14 Ch. D. 824; 48 L. T. 49; 28 W. R. 807.

\_\_\_ Ex-Judge giving Opinion as a Friend.]

The opinion of an ex-lord-chancellor given by him as a friend, and confidentially, was ordered to be produced on the ground that it was not a professional communication. Smith v. Daniell, 44 L. J., Ch. 189; L. R. 18 Eq. 649; 30 L. T. 752; 22 W. R. 856.

How Verified in Affidavit of Documents. ]-See ante, cols. 711, and 771-773,

be transacted by the former for the latter, are | 2. DOCUMENTS SUBMITTED TO OR RECEIVED FROM COUNSEL

#### a. Cases and Opinions.

Counsel not to be examined as to his knowledge as counsel. Dennis v. Codrington, Cary, 100. Defendant, if sought, must set forth case, with counsel's opinion taken by him for his own private use. Radeliffe v. Fursman, 2 Bro. P. C. 514. Sed quære, as to opinion.

Counsel not bound to disclose professional confidence. Rathuell v. King, 2 Swanst. 221., S. P., Spencer v. Luttreil, Ib., 19 R. R. 66; and Stankope v. Nott, Ib., 19 R. B. 67.

Counsel or attorney cannot be called upon to reveal the advice given to the client; demurrer therefore overruled as to the case, and allowed as to the opinion. Richards v. Jackson, 18 Ves. 474.

Demurrer to so much of a bill as called for a discovery of cases laid before counsel, and the opinions, overruled, as covering facts material to

the plaintiff's case. Id. 472.

Demorrer to bill for the discovery of a case which the defendant had stated to his own counsel for an opinion, overruled. Stanhope v. Roberts, 2 Atk. 214.

Defendant must discover as to his own admissions, though contained in case stated by him for the opinion of counsel. Clegg v. Legh, 4 Madd. 206.

A petitioner, claiming a portion of the bankrupt's property, has no right to call for the production of a case stated by the assignces for counsel's opinion, for the purpose of shewing that

the bankrupt has prevarieated in his statement. Collier, Ew parte, 4 Deac. & C. 364.

The bill required the plaintiff to discover the contents of cases laid before counsel relative to certain claims therein mentioned, and the opinion of counsel thereon; but there was not any averment that such discovery would support the plaintiff's case :- Held, that a demurrer lay

to the discovery. M. Cunn v. O' Conor, 1 Hog. 341.

Production of cases and opinions of counsel thereon relating to the matters in issue, refused. Combe v. London Corporation, 1 Y. & Coll, 631;

4 Y. & Coll, 139; 6 Jur. 571.

A case for the opinion of counsel, stated by the answer to have reference to the matters in question in the cause, and to have been submitted. to counsel after the matters in dispute in the cause had arisen, is a privileged communication, which the defendant is not bound to produce. Nias v. Northern and Eastern Ry., 3 Myl. &. C. 355; 7 L. J., Ch. 170; 2 Jur. 295. Affirming 2 Keen, 76; And see 2 Keen, 312.

An order for the production of cases, opinions, and some letters described in the answer as confidential communications which have passed between the defendants' solicitor and others, with reference to the subject-matters of the suit, was refused. Willson v. Leonard, 7 L. J., Ch. 242.

Cases stated for the opinion of counsel, whether of old date, or made with reference to or in contemplation of an existing suit or action, are not evidence against the party on whose behalf they are stated, or whose interest they affect ; therefore, if they tend to impeach that party's title, he is not compellable by suit in equity to produce them. Knight v. Waterford (Marquis), 2 Y. & Coll. 37.

Letters written, or cases stated for the opinion of counsel by a party or his solicitor, with a view to a suit then in contemplation, are privileged from production, not only in that suit, but in 77

any subsequent litigation with third parties respecting the same subject-matter, and involving counsel in the progress of the cause, or prepared the question to which such letters and cases in contemplation of, or with reference to the relate. *Holmes* v. *Buddeley*, 1 Ph. 476; 14 cause, will not be ordered to be produced for the L. J., Ch. 113; 9 Jur. 289. Reversing 6 Beav. 521.

A, and B, claimed an estate adversely as heirs ex parte paternia, and C, claimed the estate as heir ex parte maternia. In a suit by A, against heir ex parte maternia. In a suit by A, against B. to set aside a compromise entered into between them. B. admitted he had in his possession cases submitted for the opinion of counsel, after C.'s adverse claim, and in contemplation of legal proceedings :- Held, that they were privileged. In the same case the defendant B. stated that A. and C, had entered into some compromise to share the proceeds of the estate, and that he believed that the suit was earried on by A. for the benefit of and in concert with C.:—Held, that this did relieve B. from the obligation to produce the

A bill of discovery was filed in aid of an issue directed under the tithe commission, on a question of a modus, and a production prayed of certain documents, including cases and opinions the production of documents admitted by the of counsel relating to the matters in question in the cause, in the defendant's possession, and possession, that a case and opinions of counsel admitted by him to be so. An order for production was obtained, there being no counsel at that time instructed to oppose; but, upon a motion to discharge that order subsequently :-Held, that those documents were protected; and the plaintiff having asked for and obtained more than he was cutified to, because no one appeared, must pay the costs; and no order could then be made for a production, which must depend on a subsequent order. Birch v. Barker, 5 Jur. 430.

Under the general charge in a bill that the defendant has divers papers, writings, &c., in his possession or power, relating to the matters in the bill mentioned, the plaintiff is entitled to the production of cases submitted for the opinion of sub for the opinion of Dutch counsel, and the counsel admitted by the answer of the defendant to be in his possession, but not to the opinions shereon:—Held, privileged. Bankury, 2 bankury, 2 bear, 173; 9 L. J., Ch. I. Bankury, 2 bear, 173; 9 L. J., Ch. I. Cases and the opinions of counsel thereon given upon those cases. Though a plaintiff is, cases and the opinions of counsel thereon generally speaking, entitled to the production anterior to the ligitation:—Held, privileged from and discovery of all papers relating to the matters in the bill mentioned in the defendant's possession or power, yet it seems that he is not entitled to the production of letters stated by the answer of the defendant to have been received by him since the filing of the bill in answer to inquiries made by him in respect to some of the matters in question, with a view to his proofs in the cause, nor to any particulars respecting such letters which would disclose the names of the witnesses, or the facts likely to be proved by them. Preston v. Carr, 1 Y. & J. 175.

Ougere, whether the client is compellable to disclose any confidential communication between him and his solicitor or counsel which his solicitor or counsel would be privileged in refusing to disclose. Cases laid before counsel, on behalf of a client, stand upon the same footing as other professional communications from the client on the one hand to the counsel or solicitor on the other; and as far as relates to any discovery by the counsel or solicitor, the question of the existence or non-existence of any suit, claim, or dispute, is immaterial. Pearse v. Pearse, 1 De G. & Sm. 12; 16 L. J., Ch. 153; 11 Jur. 52.

Cases and statements for the opinion of counsel, admitted by the answer of the defendant to be inadmissible. *Underwood v. Seretary of State* in his custedy, possession, or power, ordered for *India*, 35 L. J., Ch. 545; 12 Jur. (N.S.) 321; to be produced for the usual purposes; but it 14 L. T. 385; 14 W. R. 551.

cause, will not be ordered to be produced for the purposes of the cause. Newton v. Beresford, I

alleged authority of the Land-Tax Redemption Act, conveyed lands of the prebend to a trustee. for himself. He and his trustee subsequently conveyed away part of those lands to purchasers, and the residue, by way of advancement, to the defendant, his son. The defendant afterwards conveyed to other purchasers part of the lands so conveyed to him. In a suit by the present prebendary to impeach the transaction of 1808, and praying an account of the purchase moneys received by the defendant and his father upon the several sales effected by them respec-tively, but to which suit the purchasers were not made parties, and their absence objected to by the answer :- Held, upon motion for answer of the defendant, the son, to be in his which were stated to have been "in contemplation of legal proceedings, and with reference to the title of the defendant at issue in the present suit," were protected from production; but not drafts and copies of conveyances made by father and son of the lands comprised in the indenture of 1808; nor letters between father and son and their solicitor not stated to relate to any question between the son and those representing the prebendal estate; nor a case and opinion of counsel stated to have been "in contemplation of legal proceedings generally."

Beadon v. King, 17 Sim. 34; 13 Jur. 550.

A case submitted since the institution of the

production. Reece v. Trye, 9 Beav. 316.
Privilege as to cases and opinions anterior to any ligitation. Penruddock v. Hummond, 11 Beav. 59.

There is no essential difference between cases stated for the opinion of counsel and other communications, with respect to the privilege of professional confidence. Walsingham (Lord) v. Goodricke, 3 Hare, 122.

Instructions by a purchaser to his counsel for the preparation of the draft agreement to purchase though given long ante litem motam: -Held, to be privileged in a subsequent suit which sought to impeach and set aside the sale, on the ground that the vendor was a trustee who had no power to sell. So also were the draft agreement itself, as approved by counsel, and the opinion of counsel upon alterations in the draft. Walsingham (Lord) v. Goodriche, (3 Hare, 122) distinguished. Manser v. Dia., 1 Kay & J. 451; 24 L. J., Ch. 497; 1 Jur. (N.S.) 466; 3 Eq. R. 650; 3 W. R. 318.

A defendant claimed privilege for cases submitted to counsel, and their opinions thereon. The plaintiff filed an affidavit to show that the eases and opinions had been published, and were not privileged :- Held, that the evidence was same subject-matter as the present dispute, and after it had arisen, is privileged from production. Jenhyns v. Bushby, 35 L. J., Ch. 820; L. R. 2 Eq. 547; 12 Jur. (N.S.) 558; 15 L. T. 310.

The attorney of the plaintiffs in an action

communicated to the plaintiffs in another action against the same defendant, and involving substantially the same question, a case and opinion taken on behalf of the plaintiffs in the former action, with permission to copy it. The defendant in the actions filed a bill of discovery against the plaintiffs, to whom the case and opinion had been lent:—Held, that they could not be compelled to produce the copy which they had made. Entheren v. Cobb, 2 De G. M. & G. 632; 17 Jur. 81.

A suit was instituted to administer to the estate of P., and counsel's opinion was taken, and certain letters passed in relation thereto. Another suit was instituted to stay proceedings in the first suit, and charging fraud. A summons was taken out for the production of the cases and opinions of counsel, and the letters

which passed on that occasion. Production ordered. Phillips v. Holmer, 15 W. R. 578.

From copies of letters written before the litigation by a plaintiff to one of the defendants, it appeared that the former had taken opinions of counsel, and the friendly opinion of Lord Westbury, when an ex-chancellor, on points which afterwards became part of the subjectmatter of the litigation. The plaintiff, in answer to an application to produce these opinious and the eases on which they were founded, objected, on the ground that "they were written in anticipation of and in relation to the litigation." He did not say they were confidential communi-cations:—Held, that he was bound to produce both classes of documents, Smith v. Daniell, 44 L. J., Ch. 189; L. R. 18 Eq. 649; 30 L. T. 752; 22 W. R. 856.

Instructions to counsel for the purpose of obtaining legal advice, and his notes or opinion thereon, are privileged from inspection, whether written before or after litigation was commenced, or in contemplation. Mostyn v. West Mostyn

Coal and Iron Co., 34 L. T. 531.

Upon a summons by the defendant that the plaintiffs-a corporation-might be ordered to produce the documents comprised in their affidavit of documents :- Held, that the opinions of counsel with reference to these proceedings, whether taken before or after the commencement of the action, were privileged; and the fact that the defendant was a ratepayer, and the opinions might have been paid for out of the parish rates, gave the defendant no special claim to inspection. Bristol Corporation v. Cox, 53 L. J., Ch. 1144; 26 Ch. D. 678; 50 L. T. 719; 33 W. R. 255.

\_\_\_\_ Action by Pauper.]—The defendant in an action where the plaintiff is suing as a pauper is not entitled to inspection of the ease laid before counsel and his opinion thereon upon which the permission to sue as a pauper was obtained. Stoane v. British Steamship Co., 66 L. J., Q. B. 72; [1897] 1 Q. B. 185; 75 L. T. 542; 45 W. R. 203—C. A.

A case for the opinion of counsel, stated in aside a purchase of the trust property, made reference to a separate litigation about the thirty years before by the trustee, the trustee same subject matter as the present dispute, and insisted on the knowledge of the transaction and long acquiescence therein by the cestui que trust. and in his answer to a cross-bill the cestui que trust admitted that he had an opinion of counsel on his right, which he had taken many years before. The court held the opinion to be a privileged communication, and refused to order

its production. Woods v. Woods, 4 Hare, 83.
Case and opinion submitted and taken by trustees in contemplation of the litigation :-Held, privileged as against the cestuls que trustent. Brown v. Oakshott, 12 Beav. 252.

Surviving executor, who has not acted in the testator's affairs, protected from the discovery of cases and opinions stated and given on behalf of the deceased executor who had acted, such cases and opinions having relation to a claim against the deceased executor of the same nature as the claim made against the surviving executor. Adams v. Barry, 2 Y. & Coll. C. C. 167.

A trustee is not bound to produce to his cestuis que trustent cases laid before counsel with the view of resisting a claim by such cestuis que trustent, although the trustee is not personally interested. Thomas v. Secretary of State for India. 18 W. R. 312.

A trustee taking counsel's opinion to guide himself in the administration of his trust, and not for the purpose of his defence in a litigation against himself, is bound to produce them to his cestui que trust, but the relation of trustee and eestui que trust must for that purpose be first established. Wynne v. Humberston, 27 Beav.

A mere claimant to an estate is not entitled to the production of eases and opinions taken

by a trustec. Ib.

Documents accompanying a case for the opinion of counsel are privileged. Ib.

A testatrix gave estates to trustees, upon trust to receive the rents for a period of fifteen years, and apply the same as in the will mentioned; and she directed that in case any person should within the above period establish his title to the estates as theheir-at-law of her nucle, to the satisfaction of her trustees, her trustees should deliver the possession of the estates to such person; but in case no such person should so establish his claim, she devised the estates to the plaintiff; and the testatrix, in order to assist the trustees in coming to a correct conclusion, authorised them to consult three barristers as to the validity of any claim that should be made; and the judgment of the rustees, sanctioned by the opinion of two of such barristers, was to be conclusive. After the expiration of the fifteen years the plaintiff filed a bill against the surviving trustee and A. and B., two persons who had put in their claims to the estates within the fifteen years, praying a declaration that he was entitled to the estates. notwithstanding the claims of the defendants :-Held, that the relation of trustee and cestui que trust did not subsist between A, and the trustee, so as to entitle A. to the production of the cases submitted by the trustee to the counsel for their opinions, with their opinions thereon, and the copies of documents and papers sent with such cases. S. C., 28 L. J., Ch. 281; 5 Jur. (N.S.)

Cases and opinions of counsel taken by trustees, As between Trustee and Cestui que as such merely, are not entitled to protection in Trust.]-In a suit by a cestui que trust, to set a suit by the cestuis que trustent against the trustees, or their representatives. Devaynes v. supra. Lambe v. Orton, 1 W. R. 207; 1 Drew. Robinson, 20 Beav. 42.

The same rule applies to cases and opinions taken before the time when the defendant (the representative of a trustce) admits having first

representative of a crusce) aumits naving irst heard of the questions raised by the bill. *Ib*. Trustees took counsel's opinion as to whether they should exercise a discretionary power to advance part of their trust fund for the benefit of some of the cestuis que trustent; and others of the cestuis que trustent having filed a bill to restrain them from exercising such discretion, they took a second opinion as to their defence in the suit. Upon summonses for production by the plaintiffs :- Held, that the first case of opinion having reference to the dealings with the trust estate, all the cestuis que trastent had a right to inspection, and the court ordered them to be produced, but that the second case and opinion being after suit instituted, the plaintiffs had no right to production. Tulbut v. Marshfield, 2 Dr. & Sm. 549; 6 N. R. 288.

## b. Briefs.

When Protected. ]-J. B., a lunatic, was tenant in tail in possession of an estate of which C. B., his committee, was tenant in tail in remainder. An action having been brought after the death of J. B. without issue and without barring the entail, against C. B. to enforce an agreement made in lunacy in respect of the estate, into which it was asserted that C. B. had entered in her private capacity as well as in that of committee, a summous for production of documents was issued against her, asking that she might be ordered to produce, among other documents, counsel's briefs upon the proceedings in lunacy :-Held, that these documents were not privileged, and must be produced. Brown, In re, Tyas v. Brown, 42 L. T. 501; 28 W. R. 575.

On summons to produce documents used by defendant in a former litigation in which the same matters were in question :- Held, 1st, that drafts of answers, affidavits, &c., filed were pro-tected :-Held, 2nd, that connsel's briefs, except instructions and observations for counsel, and remarks by counsel, were not protected, but would not be ordered to be produced so far as they contained copies of documents otherwise produced. Walsham v. Stainton, 3 N. R. 241; 2 Hens. & M. 1; 9 L. T. 603; 12 W. R. 119.

Connsel's brief on a trial in the Probate Court will be protected from production. Niehold v. Jones, 5 N. R. 361; 2 Hem. & M. 588; 13 W. R. 451

Order for production of briefs refused. Williams v. Leonard, 7 L. J., Ch. 242.

Indorsement on. ]-Comusel's indorsement on their briefs of an order made by the Court of Probate (the orders of that court not reciting the appearance of parties by counsel), and the shorthand writer's notes of the proceedings in court ordered to be produced; but with liberty to seal up any part of the indorsement which did not relate to the order made by the court and also any observations or notes made upon the shorthand notes. Nicholl v. Jones, supra.

## c. Drafts.

Pleadings.]—Drafts of pleadings are privileged from production. Walsham v. Stainton, a letter admitted by the defendant to be in his

Counsel have a right to drafts as precedents, but not to detain them where either party may have a benefit from the inspection of them. Stanhope v. Roberts, 2 Atk. 214.

Advertisement ] - A successful plaintiff in a chancery action, brought to restrain the infringement of his trade-mark, drafted an advertisement of the proceedings in and result of the action for publication in a trade journal; before publication the draft was submitted to counsel, and the advertisement as settled by him was published. One of the defendants in the chancery action, alleging the advertisement to be libellous, brought an action for libel in respect of its publication, and sought to obtain inspection of the draft advertisement :-Held, that the document was privileged from production within the rule as to professional privilege adopted in Minet v. Morgan (L. R. 8 Ch. 361). Wheeler v. Le Marchant (17 Ch. D. 675) commented on, Lowden v. Blakey, 58 L. J., Q. B. 617; 23 Q. B. D. 332; 61 L. T. 251; 38 W. R. 64; 54 J. P. 54.

#### 3. COMMUNICATIONS BETWEEN SOLICITOR AND CLIENT.

## a. Direct.

With reference to Litigation. |- The court will not order a defendant to produce letters which passed between him and his solicitor, in the relation of solicitor and client, in the progress of the cause, or with reference to it previously to its being instituted, or which contain legal advice. Garland v. Scott, 3 Sim. 396.

A defendant will not be ordered to produce papers containing confidential communications between him and his solicitor, in the relation of solicitor and client, during the progress of the snit, or with reference to it, previous to its com-mencement. Hughes v. Biddulph, 4 Russ. 190; 28 R. R. 46.

Where it is sworn that documents are confidential communications, relating to the partienlar suit, or to another suit which, though not actually in the matter of the same litigation, involves or embraces the same issue, they are privileged, although they do not directly relate to the particular suit. Thompson v. Falk, 1 Drew, 21.

A bill of discovery was filed in aid of a defence to an action at law which, at the hearing of the cause, the plaintiff had liberty to bring :- Held, that the defendant, a solicitor, and afterwards also a trustee, was not bound to produce letters or documents relating to the trial, written preparatory to the action at law or the suit. Semble, Few v. Guppy, 13 Beav. 457. Sec Foakes v. Webb, ante, col. 825.

After Dispute.]-Letters written before suit, but after the dispute arose:—Held, to be privileged. Bushnell v. Bushnell, 2 Jur. 774.

To entitle confidential communications to protection, it is not necessary that they should have been made in contemplation of the suit; it is sufficient if they relate to and were made in the course of the dispute which is the subject of the suit. Clagett v. Phillips, 2 Y. & Coll. C. C. 82; 7 Jur. 31.

A plaintiff is not entitled to the production of

920

possession, but which the defendant states was written by him to his solicitor, and directed the solicitor to take the opinion of counsel upon the question in dispute between the parties. Vent v.

Pacey, 4 Russ. 193.

Where communications and statements are made by a client to his confidential adviser touching the matter in dispute, before any suit has been instituted, they are not entitled to protection except there are some extraordinary circumstances. Bluck v. Galsworthy, 2 Giff. 453; 7 Jur. (N.S.) 91; 3 L. T. 399.

But the court will not order the production of documents which contain advice given to a client confidentially upon those statements. Ib.

The court will not order the production of confidential communications between solicitor and client which took place either in the progress of the suit, or with reference to the suit at its commencement. Confidential communications between attorney or counsel and client anterior to the suit, and without reference thereto, are not privileged. In a suit for specific performance, cases submitted to counsel subsequently to the contract relating to the sale, the objections taken by the purchaser to the vendors' title, the steps taken by the vendors to clear up the objections, &c.:-Held, to be communications made with reference to the dispute, which resulted in the litigation. Flight v. Robinson, 8 Beav. 22; 13 L. J., Ch. 425; 8 Jur. 888.

Communications between solicitor and client as to a contract which may lead to litigation are privileged. Wilson v. Northampton and Banbury Ry., L. R. 14 Eq. 477; 27 L. T. 507; 20 W. R.

Before Prospect of Litigation.] - Upon a motion that the defendant might produce documents in the schedule to his answer :- Held, that written communications, which passed between the defendant and his solicitor before any dispute between the parties to the suit, were privileged so far as they contained legal advice or opinions, but not otherwise, although relating to matters which formed the subject of the suit. Walsingham (Lord) v. Goodricke, 3 Hare, 122.

Letters relating to the subject-matter of a suit, written by the defendant's solicitor to the defendant's agent, are not protected from production, nuless they were written with reference to the dispute between the parties to the suit, and with a view to the defence of the suit. Original Hartlepool Collieries Co. v. Moon, 30 L. T. 585

-C. A

A plaintiff will not be compelled to produce confidential correspondence between himself or his predecessors in title and their respective solicitors with respect to questions connected with matters in dispute in the suit, although made before any litigation was in contemplation. Minet v. Morgan, 42 L. J., Ch. 627; L. R. 8 Ch. 361; 28 L. T. 573; 21 W. R. 467.

A claimant, who deposed that "obstacles having arisen in granting a second lease, one only was granted," was asked on cross-examination. was asked on cross-examination, whether the obstacles were suggested by him to his solicitor, or by his solicitor to him :-Held, not bound to answer, though the communication was before any litigation was in contemplation. Turton v. Barber, 43 L. J., Ch. 468; L. R. 17 Eq. 329; 22 W. R. 438.

And see Hampson v. Hampson, post, col. 938.

Non-Contentious Business. ]-Where A. had employed B., an attorney, with reference to the preparation of certain deeds of settlement, and also of an agreement in writing, of prior date to the deeds, and afterwards a bill was filed by A. and others against B, and C. (C. being interested in supporting the deeds), to have the deeds rectified, and made consistent with the agreement in writing :- Held, that communications which had passed between A. and B., her attorney, at the time of the preparation of the deeds and agreement in writing, and having relation thereto, were not admissible in evidence against A. objecting thereto. Harring v. Cloberry, 1 Ph. 91; 11 L. J., Ch. 149; 6 Jur. 202.

Generally, it seems that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of a professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation. Greenough v. Gashell, 1 Myl. & K. 98; Coop. t. Brough. 96.

In a suit for specific performance, cases submitted to counsel by the vendors and correspondence with their solicitors, previously to the sale, not protected as having no reference to the dispute which resulted in the litigation. Flight v. Robinson, 8 Benv. 22; 13 L. J., Ch. 425; 8 Jur. 888.

All communications between a client and his legal adviser for the purpose of quieting the client's doubts as to his title or otherwise. whether before a suit or after, and whether in contemplation thereof or not, will be protected from discovery by the client in the same manner as they would be protected in the case of the legal adviser. Pearse v. Pearse (1 De G. & Sm.) (8 Beav. 22). Manser v. Dir, 1 Kay & J. 451; 3 Eq. Rep. 650; 1 Jur. (N.S.) 466; 3 W. R. 313.

The privilege of communications between solicitor and client extends to all matters within the scope of the ordinary duties of a solicitor, and the sale of estates being one of such matters, it was held that a solicitor was not at liberty to disclose what had passed in conversations which he had had, either with the client or the agent of the client, relative to the amount of the bidding to be reserved upon the sale of an estate in which he had been concerned for him, or to other matters connected with such sale. But, semble, if the agent had been examined he would have been bound to answer. Carpuael v. Powis, 1 Ph. 687; 9 Beav. 16; 15 L. J., Ch. 275. Upon settling interrogatories for the examina-

tion of a vendor in the Master's office, on a question of title between vendor and purchaser :-Held, that the vendor was not compellable, at the instance of the purchaser, to state his motive for making a certain appointment, or to disclose confidential communications made by him to his solicitor and counsel respecting the property, although such communications were made merely on behalf of the consulting person singly, and were not made during a suit, during a dispute, or after the threat of a suit. Pears v. Pearse, 1 De G. & Sm. 12; 16 L. J., Ch. 153; 11 Jur.

Correspondence between a client and his solicitor acting in his professional capacity is protected from production, even though it does not relate to the matters in question in the suit. Boyd v. Petrie, 20 L. T. 934; 17 W. R. 903.

A bill was filed by one of two residuary legatees, to set aside the purchase by the executors of certain shares of a ship, which were part of the testator's assets. The defence was that the purchase by the executors was made at the special desire of the residuary legatees, who sent their solicitor to the executors to overcome their objections to make the purchase. The defendants examined the solicitor to prove these facts. An objection being made to his depositions, they fessional confidence. Lodge v. Prichard, 4 De G. & Sm. 587; 15 Jur. 1147.

Letters written to the defendants by their solicitors, in that character merely, are privileged. Goodall v. Little, 1 Sim. (N.S.) 155; 20 L. J.,

Ch. 132: 15 Jur. 309.

Letters written by a client to his attorney are privileged communications, and although they may contain matter necessary for the proof of the plaintiff's case, the court will not enforce their production. Harrey v. Kirwan, 7 L. J., Ex, Eq. 50.

Right of Solicitor to refuse Disclosure.]-Serivence not bound to disclose evidence obtained in professional confidence. Harrey v. Clayton, 2 Swanst. 221; 19 R. R. 66.

A solicitor may, by answer to a bill against A solution may, by answer to a bitt against him and his clients, refuse to discover any deeds or facts confidentially communicated to him. Stratford v. Hogan, 2 Ball & B. 164.

Attorney cannot be called upon to reveal the

advice given to the client; demurrer, therefore, overruled as to the case, and allowed as to the pinion. Richards v. Jackson, 18 Ves. 474.

A solicitor invested his client's money on a opinion.

mortgage, and at the client's desire took the mortgage in his own name, without any trust being declared by the deed: in a suit by a judg-ment creditor of the mortgagor, to redeem against the solicitor and the mortgagor (who was out of the jurisdiction):—Held, that the solicitor was privileged from disclosing the name of his client, and also the particulars of other mortgages of the property, which had been taken by other clients of the solicitor in their own names: Held, also, that the case was an exception to the rule that a defendant who submits to answer, must answer fully. Jones v. Pugh, 12 Sim. 470; 1 Ph. 96; 11 L. J., Ch. 323; 6 Jur. 613.

See also Greenwigh v. Guskell, supra, col, 919.

Duty of Solicitor to refuse Disclosure.]—A solicitor will not be allowed to disclose in whose possession or custody a particular document is, or when or where he saw the same, if he came to the knowledge of the fact inquired after in the course of confidential communications with his client in his professional capacity. Ctiman v. Orton, 9 L. J., Ch. 268, and see Carpmael v. Powis, supra, col. 920.

Belief founded on Privileged Communications. -A party to an action cannot be compelled to answer interrogatories asking as to his know-ledge, information, or belief with regard to matters of fact, if he swears that he has no matters of fact, if he swears that he has no -Documents must be produced unless they are knowledge or information with regard to those protected by being both professional communimatters except such as he has derived from cartons and also confidential in their nature, privileged communications made to him by his Smith v. Danield, 44 L. J., Ch. 189; L. R. 18 Eq. solicitors or their agents; for since under those [49; 30 L. T. 752; 22 W. R. 85].

Confidential letters between solicitor and client | circumstances his knowledge and information are protected. Knight v. Waterford (Marquis), are protected, so also is his belief, when derived 2 Y. & Coll 37. solely from such communications. Lyell v. Kennedy, 58 L. J., Ch. 449; 9 App. Cas. 81; 50 L. T. 277; 32 W. R. 497—H. L. (E.)
The plaintiff having been interrogated as to his knowledge, information, and belief upon

matters relevant to the defendant's case, answered that he had no personal knowledge of any of the matters inquired into; that such information as he had received in respect of those matters had been derived from information procured by his solicitors or their agents in and for the purpose were suppressed, as being in violation of pro- of his own case: Held, that the answer was sufficient. Ib.

> As to Residence of Wards concealed from Court. ]-A solicitor is bound to give to the court any information which may lead to the discovery of the residence of a ward of the court whose residence is being concealed from the court. although such information may have been comauthors as the information may have been communicated to him by his client in the course of his professional employment. Rumsbotham v. Senior, L. R. 8 Eq. 575; 17 W. R. 1057.
>
> Therefore, when the mother of wards of the

> court had absended with the wards her solicitor was ordered to produce the envelopes of letters which he had received from her as her solicitor, with the object of discovering her residence from the postmarks. Th.

Direction to Sheriff. ]-A direction given by a client to his attorney, or his clerk, to send a particular person, not a sheriff's officer, with the sheriff to point out the person to be arrested under a capias ad satisfaciendum, is not a privileged communication. Caldbeck v. Boon, Ir. R. 7 C. L. 32.

Not Privileged as against Solicitor's Partner.] Semble, in a suit for taking a partnership account between solicitors, the plaintiff is entitled to the discovery and production, in the usual way, of papers material to the account, though such papers relate to professional business transacted for their clients. Perkins, 2 Hare, 540; 8 Jur. 186.

As against Party having a Right of Property in the Communications. ]-A plaintiff in a shareholder's action against a company is entitled to discovery of professional communications between the company and its legal advisers relating to the subject-matter of the action, when such communications are paid for out of the funds of the company. Gourand v. Edison Gower Bell Tele-phone Co., 57 L. J., Ch. 498; 59 L. T. 813.

Scotch Solicitor. ]-The same privilege with respect to the non-production of confidential communications as between an English solicitor and his client, is extended to like communications as between a Scotch solicitor and law agent practising in London, though not admitted an English solicitor, and his client in Scotland. Lawrence v. Campbell, 4 Drew. 485; 28 L. J., Ch. 780; 5 Jur. (N.S.) 1071; 7 W. R. 336.

Must be Confidential as well as Professional.]

# b. Through Agents.

Communications made through a third person, from a client to a solicitor, are privileged, if otherwise entitled to be so. Bunbury v. Bunotherwise entitled to be so. bury, 2 Beav. 173; 9 L. J., Ch. 1.

Communications which passed between the defendant and his agents for the purpose of being communicated by his agents to his legal adviser: —Held, to be privileged from production. Reid v. Langlois, 1 Mac. & G. 627; 2 Hall & Tw. 59;

19 L. J., Ch. 337; 14 Jur. 467.

Communications between solicitor and client through the medium of an agent are protected equally with communications had directly with the principal. Russell v. Jackson, 9 Hare, 387; 21 L. J., Ch. 146; 15 Jur. 117.

Confidential letters which after the matters in a suit arose, and with reference thereto, were sent by a plaintiff resident abroad to his agents in England to be communicated to his solicitor: —Held to be privileged. Hooper v. Gumm, 2 John. & H. 602; 6 L. T. 891; 10 W. R. 644.

In order to establish privilege as to letters sent by the agent to the plaintiff:—Semble, that they must appear to have been sent in consequence of communications from the solicitor. Ib.

The same practice applies as to the production of books, whether abroad or in England. Ib.

Documents passing between the defendants or their agents and their solicitor ante litem motam are protected from production. Macfarlane v. Rolt, 41 L. J., Ch. 649; L. R. 14 Eq. 580; 27 L. T., 305; 20 W. R. 945.

Instructions submitted to solicitors or counsel for the purpose of obtaining legal advice, and their notes or opinions thereon; correspondence between a party to an action, or his predecessor in title, or persons acting on their behalf, and their legal advisers, are privileged from inspec-tion, whether written before or after litigation was commenced or in contemplation. Mostyn v. West Mostyn Coal and Iron Co., 34 L. T. 531.

#### 4. DOCUMENTS OR INFORMATION PREPARED OR OBTAINED BY SOLICITOR.

## a. Documents Prepared by Solicitor.

Circumstances under which documents which had been prepared with a view to an action were deemed to be of a confidential nature, and so not liable to production at the requisition of the other party, and this confidentiality held to protect not only the writer to the signet who had conducted the legal proceedings, but also a mining engineer employed in the business. Bar-gaddie Coal Co. v. Wark, 3 Macq. H. L. 467.

These documents clearly may be privileged as

having been written with a view to the information of the defendant under instructions of counsel previously to raising an action, just in the same way as a brief prepared for a trial or a case for counsel's opinion would be privileged. Ib.

Copies - Deposition before Receiver of Wrecks.] -In a collision action, the plaintiffs' solicitors. for the purpose of the action, obtained from the Board of Trade copies of depositions made before the receiver of wrecks by the master and crew of the plaintiffs' ship as to the circumstances of the collision:—Held, that the copies, having been obtained by the solicitors for the purposes of the action, were privileged, and that the court

depositions were made. The Palermo, 53 L. J., P. 6; 9 P. D. 6; 49 L. T. 551; 32 W. R. 403; 5 Asp. M. C. 165-C. A.

- Public Records.]-Although primâ facie privilege cannot be claimed for copies of or ex-tracts from public records or documents which are publici juris, a collection of such copies or extracts will be privileged when it has been made or obtained by the professional advisers of a party for his defence to the action, and is the result of the professional knowledge, research and skill of those advisers. Lyell v. Kennedy, 51 L. J., Ch. 937; 27 Ch. D. 1; 50 L. T. 730—

K.'s solicitor had, for the purpose of K.'s defence in the action, procured copies of and extracts from certain entries in public registers, and also photographs of certain tombstones and honses to be taken, for which K. in his affidavit of documents claimed protection:—Held, that although mere copies of unprivileged documents were themselves unprivileged, the whole collection, being the result of the professional know-ledge, skill, and research of his solicitors, must be privileged—any disclosure of the copies and photographs might afford a clue to the view entertained by the solicitors of their client's case, Ib.

- Of Letters. ]-A correspondence had taken place between the defendant in an action and persons other than the plaintiff which was material to the questions at issue in the action. The defendant had not preserved the letters received by him or copies of the letters written by him in the course of such correspondence, but after action brought his solicitor, for the purposes of the defence to the action, procured through such third persons copies of the letters so written and received :—Held, that such copies were not privileged against inspection by the plaintiff. Chadwick v. Bowman, 16 Q. B. D. 561; 54 L. T. 16.

# Shorthand Notes. - See infra, cols. 935, 936.

Notes of Solicitor on.]—The notes of a solicitor on a copy of the shorthand notes of a trial in the Probate Court will be protected from production. Nicholl v. Janes, 2 H. & M. 588; 5 N. R. 361; 13 W. R. 451.

Bill of Costs.]—The clerk of a solicitor, who was the solicitor of the mortgagor and the mortgagee in the creation of the security, and who copied the bill of costs of the solicitor in the transaction of making an appointment of the estate comprised in the security, and of pre-paring the mortgage deed, which was founded on the title created by the appointment, may be received as a witness to depose to the handwriting on the document (which proof alone does not make it evidence), but he cannot be received to depose further as to the contents of the bill of costs, or the subject to which it relates, for an attorney's bill of costs is his history of the transaction, and the attorney could not be himself permitted to give evidence of the transaction against his client, or against those claiming under his client. Chant v. Brown. 9 Hare, 790; 16 Jur. 606.

The consent of the personal representative of the mortgagor, who was one of the clients of the solicitor, to the admission of the bill of costs in would not inquire for what purpose the original evidence, does not make it evidence which can

mortgagor only, or with the solicitor of persons subject-matter of the contract, which might lead having interest in the mortgaged estate in to litigation, whether it had done so or might do default of appointment, such solicitor not being the solicitor of the mortgagee, are not privileged the solicitor of the mortgagee, are not privileged that the would do so, was privileged, and probled communications when tendered as evidence in a suit to impeach the mortgage security as having been founded on an appointment made in fraud of the wave of the wave of the same of of the power, Ib.

Bill of costs held to be privileged. Turton v.

Barber, 43 L. J., Ch. 468; L. R. 17 Eq. 329; 22 W. R. 438.

Draft Pleadings.]—Drafts of pleadings are privileged from production. Lembe v. Orton, 1 W. R. 207; 1 Drew. 404; Walsham v. Stainton, 3 N. R. 241; 2 H. & M. 1; 9 L. T. 603; 12 W. R. 197; 1 Drew. 405; 12 H. & M. 1; 9 L. T. 603; 12 W. R. 198; 12 H. & M. 1; 9 L. T. 603; 12 W. R. 198; 12 H. & M. 1; 9 L. T. 603; 12 W. R. 198; 12 H. & M. 1; 9 L. T. 603; 12 W. R. 198; 12 H. & M. 1; 9 L. T. 603; 12 W. R. 198; 12 H. & M. 1; 9 L. T. 603; 12 W. R. 198; 12 H. & M. 1; 9 L. T. 603; 12 W. R. 198; 12 H. & M. 1; 9 L. T. 603; 12 W. R. 198; 12 H. & M. 1; 9 L. T. 603; 12 W. R. 198; 12 H. & M. 1; 9 L. T. 603; 12 W. R. 198; 12 H. & M. 1; 9 L. T. 603; 12 W. 198; 12 W. R. 112,

# b. Information through Agents.

Where the circumstances of the case render it necessary for a party or his solicitor to employ an agent to collect evidence in support of legal proceedings, the communications of such agent to his principal relating to such evidence are privileged. Steele v. Stewart, 1 Ph. 471; 14 L. J., Ch. 34; 9 Jur. 121. Affirming 13 Sim. 583.

The reports of an accountant employed by a defendant's solicitor to investigate books are privileged from production. Walsham v. Stainton, 2 Hem. & M. 1; 3 N. R. 241; 9 L. T. 603;

12 W. R. 119.

So also are drafts of pleadings and observa-tions made upon briefs, though the briefs themselves are not privileged when they consist of matter publici juris. *Ib*.

Where production was sought of so much as

consisted of copies of, or extracts from, or references to documents or records in a public registry of a report made by a third person at the instance of the defendant's solicitor, for the purpose of his advising the defendant, and which report itself, it was admitted, was protected, the court refused to order production, on the ground that the extracts or copies were so mixed up with the protected parts of the report, that it would be difficult, and almost impracticable, to exhibit the one portion without disclosing the other portion. Churton v. Frewen, 2 Dr. & Sm. 394; 12 L. T. 105; 13 W. R. 490.

## c. Communications between Solicitor and Third Party.

In Anticipation of Litigation. ]-Correspondence between the solicitor of one of the parties to an action and a third person for the purpose of ascertaining facts, with a view to the action which was afterwards brought and was then anticipated, and for the purpose of guiding the party as to the mode of carrying it on, is privileged from inspection. M'Corquodale v. Bell, 45 L. J., C. P. 329; 1 C. P. D. 471; 35 L. T. 261; L. J., C. P. 3: 24 W. R. 899.

In a suit against a company for specific performance of a contract dated in 1863, production was required from the company of correspondence passing, before the institution of the suit, between the former engineer and solicipanies.]—In an action against a railway consolicors and the secretary and the agents, and you have to a passenger from an accident sub-agents, engineers, surveyors, and directors of solicitors and the screenary and the agents, panets, p

be admitted against the parties claiming under advising on behalf of the company in respect the mortgagee, the other client. Ib. of the subject-matter of the suit:—Held, that Communications with the solicitor of the the whole of this correspondence relating to the so, or whether it was probable or improbable

Before Dispute. |- In an action for specific performance of a building contract to take on lease building land from the defendants, the defendants sought to protect from production letters which had passed between their solicitors and their surveyors:—Held, by Bacon, V.-C., that the letters were privileged. But held, on appeal, that the defendants must produce the letters, except such of them (if any) as the defendants should state by affidavit to have been prepared confidentially after dispute had arisen between the plaintiff and the defendants, and for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties to the action. Wheeler v. Le Murchant, 50 L. J., Ch. 793; 17 Ch. D. 675; 44 L. T. 632; 45 J. P. 728-C. A.

## d. Communications at Instance of Soligitor

Letters and communications written at the instance, either directly or indirectly, of the solicitor to either party to an action, and for his use, for the purposes of the legal proceedings in such action, are privileged from inspection by the opposite party. Priend v. L. C. & D. Ry., 46 L. J., Ex. 696; 2 Ex. D. 437; 36 L. T. 729; 25 W. R. 735—C. A.

Answers to inquiries addressed by defendants to their agent in the Falkland Islands, by direction of their solicitor, for the purpose of pro-euring evidence in support of defendants' case, are within the rule as to protection. Lafone v. Fulkland Islands Co., 4 Kay & J. 34; 27 L. J.,

Ch. 25; 6 W. R. 4.

The true test in such cases is, not whether the person, who is at a distance and transmits the information, is the agent of the solicitor, and sent out by him, but whether, in transmitting that information, he was discharging a duty which properly devolved on the solicitor, and which would have been performed by the solicitor had the circumstances of the case admitted of his performing it in person. Ib.

Protection will not be withheld from communications made in apprehension of litigation. on the ground that the precise form which the litigation afterwards assumed was not foreseen. An affidavit in support of a claim to seal up certain passages in a book, not being sufficiently explicit, the court inspected the disputed passages in order to determine their right to-

protection. 1b.

## 5. DOCUMENTS OR INFORMATION PREPARED OR OBTAINED BY CLIENT.

#### a. Reports.

By Officials of Railway and other Com-

dent, and guard of the train in the ordinary course of their duty, but refused such order as to reports from scientific men consulted by the company as to the cause of the accident. Woolley v. North Landon Hy. 38 L. J. C. P. 317; L. R. 4 C. P. 602; 20 L. T. 813; 17 W. R. 650, 797.

The court allowed inspection by the plaintiff of a copy of a report made by the company's general manager to the Board of Trade as to the accident, pursuant to 3 & 4 Vict. c. 97, s. 3; also of a guarantee given some years before the accident of materials for locomotives, part of which at the time of the accident formed a portion of the engine in question; also of such entries in the minute-books of the directors of the company and their professional advisers or the result thereof. Ib.

Documents which are written in answer to inquiries made by a railway official to the head office of the company after threat of litigation, and which, in the discretion of the judge, appear to fall short of notes of the case to be laid before the legal advisers of the company, and were not in the nature of proofs for the trial, are not privileged from inspection, notwithstanding that the documents were not made in the ordinary course of the duty of the person writing them, but in answer to special inquiries. Fenner v. L. & S. E. Ry., 41 L. J., Q. B. 313; L. R. 7 Q. B. 767; 26 L. T. 971; 20 W. R. 830.

In an action against a railway company for liberty to inspect reports as to the accident made by servants and officers of the company to their employers shortly after it took place; although the company alleged that the documents contained statements made by various persons for the purpose of giving the company such information as would enable them to judge whether or not they could be made responsible to the plaintiff or any other persons by reason of the matters stated therein, and were made in consequence of a custom requiring such state-ments to be made in cases of any accident cansing or being likely to cause personal injury to any passenger, and that the same constituted the instructions to the company's advisers, as to defending the action, and could not be produced without disclosing the grounds of their defence..

Parr v. L. C. & D. Ry., 24 L. T. 558. In an action against a railway company for work done and materials supplied at their request, the defendant company objected to produce for the plaintiff's inspection-(a) their engineer's report to the board of directors with reference to the subject of claim; (b) correspondence between the defendant's servants and agents with reference to the defence of the action; (c) extracts of minutes of private proceedings of the board at meetings with reference to the litigation, then contemplated though not actually commenced-claiming that all these documents were privileged. It was not alleged in the affidavit of discovery that the engineer's report related solely to the defendant's case, or that it was prepared for the purpose of being laid before their legal advisers:—Held, that the

reports as to the accident made respectively by between them and their solicitors, but were the company's inspector, locomotive superintendent, and guard of the train in the ordinary minutes. Worthington v. Dublin, Wicklow and Wexford Ry., 22 L. R., Ir. 310.

In an action for damage caused by the negligence of the defendants or their servants in the use of an engine, whereby sparks and red-hot cinders escaped from the engine and set fire to the plaintiff's building, the plaintiffs administered the following interrogatory: "Have the defendants or any of their servants or agents any knowledge, information, or belief as to the eause of the fire in respect to the happening whereof this action is brought? If yea, set out the same fully, with dates and full particulars. If any of the said servants or agents have communicated to the defendants such knowledge, information, or belief, let the defendants set out the company relating to the accident which were not entries of communications between dates and particulars." To this the defendants answered: "We have no information at all on the subject, save such as appears in the reports set out in the schedule to our affidavits, filed in this cause on the 28th May, 1884, and which by the judgment of the Divisional Court of the 7th July last were held to be privileged from production, which we decline to produce":—Held, that the answer was sufficient, as a further or better answer could not be given without disclosing the contents of privileged reports made to the defendants by their servants, which reports the defendants were not bound to disclose. London, Tilbury and Southend Ry. v. Kirk, 51 L. T. 599,

A document is not protected from inspection on the ground that it was made for the purpose, injuries to a passenger from an accident, the in the event of litigation, of being laid before court made an order for the plaintiff to have the defendants' solicitor to be used by him for the defendants' solicitor to be used by him for the purposes of the defence to any action, if any action should be brought. Cook v. North Metro-politan Tramway Co., 54 J. P. 263.

A report made by the conductor of an omnibus when litigation was reasonably apprehended for the purpose of enabling the solicitor of the omnibus company to conduct the defence of any action which might be brought is privileged from inspection, though no action has been commenced or even threatened. Collins v. London General Omnibus Co., 63 L. J., Q. B. 428; 5 R. 355; 68 L. T. 831; 57 J. P. 678.

By Medical Men-To Railway Company. Action by executors for the benefit of the widow and children of B., whose death was occasioned by the negligence of a railway company. Plea, that the company paid to B. in his lifetime 75%. in satisfaction and discharge of all claims. Upon an order for discovery of documents relating to the matter in dispute obtained by the plaintiffs : -Held, that reports of a clerk in the office of the secretary of the company sent by them to the deceased to communicate with him respecting the accident, and of the medical officer of the company employed by them to visit the deceased, respecting his examination of the deceased, connected with the accident, were not privileged communications. Baker v. L. & S. IV. Ry., 8 B. & S. 645; 37 L. J., Q. B. 53; L. R. 3 Q. B. 91; 16 W. R. 126.

A plaintiff, in an action for injuries sustained by the negligence of a railway company, was examined under a judge's order by medical men defendants were bound to produce the report on behalf of the company. Inspection by the and the correspondence save correspondence plaintiff of the medical men's reports to the

Where, on an action against a railway company to recover damages for injuries sustained by their negligence, the plaintiff is examined by medical men employed on their behalf, the reports sent by the medical men to the company are privileged from inspection, provided that the camination and reports were promised by the of the medical officer of an insurance company as solicitor of the company or at his instance, for the purpose of enabling him to give advice to to as privileged, because confidential:—Held, the purpose of conform many give dayies of the spirite produced. Leev. Hammerton, of assisting him generally in the conduct of the 10 L. T. 730; 12 W. R. 375.

legal proceedings. Ib. It is immaterial that the judge's order under a judge has no jurisdiction to make an order in that form except under 31 & 32 Vict. c. 119, s. 26, and the plaintiff must be treated as if he had submitted voluntarily to the examination. Ib.

When, after an accident on a railway, the officials of the railway company, in the usual course of their ordinary duty, make a report to the company, whether before or after an action | Aurust, 21 | 2.00, 1.00 the claim, then an inspection of the report made

When a medical man, sent by a railway company to examine a person who has claimed compensation for personal injury from an aecident on their railway, has made a report on the sub-ject-matter of the claim for the guidance of the ecompany in yielding to or resisting such claim, such report is obtained with a view to pending litigation, and the claimant cannot call for an inspection of it on bringing an action founded on such claim. Chasey v. L. B. & S. C. Ry, 39 L. J., C. P. 174; L. R. 5 C. P. 146; 22 L. T. 19: 18 W. R. 498.

- To Insurance Company.]-In an action against an insurance company upon a policy of life insurance, the company having pleaded that the policy was obtained by fraudulent concealment and misrepresentation of material facts, the plaintiff applied for inspection of the following documents:—viz. two reports made to the company by private friends of the assured, to whom the company was referred, with relation to the assured's state of health and habits; and a report made by a medical man to whom the assured was referred for examination on behalf of the company. At the head of the printed forms of questions, upon which these reports were made, were statements that the company legal advise, with a view to litigation. Early would regard the answers given as strictly private v. Tottle, 45 L. J., Q. B. 138; 1 Q. B. D. 141; 33 and, confidential. The company, on accepting L. T. 724; 24 W. R. 933. were made, were statements that the company the insurance, after consideration of the pro-

company was refused as being privileged. Friend allowed inspection of the documents, on the company was reason as sening privilegent. errent autowert inspection to the decounterest, at the v. L. C. S D N. Ry., 46 L. J., Ex. 666 ; 2 Ex. D. 437; 36 L. T. 729; 25 W. R. 735—C. A. spection, and the plaintiff had made out a good prima facie case for supposing that they were material to his case. Mahony v. National prime field case for supposing that they wanterial to his case. Mahony v. National Widows' Life Assurance Fund, 40 L. J., C. P. 203; L. R. 6 C. P. 252; 24 L. T. 548; 19 W. R. 722.

In a foreclosure suit in equity, the defence of insanity being set up, the production of the report

which the plaintiff was examined was drawn ap for damages for improperly constructing a a judge has no intribution to make the construction of the the plaintiff to survey the tng for the purposes of the action are liable to inspection. Martin v. Butchard, 36 L. T. 732,

The court will not allow surveys made solely for the purpose of the case of one of the parties on a trial or for the opinion of one of the parties' legal advisers to be inspected. The Theodor Korner, 47 L. J., P. 85; 3 P. D. 162; 38 L. T.

the port is subject to inspection; but when a collision occurs between one of the claim for compensation has been made, and the company is seeking to inform itself, by the medical examination by its own medical officer, port to the loads of the usual practice) a medical examination of the person making of Admiralty will not, in a corps again, the claim, then an inspection of the rows was a company to the claim, then an inspection of the pressure and the claim, then an inspection of the pressure and the claim, then an inspection of the pressure and the claim, then an inspection of the pressure and the claim, then an inspection of the pressure and the claim, then an inspection of the pressure and the claim, then are pressured as the pressure and the pressure and the claim, then are pressured as the pressure and the claim, then are pressured as the pressure and the control of the pressure and the pressure and the control of the pressure and the control of the pressure and the pressure and the pressure and the control of the pressure and the control of the pressure and th of Admiralty will not, in a cause against the captain, in which an appearance has been entered or them after such examination will not be granted, such a report being a privileged document. Schner v. G. N. Ry., 43 L. J., Ex. 150. L. R. 9 Ex. 298; 32 L. T. 233; 23 W. R. 7. The case of Chasen v. J. B. § S. C. Ry. (intra) approved and followed in preference in Exercises (Exercise 200). The case of Caseey v. L. B. § S. C. Ry. (infra), approved and followed in preference to Fenner v. L. § S. E. Ry. (supra). Ib.

to the effect that such production would be prepared and followed in preference to Fenner v. L. § S. E. Ry. (supra). Ib.

# b. Correspondence with Agents.

When not Privileged. |- Letters written by a defendant after the commencement of a suit to an unprofessional agent abroad, but, "confidentially, and in reference to the defence," &c.:
—Held, not privileged. Kerr v. Gillespie, 7
Beav. 572.

In an action for not delivering goods according to contract it appeared that the defendant, before selling the goods to the plaintiff, had purchased them from a company; and that shortly before the action was commenced he had sent to the company's agents two letters from the plaintiff's solicitors relating to the claims made in the action, requesting them to obtain information respecting these claims, and that a number of letters thereupon passed between the defendant and the company's agents upon the subject, some of them after the action was brought; and that ultimately the company agreed to allow the defendant a large deduction from the invoice price:-Held, that the plaintiff was entitled to inspection of the letters as they could not be said to be confidential communications between the defendant and any one in the nature of his

the insurance, after consideration of the pro-posals for insurance, and of these reports, charged giving information respecting what the agent a special rate of premium on the ground that has actually done for, and on account of, the the life was not a first-class one. The court principal, is not privileged, although it is sent in

compliance with the request of the principal, | nor do they support or tend to support the demade after the principal has been threatened with litigation respecting the matter on which he requires information. Anderson v. Bank of British Columbia, 45 L. J., Ch. 449; 2 Ch. D. 644;

35 L. T. 76; 24 W. R. 624-C. A.

A bill was filed against a banking company to compel them to replace a sum of money alleged to have been improperly transferred by them from one account to another at their branch bank in Oregon. Before the bill was filed, but after litigation had become highly probable, the manager in London telegraphed to the manager in Oregon to send full particulars of the whole transaction. On an application by the plaintiff in the suit for production of documents, the bank resisted production of the letter sent in answer, as being privileged :-Held, that the letter was not privileged, and must be produced. Ib.

The cases where it has been held that communications with persons other than legal advisers are privileged, may rest on the principle that a party is not bound to disclose his counsel's brief, or the materials obtained for the brief. Ib.

It may be that a party is not bound to disclose notes of evidence obtained from proposed

witnesses. Ib.

In an action to restrain the defendant company from making or using any brake apparatus similar to the "continuous brake apparatus" of which the plaintiff was the inventor and patentee, the defendant company sought to with-hold from production certain letters which had passed between the officers of the company and between them and other persons. This correspondence, it was alleged, had arisen in consequence of a claim made by the plaintiff regarding his patents, in a letter addressed to the secretary of the company, which was taken by them to be an intimation that the plaintiff intended to proeccd against them for infringement of his various patents. The letter was handed to the company's solicitors, with instructions to advise the company as to the merits of the plaintiff's elains, and thereafter the matter had been conducted with the view of getting materials for a contest if necessary, Bacon, V.-C., was of opinion that the plaintiff's letter did not contain any threat of litigation, and held that the correspondence which the plaintiff desired to inspect could not he treated as privileged from discovery, and must be produced:—Held, on appeal, that assuming the plaintiff's letter to amount to a threat of litigation, the affidavit setting out the above reasons for not producing the documents did not disclose a sufficient ground of privilege, Westinghouse v. Midland Ry., 48 L. T. 462-

The plaintiffs sued the defendants for money paid to the defendants' use, as their agents, for the sale of goods in Australia. The plaintiffs' manager and sole representative in England, in an affidavit made pursuant to Ord. XXXI, r. 12, stated, "The plaintiffs have in their possession or power the documents relating to the matters in question in this action, set forth in the first and second schedules hereto." Certain documents were set forth in the second schedule as follows: "Letters and other communications from the plaintiffs' house in Melbourne to the London house, and press copy letters and other communications vice versa, and I say that such plaintiffs, and not to the case of the defendants, sional confidence to his solicitor," approved. Ib.

fendants' case, and they do not to the best of my knowledge, information, and belief, contain anything impeaching the case of the plaintiffs, wherefore the plaintiffs object to produce the same, and say they are privileged from inspection by the defendants":—Held, that the documents were not privileged from inspection. Me Lean v. Jones, 66 L. T. 653.

The plaintiff, a merchant in Germany, on the ground that he did not understand English, wrote in German certain letters both before and after the issuing of the writ, to his agent in London in reference to the action "for the purpose of obtaining advice, information, or evidence with reference to and for the purpose of such litigation, in order that the contents thereof might be communicated by the agent in English to his solicitor, who did not understand German":-Held, that such letters were not privileged, and that the defendant was entitled to inspection. Vetter v.

Schreiber, 53 J. P. 39.

A trading company, having become embarrassed, appointed three of its members, A., B. and C., to act as a committee for the shareholders in winding up its affairs, and they were empowered to send out agents to India for that purpose; and they were empowered by the directors to manage and arrange the affairs of the company. They appointed D. and E. agents to go to India. The plaintiffs brought several actions on certain debentures against A., B. and C., as shareholders. A., B. and C. filed a bill for an injunction, and to have the debentures delivered up. The present plaintiffs then filed a bill against A., B. and C. for discovery. A., B. and C., in their answers, admitted the possession of certain documents, consisting of communica-tions which passed between them and the directors, the secretary of the company, and the agents in India, and which were alleged to be confidential communications after the matters in question in this suit had arisen, and in contemplation of or pending proceedings in respect of various matters, and in particular of the claims of the plaintiffs, and for the purpose of communicating to the persons to whom they were addressed the proceedings adopted in respect of such claims, and the opinions of the legal advisers consulted by the defendants, or for the purpose of being submitted to such legal advisers and the shareholders; and they claimed protection from production :- Held, that the documents were not privileged, with the exception of such parts thereof as contained the opinions of the legal advisers, it being no ground of privilege that they relate to the matters in dispute, and arose ont of communications between the parties themselves with a view to their defence in the Glyn v. Caulfield, 3 Mac. & G. 468; 15 suit. Jur. 807.

Professional privilege, as a ground of exemption from production of documents, is adopted simply from necessity, and ought to extend no further than absolutely necessary to enable the client to obtain professional advice with safety.

The decision of the vice-chancellor, Lord Cranworth, in Goodall v. Little (1 Sim. (N.S.) 155), "that there is no protection as to letters between parties themselves, or from a stranger to a party, merely because such letters may have been letters and other communications, and press written in order to enable the person to whom copies relate exclusively to the case of the they were sent to communicate them in profesWhen Privileged. —Communications with an his co-defendant are privileged communications. unprofessional agent in anticipation of litigation. —Hamilton v. Nott, 42 L. J., Ch. 512; L. R. 16 and with a view to the prosecution of, or defence to, a claim to the matter in dispute, are privileged.

Ross v. Gibbs, 39 L. J., Ch. 61; L. R. 8 Eq. 522. Declaration alleging breaches of an agreement made between a banking company carrying on business, amongst other places, at Bombay, and the defendant, who had been their agent there. Upon an order for discovery of documents relating to the matter in dispute obtained by the defendant, the secretary of the bank made an affidavit that the letters specified in a schedule attached to the affidavit consisted of communications between the head office of the bank in London and their officers at Bombay, not forming part of the res gestae, but written after the defendant had left the service of the bank and the dispute in question in the cause had arisen, being on the one part instructions given and inquiries made with the view of obtaining the information required to enable the bank to decide as to the mode of proceeding against the defendant, several of them having been written under the immediate direction and advice of the attorney for the bank; and on the other part, their officers' reports and replies specifying the evidence which could be addreed in Bombay to prove the breaches of contract complained of, and that the same could not be material to the defendant with a view of establishing his case. The defendant made an affidavit of his belief that the correspondence in the schedule was material to the defence of the action :—Held, that all this correspondence was confidential communication, which the defendant was not Australia and China v. Rich, 4 B. & S. 73; 32 L. J., Q. B. 300; 8 L. T. 454; 11 W. R. 830.

## c. Correspondence with co-Defendant.

Letters by a co-defendant to his co-defendant in England, though for communication to the latter's solicitor with a view to his defence, are not privileged. Goodall v. Little, 1 Sim. (N.S.) 155; 20 L. J., Ch. 132; 15 Jur. 309.

Though a defendant in a suit is not compellable to produce letters and copies of letters, between himself and his solicitor, subsequently to the institution of the suit and in relation thereto, yet where there are more defendants than one, they, are bound to produce letters and copies of letters which have passed between them with respect to their defence of the suit. Whithread v. Gurney, Younge, 541.

Communications made by one defendant to another in reference to enabling them to defend the suit are not privileged. Betts v. Menzies, 26 L. J., Ch. 528; 3 Jur. (N.S.) 885; 5 W. R. 767. Quære, whether such communications would be ordered to be produced if they were dupli-cates of what had been sent to the defendant's

solicitor. Ib. A letter written between co-defendants respecting a matter in litigation, with direction to forward it to their joint solicitor, is privileged. Jenkyns v. Bushby, 35 L. J., Ch. 820; L. R. 2

Eq. 547; 12 Jur. (N.S.) 558; 12 L. T. 310. The correspondence between co-defendants after the institution of a suit is not, as a general rule, privileged from production; but where one defendant, being a solicitor, has acted as agent for the solicitor on the record, to collect evidence in the suit, the letters passing between him and the rule of professional confidence, the defendant

Eq. 112.

In a suit in which the bill charged fraud against all the defendants, two of them were ordered to produce all letters written to them, in reference to the subject of the suit and before the dispute arose, by a co-defendant who had been their solicitor in the original transaction, save only such letters as they should shew by affidavit to contain legal advice or opinions. Sunkey v. Alexander, Ir. R. S Eq. 241.

## d. Documents Prepared as Evidence.

The usual order having been made in chambers to answer and produce documents, one of the defendants objected to produce documents, on the ground that they had been obtained by him for the defence of himself and the other defendant since the institution of the suit, and did not relate to or evidence the title of the plaintiff or his predecessors :- Held, that the word "title" might refer to the property, the subject of the suit, the relief asked, or the designation of the plaintiff's character, and that the defendant was bound to produce the documents. Felkin v. Herbert (Lord), 30 L. J., Ch. 798; 9 W. E. 756. A person who effected an assurance upon

another's life commenced an action against the trustees of the insurance company, for the recovery of the amount insured. The trustees filed a bill of discovery against him in aid of their defence to the action, charging that the declaration upon the basis of which the assurance had been effected was untrue, and that the defendant entitled to inspect. Chartered Bunk of India, had in his possession various documents, by which the truth of the matters alleged in the bill would appear, and requiring him to produce them. The defendant, by his answer, stated he had in his possession the documents which he enumerated in the first schedule to his answer, but that, from a certain period after the death of the person whose life was insured, he considered it possible that the insurance company had in contemplation to dispute their liability; and therefore from that period he contemplated the necessity of bringing the action; and he added, that the documents mentioned in the first schedule contained information furnished to him, as to evidence which could be procured or given on his behalf against the company; and that producing the same might disclose the names of witnesses intended to be examined, and evidence intended to be given, on his behalf, in the action, and in the present suit; and he submitted that he ought not to be compelled to produce any of the documents mentioned in that schedule. He admitted the possession of certain other documents, mentioned in the second schedule, and then added, that excepting the particulars mentioned in the two schedules, he had not in his possession any documents relating to the matters mentioned in the bill, whereby the truth thereof would appear :- Held, first, that the admissions in the answer, coupled with the description of some of the documents given in the first schedule, were sufficient admissions that the documents were such as under the ordinary rule the plaintiffs were entitled to inspect:-Held. secondly, that the statement of the possible effect of the discovery was not a sufficient ground for withholding it :—Held, thirdly, that with respect to such of the documents as did not fall within

from producing them by the circumstance of their having come into existence after litigation was contemplated, masmuch as, in the opinion of the court, that ground of defence was not sufficiently raised by the answer. Whether, as to such documents, that ground of defence, if properly taken, could have been made available, quære. Storey v. Lennox (Lord), 1 Myl. & C. 525: 6 L. J., Ch. 99.

Where the plaintiff and defendant, a feme covert, and others, were tenants in common, and the bill was filed to establish a partition which had been made by agreement, or to effect one by the usual commission, the defendant having admitted the possession of deeds, &c., but alleged that they related merely to the title, &c., of the subject in dispute, and had been prepared with a view to the defence in the suit, but did not connect therewith her professional advisers :-Held. not privileged; held, also, that the plaintiff had an interest in deeds showing the mode in which the defendant had dealt with her share, the plaintiff having an interest in knowing who were the tenants in common with him. Maden v. Veevers, 7 Beav, 489. And see 5 Beav, 503; 12 L. J., Ch. 38,

Before the institution of a suit against assignces of a bankrupt for the purpose of establishing a security given by him, prior to his bankruptcy, to the plaintiff, the plaintiff had been examined before the commissioner in bankruptey respect-ing the subject-matter of the suit. Upon a ing the subject-matter of the suit. Upon a motion by the plaintiff for the production by the assignees of the office copies of the examination of the plaintiff before the commissioner, Romilly, M.R., ordered such production. Upon appeal, the court discharged the order, being of opinion that the documents ought not to be produced until the hearing of the cause. Gandee v. Stansfeld, 28 L. J., Ch. 436; 5 Jnr. (N.S.) 778; 7 W. R. 297.

And see Anderson v. Bank of British Columbia, ante, col. 931.

#### e. Shorthand Notes.

Notes made by a shorthand writer employed by one of the parties were ordered to be produced so far as they merely described what took place in open court, but with liberty to seal up all notes or observations thereon, and all such parts thereof, if any, as did not relate to the proceedings in court. Nicholl v. Jones, 2 Hem. & M. 588; 5 N. R. 361; 13 W. R. 451.

The court will not order a defendant to produce the transcript of the shorthand writer's notes of proceedings had at a trial at law. Rap-

son v. Cubitt, 7 Jur. 77.

J. B., a lunatic, was tenant in tail in possession of an estate, of which C. B., his committee, was tenant in tail in remainder. An action having been brought after the death of J. B. without issue, and without barring the entail, against C. B. to enforce an agreement made in lunacy in respect of the estate, into which it was asserted that C. B. had entered in her private capacity, as well as in that of committee, a summons was issued against her for production of, inter alia, the shorthand writer's notes of the proceedings in lunacy:-Held, that the notes were not privileged, and must be produced. Brown, In re, Tyas v. Brown, 42 L. T. 501; 28 W. R. 575.

was not entitled to contend that he was protected executed a certain agreement, the defendant. while the action was pending, commenced an action against other persons whom he charged with a conspiracy to defraud him, and to utter the agreement as binding upon him, knowing it to be a forgery. After the commencement of the second action the defendant caused shorthand notes of the evidence, speeches and summing up at the trial of the first action, as he deposed for the purpose ["amongst others"] of his case in the second action :- Held, upon the above facts, that the shorthand notes were privileged from inspection in the second action, and that the affidavit need not shew that the notes came into existence exclusively for the purposes of such action. Nordon v. Defries, 51 L. J., Q. B. 415 : 8 O. B. D. 508 : 30 W. R. 612 : 46 J. P. 566.

Transcript of shorthand notes of proceedings in open court are not privileged. Nordon v. Defries observed upon. Worsnold, In re, Hobson v. Worsnold, 58 L. J., Ch. 31; 38 Ch. D. 370; 59 L. T. 399; 36 W. R. 625.

The corporation of P. took compulsorily some of R.'s land, and at an arbitration to ascertain the sum to be paid, R. claimed a right of way over other land to a river, and such alleged right had to be considered in regard to the sum to be assessed. R. employed a shorthand writer to take notes of the evidence and arguments, and afterwards had them transcribed for his own purposes, Subsequently he brought an action for a mandatory injunction to compel the corporation to remove materials which they had put on the land over which he claimed the right of way. The relevancy of the notes was admitted. On motion by the corporation for the production of the transcript, R. objected on the ground that it was privileged, as the notes were taken at his expense: and in anticipation of other proceedings against the corporation :- Held, that the transcript of the notes was not privileged, and that it must be produced. Rawstorne v. Preston Corporation, 54 L. J., Ch. 1102; 30 Ch. D. 116; 52 L. T. 922; 33 W. R. 795.

Examination in Bankruptcy.]—A trustee in bankruptcy had, under s. 27 of the Bankruptcy Act, 1883, obtained an order for the examination of certain persons for the purpose of enabling his solicitor to advise him as to bringing the present action :- Held, that the transcript of the shorthand notes of the examination of those persons was privileged. Learoyd v. Halifaw Joint Stock Banking Co., 62 L. J., Ch. 509; [1893] 1 Ch. 686; 3 R. 252; 68 L. T. 158; 41 W. R. 344.

Trustees, under a creditor's deed, caused the directors of a company and others to be examined in the Court of Bankruptcy with a view to taking the opinion of counsel as to the institu-tion of a suit:—Held, that they ought not to be ordered to produce a copy of the examination at the instance of the company. *Evolution v. Queen's Every Wire Rope Co.*, 38 L. J., Ch. 263; 17 W. R. 585.

#### f. Other Documents.

Books of Corporation. ]-Upon a summons by the defendant, that the plaintiffs-a corporation -might be ordered to produce the documents comprised in their affidavit of documents :-Held. that minutes of the corporation and sub-committees appointed by them to report as to Types v. Bronz, 42 L. T. 501; 28 W. R. 575.

Matters connected with the litigation were An action having been commenced to deterprivileged. Bristol Corporation v. Cos., 53 L. J., mine whether the defendant had or had not Ch. 1144; 28 Ch. D. 678; 50 L. T. 719; 38 W. R.

Compromise of former Action.]—The plaintiffs were the owners of goods shipped on board the defendants' vessel, the B., and their case was, that the goods had been lost through a collision between the B. and the H., owing to the defendants' negligence. A suit and cross suit had previously been commenced in the Court of Admiralty between the owners of the two vessels, and these suits were compromised by a private agreement in writing :- Held, that the plaintiffs were entitled to inspection of this agreement with an average statement attached to it; for that without deciding that such an objection would be material, it did not appear that the owners of the H. objected to the inspection; and the document clearly related to the matter in question, as it might contain an admission of liability on the part of the defendants. Hutchinson v. Glorer, 45 L. J., Q. B. 120; 1 Q. B. D.
138; 33 L. T. 605; 24 W. R. 185. Affirmed on appeal, 33 L. T. 834-C. A.

Letter as to Character of Servant. - A letter written in answer to inquiries about the charaeter of a servant is privileged in this sense only, that although it contains defamatory statements it will not support an action for libel unless malice is shewn; but it is not privileged in the sense of being privileged from production, such privilege being confined to communications with

#### g. Models.

Gas Explosion. - In an action against a gas company for negligently allowing the escape of gas from their main through an open window into the plaintiff's premises, where it ignited and exploded and caused a fire, which consumed them:—Held, that inspection by the company of a model made for the plaintiff from memory after the destruction of his premises, which had since been rebuilt, was not to be allowed. Morley v. Great Central Gas Co., 2 F. & F. 373,

#### 6. DOCUMENTS PREPARED BY THIRD PARTIES.

With intention of being laid before Solicitor.] -Documents prepared by a third party, in relation to an intended action, whether at the request of a solicitor or not, and whether ultimately laid before the solicitor or not, are privileged, if prepared with a bona fide intention of being laid before him for the purpose of taking his advice; and an inspection of such documents cannot be enforced. Southwark and Vauxhall Water Co. v. Quick, 47 L. J., Q. B. 258; 3 Q. B. D. 315; 26 W. R. 341—C. A. Affirming 38 L. T. 28.

Anonymous Letters to Solicitor, Counsel and Party to Action.]—The plaintiff sued to recall probate on the ground that the testator was not of sound mind, and that the will was obtained by the undue influence of the defendants. Afterthe commencement of the action four anonymous letters relating to the matters in dispute were received—two by the plaintiff, one by her solicitor, and another by her counsel in the action :- Held, that the letters to the plaintiff must be produced, but that the letters to the solicitor and counsel were privileged, for they must be taken to have been sent to them for the a suit to rectify a mistake in a marriage settle-

255. And see Worthington v. Dublin, Wicklow purposes of the action and by reason of their and Wexford Ry., ante, col. 928. and the privilege was not lost because they were not sent in consequence of any request by the solicitor and counsel, nor obtained by their exertions. *Holloway*, *In re*, *Young v. Holloway*, 56 L. J., P. 81: 12 P. D. 167; 57 L. T. 515; 35 W. R. 751—C. A.

Confidential Letter to Party.]—A confidential letter to one of the parties to an action containing mere matter of opinion volunteered by a non-legal agent who has no personal knowledge of the facts beyond that possessed by the party applying for production is not within the rule as to professional or quasi-professional privilege, and is therefore not protected. Bustres v. White, 45 L. J., Q. B. 642; I Q. B. D. 423; 34 L. T. 835; 24 W. R. 721—C. A.

## 7 COMMUNICATIONS RETWEEN THE LEGAL ADVISERS.

Members of Firm.]--Correspondence between members of a firm of solicitors as to matters about which they have been consulted by their elients are privileged from inspection, whether written before or after litigation was commenced or in contemplation. Mostyn v. West Mostyn Coul and Iron Co., 34 L. T. 531.

Town and Country Solicitor. - A defendant will not be ordered to produce papers containing confidential communications between his The legal advisors of the party. Webb v. Etst., 49
commentant communications occurred the legal advisors of the party. Webb v. Etst., 49
country solicitor and client, during the progress
V. R. 336; 44 J. P. 200-Q. A.

the suit, or with reference to it, previous to its commencement. Hughes v. Biddulph, 4 Russ. 190: 28 R. R. 46.

Letters written post litem motam, and passing between the country solicitor and his town agent, which relate to the litigation or the subject-matter, are privileged, and a defendant cannot be compelled to answer as to the nature of their contents. Cutt v. Tourle, 23 L. T. 485; 19 W. R. 56.

Letters written two years before the institution of a snit by a country solicitor to one of a firm acting as his London agents are not privileged, though the firm afterwards acted as his solicitors in a suit which involved the subject-matter of the letters. Hampson v. Hampson, 26 L. J., Ch. 612.

Solicitor and his Legal Agent. |- Letters passing between a party's solicitor and an attorney employed by that solicitor to act in the Mayor's Court were held to stand on the same footing as communications between elient and legal adviser. Goodall v. Little, 1 Sim. (N.S.) 155; 20 L. J., Ch. 132; 15 Jur. 309.

Communications between the solicitor and an avoue acting as his agent abroad are privileged. MacFarlar v. Rolt, 41 L. J., Ch. 649; L. R. 14 Eq. 580; 27 L. T. 305; 20 W. R. 945.

Solicitors of Opposite Parties. ]-The rule of privilege protecting confidential communications does not extend to communications between the solicitors of opposite parties. 21 L. J., Ch. 10; 15 Jur. 1168. Gore v. Harris,

#### 8. SOLICITOR ACTING FOR PARTICULAR PERSONS.

## a. Married Women.

A solicitor, who was examined as a witness in

ment, declined to produce certain letters, on the ground that he had received them in his character of confidential solicitor to the intended wife; and he declined to produce certain books, because they contained particulars of confidential matters between him and his clients:-Held, that the grounds alleged for the non-production were insufficient. Walsh v. Trevanion, 15 Sim. 577; 16 L. J., Ch. 330; 11 Jur. 360.

Wherever husband and wife have distinct interests, and the wife is induced, in dealing with those interests, to act under the advice of an attorney employed and paid by the husband, the attorney must be deemed to act as the attorney of both husband and wife, and each of them has a right to call for the production, and to have full inspection, of all documents that may come into the possession of the attorney during such employment relating to the transactions and to the advice given to the wife. Warde v. Warde, 3 Mac. & G. 365; 21 L. J., Ch. 90; 15 Jur. 759. Reversing 1 Sim. (N.S.) 18.

Correspondence of a married woman (living apart from her husband) with her solicitor, in reference to a divorce, which was afterwards obtained by collusion between husband and wife, held not to be privileged from production to the husband, or parties claiming through him. Ford v. De Pontes, 29 L. J., Ch. 883; 5 Jur. (N.S.) 993; 32 L. T. 383; 7 W. R. 299.

But otherwise with respect to correspondence of the wife subsequent to the divorce, when she was acting as a feme sole, and not in relation to

the matter of the divorce. Ib.

A solicitor being examined as a witness in a suit to establish a claim upon a widower in respect of property, alleged to have been fraudulently received by the deceased wife of the widower during coverture, was not compelled to produce letters written to him by the wife at the time of the alleged fraud, he having received those letters in his professional capacity, and not having been implicated in the frand. Charlton v. Chambes, 1 N. B. 547.

#### h. Trustees.

Disputes arose between two cestuis que trustent in respect of the trust matters, and the trustee acted as solicitor for one :--Held, that the communications between such solicitor and cestui que trust were not privileged as against the other. Tuguell v. Hooper, 10 Beav. 348; 16 L. J., Ch. 171.

In a suit to which trustees were defendants production was sought of letters which had passed between the trustees and their solicitors with reference to the trust, and of memoranda and instructions to counsel prepared by the solicitors on behalf of the trustees. Some of these documents related to a former spit which had sought to set aside a deed of release impeached in the present suit. None of the documents had been charged to the trust estate :- Held, that all these documents were privileged. Bacon v. Bacon, 34 L. T. 349.

In an action by cestuis que trustent against their trustees to compel them to make good a breach of trust:—Held, that the trustees must produce letters and copies of letters from and to their solicitors in relation to matters in question in the action ante litem motam. Talbot v. Marshfield (2 Dr. & Sm. 549) followed. Mason, In re, Mason v. Cattley, 52 L. J., Ch. 478; 22 Ch. D. 609; 48 L. T. 631.

#### c. For Two Clients.

A., the defendant, wrote to his solicitor, who was also the solicitor of E., the plaintiff: "You may make Mr. E. an offer of the T. hotel on certain terms." This letter was forwarded to the plaintiff, who at once wrote and accepted the offer. A subsequent letter from the defendant to the solicitor, expressing satisfaction that E. had accepted the offer, was tendered in evidence:—Held, that the letter was privileged.

Eadle v. Addism, 52 L. J., Ch. 81; 47 L. T. 548; 31 W. R. 320.

A solicitor acting for two clients in a matter is privileged, upon examination before the court, from disclosing to one client professional instructions given to him by the other. Ubsdell, In re, 27 L. T. 460; 21 W. R. 70.

## d. Several Parties Claiming under the Client.

The reasons of the rule which protects from disclosure communications made in professional confidence, apply in cases of conflict between the client or those claiming under him and third persons; but do not apply in cases of testamen-tary disposition by the client as between different parties, all of whom claim under him. The privilege does not belong to the executors as against the next of kin, but, following the legal interest, is subject to the trusts and incidents to which the legal interest is subject. Russell v. Jackson, 9 Hare, 387; 21 L. J., Ch. 146; 15 Jur.

On a bill by the next of kin of a deceased party against his executors who were his residuary devisees and legatees, alleging that the gift of the property was made to them upon a secret trust for the foundation of a school, the solicitor of the testator, who was also after the death of the testator the solicitor of the defendants, the executors, was examined as witness for the plaintiff. On a motion by the defendants to suppress the depositions of the solicitor on the ground of professional confidence :- Held, that the communications between the testator and the solicitor might be read; and that the communications between the defendants, the executors, and the solicitor, after the death of the testator, were privileged. Ib.

A privilege given for the protection of the client cannot have the effect of excluding evidence of a trust which he had intended to create, and thus defeat a claim by the parties who accepted the trust, to hold the trust property

beneficially. Ib.

## 9. SOLICITOR CEASING TO ACT OR PRACTISE.

A. had, up to the filing of the bill, acted as the defendant's solicitor, but had ceased to do so as to the subject matter of the snit since that event. At the defendant's request he wrote observations upon a copy of the bill, which, it was sworn, were treated as instructions for the defendant's answer. Quere, whether these observations were privileged. Mochay v. Trederwick, 9 Jur. 343.

Communications between a person and his legal adviser, who had been a solicitor, but at the time of the communications had without his knowledge ceased to practise, are privileged. Calley v. Richards, 19 Beav. 401; 2 W. R. 614.

The communications had reference to the validity of a will, and passed between the plaintiff and his legal adviser between the date. of the will and the death of the testator. It his client, on the ground that he has a lien for was objected that they could not have taken costs, even when the plaintiffs in the suit cap hace in contemplation of a suit respecting the under his client. Loolett v. Cury, 3 N. R. 405. validity, and were therefore not protected :-Held, that this did not take them out of the

plaintiff, a former solicitor of the plaintiff, he was asked whether he did not, in the spring of 1859, procure a survey to be made of a ship mentioned; and he replied that he did not, but that he then made an application to certain parties in the city upon the subject, and he did so as the solicitor of the plaintiff. The witness was then asked this question:—"To whom did you make the application?" and refused to answer it on the ground that it was a privileged communication between solicitor and client. A 32 L. J., Ch. 4 motion, on behalf of the defendant, that the 11 W. R. 324. witness might be ordered to attend before the examiner and answer the question was refused with costs. Marriott v. Anchor Reversionary Co., 3 Giff. 304; S Jur. (N.S.) 51; 5 L. T. 545.

# 10. SOLICITOR AND CLIENT CO-DEFENDANTS.

The question in the cause was, whether two of the defendants had taken a conveyance of an Held, that the correspondence between the soliestate from the principal defendant with notice citors of A. and of the mortgagees before the of a certain proceeding in the Ecclesiastical Court, in which the bill alleged that they had acted as his solicitors. The principal defendant, Landon and the principal defendant and the p other defendants, by their answer, insisted on themselves while acting as his solicitor. On a 17 W. R. 435. motion for production of the documents :- Held, that the plaintiff was not entitled to read the answer of the principal defendant in reply to that elaim of privilege; but the motion was ordered to stand over, with leave to the plaintiffs to amend 380; 4 L. J., Ch. 80. their bill for the purpose of pointing that A communication defendant's attention to his relation to the eo-defendants in reference to the particular documents, and, upon his answer to their amended bill, production was ordered. Blenkinsopp v. Blenkinsopp, 2 Ph. 607; 17 L. J., Ch. 343. And see 10 Beav. 143, 277; 16 L. J., Ch. 88; 11 Jur. 721.

A solicitor and his client were both defendants. The solicitor admitted documents in his possession belonging to his client, but claimed privilege: the elient made no admission as to possession of these documents. Upon an application in the the relation of solicitor and client. Ib. presence of both, the court made an order for production. Gashell v. Chambers, 26 Beav. 303; 28 L. J., Ch. 388.

Where one defendant, being a solicitor, has acted as an agent for the solicitor on the record, to collect evidence in the snit, the letters passing between him and his co-defendant are privileged. Hamilton v. Nott, 42 L. J., Ch. 512; 16 L. R., Eq. 112.

In a suit in which the bill charged fraud against the defendants, two of them were ordered to produce all letters written to them in reference to the subject of the suit and before dispute by a co-defendant, who had been their solicitor in the original transaction, save such as they can shew by affidavit contained legal of two letters patent for similar inventions, dated advice. Sankey v. Alexander, Ir. R. 8 Eq. 241.

not refuse to produce documents belonging to so far as related to the patent of 1884. The

# 11. Information from Collateral Sources.

Professional adviser not bound of a witness of the knowledge communicated by client; but such as knowledge communicated by client; but such as knowledge communicated by client; but such as knowledge, communicated by client; but such as knowledge, communicated by client; but such as knowledge commu 4 Madd, 57.

Professional privilege is limited to communications of a solicitor with his client, and with those persons necessarily employed under the solicitor; it does not extend to communications between a solicitor and third parties. In a dispute between A. and B. the solicitor of A. had communications with B.:—Held, that they were not privileged. Ford v. Tennant, 32 Benv. 162; 1 N. R. 303; 32 L. J., Ch. 465; 9 Jur. (N.S.) 292; 7 L. T. 732;

Upon the purchase by A. from mortgagees selling under their power of sale, letters passed between the solicitors of A. and of the mortgagees, in which reference was made to an anticipated claim by B. to a legacy as charged upon the mortgaged property. B. snbsequently filed a bill to establish a charge in respect of her legacy upon the property in the hands of A. :institution of the suit was not privileged from production. Paddon v. Winch, 39 L. J., Ch. 627;

and an architect, having reference to the queswithholding the production of certain letters in tions in the suit, but not written in contemplation their possession as being privileged communications between the principal defendant and to produce them. Page v. Ward, 20 L. T. 518;

Motion for the production of correspondence referred to in the answer between the solicitor of the defendants and a person not a party to the snit, refused, Carling v. Perring, 2 Myl. & K.

A communication to be privileged must have been made by the client to the solicitor, or by the solicitor to the client. Marsh or March v. Keith, 1 Dr. & Sm. 342; 30 L. J., Ch. 127; 6 Jur. (N.S.) 1182; 3 L. T. 498; 9 W. R. 115.

A communication, to come within the principle of privilege, must be made by a solicitor to his client, or vice versa, and also in relation to the actual thing to which the interrogatory relates. It is not sufficient that the knowledge is stated to have been acquired during the subsistence of

# 12. SOLICITOR NOT ACTING AS SUCH.

Protection of confidence between solicitor and client, extends to all communications made by client for professional assistance, but not where solicitor employed in matters not professional, Walker v. Wildman, 6 Madd. 47; 22 R. R. 234.

Confidential communications between solicitor and client, in a suit to carry into effect an indenture for the benefit of the client's creditors: -Held, not to be privileged, the solicitor having taken upon himself the office of trustee under such indenture. Pritchard v. Foulkes, C. P. Cooper, 14.

An action was brought by the registered owner Avice. Sankey v. Alexander, Ir. R. 8 Eq. 241. in 1883 and 1884, for infringement of both A solicitor who is a defendant in a suit eandefendants then delivered interrogatories as to paration of the specifications filed under both patents. The plaintiff declined to answer, on the ground that they were confidential communications between himself and his solicitor and counsel, and that such documents were privi-leged; and that as regarded any documents relating to the patent of 1884, the interrogatories were irrelevant to the issue. The plaintiff's solicitor had also acted as his patent agent :-Held, that the plaintiff's answer as to documents was insufficient, as it did not distinguish between the communications between him and his soli-1 Sim, (3.8.) 3; 20 L. J., Ch. 65; 15 dur. 118. citor as such, and communications between him and his solicitor in his character of patent agent, the former class only being privileged : and held, that the defendants had a right to inspect communications between the plaintiff and his patent agent which related to the preparation of the specification of the patent of 1884, both the inventions patented being so closely connected that evidence material to the issue might be disclosed by such inspection. Moseley v. Victoria Rubber Co., 55 L. T. 482.

A defendant filled the character of solicitor only, and afterwards the double character of trustee and solicitor for others:—Held, that he was bound to produce all the documents and communications between him and his client, except those which had taken place pending the illigation. Few v. Gunny, 13 Beav, 457.

Communication not protected where professional adviser consulted merely as a confidential friend. Wilson v. Rustall, 4 Term Rep. 754, 8; 2 R. R. 515.

## 13. FRAUD, EFFECT OF.

A solicitor ordered to be examined against his client in a case of fraud. Cutts v. Pickering. 3 Ch. Rep. 66.

On a bill which sought to charge a solicitor with a fraud practised on the plaintiff in the course of proceedings on his client's behalf, the court refused to order the production of entries and memorandums contained in the defendant's books, or of written communications made or received by him, relating to those proceedings and admitted by the answer to be in the defendant's custody. And generally it seems that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a elient, even though such business had no reference to legal proceedings, either existing or in contemplation. Greenough v. Guskell, 1

Myl, & K. 98; Coop, t. Brough, 96, The plaintiff sought to have a deed set aside on the ground of the fraudulent insertion of a particular clause therein. One of the defendants, by answer, insisted that the plaintiff had notice of the clause in question at a specified time, and examined the plaintiff's solicitor in support of this issue, and inquired what passed at an alleged interview between the solicitor and the defendant at the time specified. To this interrogatory the solicitor demurred to answer, on the ground that it inquired respecting matters about which he had obtained information by means of confidential communications, made to him in the course of his agency as solicitor for his client, the plaintiff :- Held, that the selicitor was bound to answer the interrogatory. Gore v. Bowser, 5 De G. & Sm. 30. S. C., nom. Gore v. Harris, 21. L. J., Ch. 10; 15 Jur. 1168.

A bill impeached a deed on the ground of documents in his possession relating to the pre- fraud, and interrogated the defendant as to the contents of certain letters which had passed between her and her solicitor, and which, it stated, showed that the deed was prepared and executed for the alleged fraudulent purpose. The defendant, in her answer, declined to set forth the contents of the letters, as being privileged communications. The court held that the transaction, according to the account of it given in the bill and answer, was not a fraud, and therefore that the defendant was not bound to set forth

Communications between a solicitor and his client relative to a fraud contrived between them, are not exceptions to the general rule; they do not fall within the rule itself ; for the rule applies, not to all that passes between a solicitor and his client, but only to what passes between them in professional confidence ; and no court can permit it to be said that the contriving of a fraud forms part of the professional occupation of an attorney or solicitor. Ib.

The existence of an illegal purpose would prevent any privilege from attaching to the communications between solicitor and client, semble. Russell v Jackson, 9 Hare, 387; 21 L. J., Ch. 146: 15 Jur. 117.

A. purchased an advowson in June, 1845, and, in August following, mortgaged it to B. In 1850, B. filed a hill against A., and the solicitor employed by him in the purchase and the mortgage, for a sale of the advowson, alleging that the mortgage was an insufficient security, and that he was induced to lend his money upon it by misrepresentation made to him by A, and his solicitor as to the value of the advowson. A., in his answer, denied the alleged fraud; but admitted that he had in his possession letters which had passed between him and his solicitor in reference to the purchase and the mortgage, and added that they were confidential communications made to him by his solicitor in that character, and therefore were privileged; but he did not state that any of them contained legal advice or oninions, or were written post litem motam. The court ordered him to produce all the letters, *Hawkins* v. *Gathercole*, 1 Sim. (N.S.) 150; 20 L. J., Ch. 303; 15 Jur. 186.

Bill filed to set aside a sale by the plaintiff's ancester to the defendant's testator, on the ground of the sale having been made to the confidential solicitor of the vendor at an undervalue; answer admits possession of documents, but says they relate to the purchaser's title exclusively, and not in any manner to the plaintiffs title. They included copies of conveyances from the purchaser to other purchasers from him of parts, and a valuation of the estate:

—Order for their production. Also, order for production of mortgages on the estate scheduled, it being alleged in the bill that the vendor had been in embarrassed circumstances. The court always in such eases assumes the truth of the statements in the bill, in order to test the materiality of the evidence which the documents will furnish, because it will be too late to inspect after the hearing. In this case :- Held, that the plaintiff was entitled to see all documents to which he would be entitled, on the assumption that the vendor was his ancestor, and everything which might assist in proving that the estate was sold at an undervalue. Gresley v. Mousley, 2 Kay & J. 288; 2 Jur. (N.S.) 156.

The defendants, suggesting that the executors had been the mortgagor's only professional of the vendor, who were also defendants, had an adviser in the transaction. *Dacies v. Parry, 27* interest in some of the scheduled documents:— L.  $J_{\gamma}$ , Ch. 294; 4 Jur. (x.S.) 431; 6 W. R. 171. Held, that they should be served. Ib.

A. B. wrote the draft of a letter to his solicitor, in order that such solicitor might write a similar one to him, to be shown to C. D., and thereby induce him to enter into a contract. On a bill to set aside the contract for fraud:-Held, that the solicitor was bound to produce the letter, but not the other correspondence between him-

self and his client. Reynell v. Sprye, 11 Beav. 618. The title of R. to an estate having been discovered by B., R. agreed to give B. a moiety of the estate for his exertions, &c., and B. was to prosecute the claim at his own risk. B., through his solicitor, afterwards took the opinion of counsel upon the case, and instituted the suit of R. v. R., in the name of R., under a power of attorney given by R. for that purpose :- Held. in a suit by R, to set aside the transaction, that B. was bound to produce the opinion and the doenments in R, v. R, for R,'s inspection, the same not being privileged. In the same case, B., wishing to purchase the remaining moiety, procured his solicitor to write him a letter to show to R., and calculated to induce him to sell. R. agreed to sell :- Held, in a suit to set aside the sale, that the letter was not a privileged communication. S. C., 10 Beav, 51; 16 L. J., Ch. 117.

A bill to set aside leases for fraud made the solicitor who had prepared them a defendant, charging him with being a party to the fraud, and praying costs against him, and interrogating him as to his being privy to the fraud, and as to transactions regarding the preparation of the leases. The solicitor pleaded that he knew nothing as to the matters, save as the attorney of the other defendant, and therefore was privileged from giving discovery. The plea did not deny the fraud or the facts stated in the bill as evidence of it :- Held, that the plaintiff, being entitled to relief, was also entitled to the discovery as incidental to the relief. Kelly v. Jackson, 13

Ir. Eq. R. 129.

The privilege of a solicitor is confined to confidential communications with his client, and does not extend to his own acts, though done in the character of solicitor. Ib.

Confidential communications, involving fraud, are not privileged from disclosure. Gartside v. Outram, 26 L. J., Ch. 113; 3 Jur. (N.S.) 39; 5

In answer to a bill filed in equity for an injunction to restrain a former clerk of the plaintiffs from disclosing any of their dealings and transactions, the defendant stated that the plaintiffs were in the habit of conducting their business in a fraudulent manner, and specified a particular instance. In suppport of his answer the defendant filed interrogatories for the examination of the plaintiffs as to the fraudulent transactions, which they declined to answer. On exception to the answer :- Held, that there was no privilege to protect them from answering, the discovery being material to support the defendant's answer, which, if proved, would be a complete defence to the bill. Ib.

Where a suit was instituted by a mortgagor to set aside the mortgage deed, on the ground that it was obtained by the mortgagee under eirenmstances of pressure and surprise, which, however, the mortgagee denied, the court, upon motion, ordered the production of the deed, it appearing that the mortgagee was a solicitor, and that he a deceased client, of whom there was no legal

Demurrer by a solicitor to produce letters written to him by his client, about the time and in respect of a matter impeached by a bill as fraudulent, to which the solicitor was not made

a party, nor charged with fraud:—Allowed, Charitan v. Chambes, 4 Giff. 372; 1 N. R. 547; 32 I. J., Ch. 284; 9 Jur. (N.S.) 534; 8 L. T. 81;

11 W. R. 504.

A. bequeathed the interest of certain moneys to M. (a widow) for life, but in case she should marry again without the previous consent of both his executors, the interest, and all other benefit given to her by his will, should cease and determine, and in lien he gave her 50l. for life. M. intermarried with C. without consent, and died in 1862. The executors then discovered that she had been married to C., and they filed a bill for a declaration as to the fraud committed, and for an account against C. In the course of the proceedings the solicitor of M. was examined as a witness before one of the examiners, and he declined to produce his book containing entries relating to her second marriage, and also certain letters written by her on the same business, on the ground, that although his client was dead, such entries and correspondence were privileged. The solicitor was not a party to the suit, and there was no allegation connecting him with the alleged frand :-Held, that the entries and letters were protected from production by the privilege between the solicitor and his client. Ib.

A bill averred that the defendant procured the execution of a jointure-deed under a power by pressure in fraud of the power, but there was no allegation that the solicitor who prepared the deed was a party to the fraud :- Held, that the alleged fraud was not such as to exclude the instructions given by the defendant to her solicitor for the preparation of the deed from privilege. Mornington v. Mornington, 2 John. & H. 697.

The bill was framed for the purpose of setting aside this deed : and among the communications as to which privilege was claimed were letters dated a considerable time before the transaction which the bill songht to set aside, but which the defendant, in her answer, described as having been written for the purpose of obtaining professional assistance as to, and with a view to, her defence against any claim that the plaintiff might make against her. It appeared, however, on the face of the bill and answer, that a contest had previously existed as to matters intimately mixed up with the transaction which the bill sought to set aside :- Held, that the dates were not sufficient to rebut the privilege claimed. Ib.

The defendant was interrogated as to the instructions given to her solicitor for the deed, and also as to communications with reference thereto between herself or any persons on her behalf, and any persons acting on behalf of the grantor of the jointure. In her answer she ignored "save as herein and in the schedule hereto appears." By a subsequent clause as to documents generally, she claimed privilege for letters written by and to her solicitor; but in other parts of the schedule, as to which privilege was not claimed, were some documents which might satisfy the description of communications with third parties :- Held, that the form of the

answer was no bar to the privilege claimed. Ib. Where a solicitor was charged with fraud, and documents bearing on the transaction, whether his own or those of the deceased client. Feaver v. Williams, 11 Jur. (N.S.) 902; 13 L. T. 270.

An action was brought for an account of profits in respect of a purchase of trust property, on allegations that the sale was secretly made for the benefit of R., one of the trustees, with the comivance of T., another trustee, who was a solicitor. The representatives of R. claimed privilege from production for letters from T. to R, and for T.'s bill of costs, on the ground that the communications were made by T. acting as solicitor to R. in his private capacity. Production was ordered because the communications passed between two trustees, and because the solicitor and his client were charged with fraud. Postlethwaite, In re, Postlethwaite v. Rickman, 56 L. J., Ch. 1077; 35 Ch. D. 722; 56 L. T. 733; 36 W. R. 563.

The plaintiff, in a debenture-holder's action brought against the company and their agents, alleged that the company when in fact insolvent had created a charge in favour of their agents with a view to defeat and delay the debentureholders, and impeached the priority of such charge. In an affidavit of documents the liquidator now claimed privilege for copies of or extracts from opinions of counsel and advice of the company's solicitor with reference to the charge at the time of its creation :- Held, that the claim of privilege could not be sustained, having regard to the allegation of fraud. Wil-liams v. Quebrada Railmay Lend and Copper Ch., 65 L. J., Ch. 68; [1895] 2 Ch. 751; 73 L. T. 397; 44 W. R. 76.

The decision in Reg. v. Cow (54 L. J., M. C. 41; 14 Q. B. D. 153) is applicable to fraud as well as crime Th

# 14. PRIVILEGE IN SUBSEQUENT ACTION.

A correspondence took place between a client and his solicitor during the progress of a suit. A compromise was effected, but afterwards a second suit was instituted to set it aside, and to prose-cute the original suit:—Held, that the correspondence was privileged in the second suit. Hughes v. Garnons, 6 Beav, 352.

In an action by the plaintiffs against the defendant for not unloading at the port of discharge a cargo of rice purchased by the defendant from the plaintiffs, whereby the plaintiffs who had entered into a charter-party upon the terms as to the discharge of the ship similar to those contained in the contract of sale, were sued by and had to pay damages to the shipowner :- Held, that the defendant was not entitled to inspection of the papers in the plaintiffs' possession relating to the action brought against them by the shipowner in-cluding correspondence between them and their solicitor, and between their solicitor and other persons; for such papers would have been privileged from discovery in the former action, and the fact that such action had terminated did uot deprive them of their privilege. Bullock v. Corry or Currie, 47 L. J., Q. B. 352; 3 Q. B. D. 356; 38 L. T. 102; 26 W. R. 330.

An order having been made for discovery of An order having been made for discovery of assignee, were not privileged. Greenlaw v. King, documents by the plaintiff in an action, the I Beav. 137; 8 L. J., Ch. 92. plaintiff stated on affidavit that, among other documents relating to the matters in question in

representative, was alleged to be a party to the ments partially prepared by his solicitors in an fraud :-Held, that the solicitor must produce action previously brought by him against one D. (a person other than the defendant) for future use in carrying on the said action, but which were, in fact, never completed or used owing to such action not proceeding in consequence of D.'s death, and that the whole of the said doenments were of a private and confidential nature between counsel, solicitor, and client:-Held, that the documents were privileged from dis-covery in the action. Bullock v. Corry (3 Q. B. D. 356) followed. *Pearce* v. *Foster*, 54 L. J., Q. B. 432; 15 Q. B. D. 114; 52 L. T. 886; 33 W. R. 919; 50 J. P. 4-C. A.

## 15. Loss of Privilege.

Waiver. ]-The giving of an extract of a copy of an opinion of counsel, which a solicitor procured for his client on the subject-matter of the suit, to a solicitor engaged in litigation against him, does not necessarily prevent the opinion, or the case on which it was taken, from being privileged. Curey v. Cuthbert, Ir. R. 6 Eq. 599.

A waiver of privilege in respect of some out of a large number of documents for all of which privilege was originally claimed does not preclude the party from still asserting his claim of privilege for the rest. Lyall v. Kennedy, 53 L. J., Ch. 937; 27 Ch. D. 1; 50 L. T. 730-C. A.

Reference in Pleadings.] — The privilege claimed for documents is not lost merely by their being referred to in the pleadings. The penalty for non-production is that they cannot afterwards. L. J., Ch. 1148; 26 Ch. D. 724; 50 L. T. 729; 32 W. R. 654—C. A.

The draft of an answer prepared for a deceased defendant, but not put in, is a privileged docu-ment in the bands of his administratrix. But if the administratrix, by her answer, admit posses-sion of and set out part of the contents of the document, and erave leave to refer to the same, she loses the privilege as to the part so set out, but retains it as to the remainder. Belsham v. Harrison or Perceval, 15 L. J., Ch. 438; 10 Jur.

Solicitor becoming interested Personally. ]-Confidential communications as to the title of property to an attorney or connsel do not cease to be privileged by his afterwards becoming interested as devisee of the property; and where the attorney refused discovery, the court cannot regard the subsequent consent of the client to the disclosure of the matters inquired after. Chant v. Brown, 7 Hare, 79.

Information communicated to another Person. -In a suit to impeach the validity of a charge upon a living :- Held, that a correspondence between a deceased owner of the charge and his solicitor, and a case submitted on his behalf tocounsel, as to the validity of the charge, some years before the institution of the present suit, and also a correspondence in contemplation of the present suit between the defendant and the solicitor of the late owner, and which had come into the possession of the defendant, as his-

Assignees of a bankrupt solicitor have nopower under s. 137 of the Bankruptey Act, 1861, the action, he had in his possession certain docu- or otherwise, to dispose of books containing entries relating to confidential communications between the solicitor and his clients, material to establish his case on such trial. *Ib*. Proper course of proceeding in such cases. Roberts, Ex parte, Holden, In re, 3 N. R. 230.

# V. EVIDENCE OF PARTY'S CASE OR

#### 1. Generally.

## a. Discovery and Production of Documents.

General Rule-What Necessary to protect Documents. |-To protect a defendant from the discovery or production of a document relating to the subject in dispute, it is not sufficient that it should be evidence of his title, or contain evidence which he intends, or is entitled to use in support of his case; it must contain no matter supporting the plaintiff's title or the plaintiff's case, or impeaching the defence, and the defendant must aver by his answer, with a reasonable degree of distinctness, that the document does contain no such matter. Combe v. London Corporation, 1 Y. & Coll. C. C. 631; 6 Jur. 571.

Production of cases and opinions of counsel thereon relating to the matters in issue, refused.

The corporation of London claimed for the fellowship porters of that city a prescriptive right of measuring and carrying, for certain fees, all corn landed on either side of the river Thames, between Yantly and Staines bridge, and carried into or out of the city, and they filed their bill against C. & Co. to establish that right. The defence of C. & Co. was, that the right. The defence of C. & Co. was, that the tor was seised in fee. Denurrer on the ground claim was of modern origin, and they filed their that the deed in question related to the defending the control of the defending the defendi gesting that the porters were established in the time of Henry III, for earrying (within the city only) corn landed by persons other them. only) corn landed by persons other than citizens at Queenhithe, which they alleged was then the only place where corn was permitted to be landed; and they claimed the inspection of certain entries in the corporation books, which purported to be copies of ancient public orders and proclamations, inquisitions, and findings relating to the landing of corn at Queenhithe, and to the charges for carrying it to certain persons within the city. Upon motion to produce these documents, which, by the answer of the corporation, were admitted to be in their possession, but were insisted upon as part of their title and that of their grantees, the fellowship porters :-Held, that they were not part of their title, and must be produced. S. C., 4 Y. & Coll. 139.

Principles upon which the court is guided in ordering the production of deeds and documents. Ib.

Distinction between eases in which discovery is sought of evidence relating to the items of an question in dispute, the right to the account, Att.-Gen. v. Thompson, 8 Hare, 115.

A plaintiff is not entitled to discovery of docualthough the title to the plaintiff is not admitted, M.Clel. 73. the question as to the existence of such title is a

Considerations of the limits of the right to discovery in cases of adverse title of the deeds and evidences in the possession of the defendant.

And see b. Interrogatories, infra. col. 958.

Protected Documents-Relating exclusively to Defendant's Case. ]-A defendant held not bound to set forth a list of documents in his possession relating to his own title. Sutherland

v. Sutherland, 17 Beav. 209.

Title-deed of the defendant ordered to be produced, where it contained a recital that might affect him with constructive notice of the plaintiff's interest in the estate. Necsom v. Clarkson, 2 Hare, 166; 12 L. J., Ch. 99; 6 Jur. 1055.

In a snit to enforce an agreement relating to land, made by the defendant's father, the defendant alleging that, under a certain deed, dated, &c.. his father was only tenant for life, and that he himself was tenant in tail under the same deed :- Held, that the plaintiff was not entitled to the production of it. Wasney v. Tempest,

9 Benv. 407. Bill by legatees, whose legacies were charged on real estates, for a discovery and production of a deed, by which, as it was alleged, the real estates were limited to uses, under which the testator was tenant in tail only, but from which, as the plaintiff insisted, it would, if produced, appear that a small portion only of the estate was so settled, and that of the residue the testa-

them, on the ground that they relate exclusively to his title, do not support the plaintiff's case, nor tend to defeat his own, if the documents may be important in determining the question at issue in the suit, they must be produced. Greenwood v. Greenwood, 6 W. R. 119.

In a suit by a vicar against occupiers for tithes, a motion was made by the plaintiff for production of deeds, papers and writings admitted by the answer of one of the defendants to be put in his possession or power. The defendant resisted the application on the ground that several of such documents related to and showed his title as lay impropriator to some of the tithes in question. The court held that the plaintiff was not entitled to the production of such of them as related to the title of the defendant to the tithes in question. Collins v. Gresley, 2 Y. & J. 490.

As to how far a viear, plaintiff in a title cause, is compellable to produce for inspection, account, the right to which is disputed, and &c., vicar's books, and those of predecessors, cases in which it relates to the fundamental admitted by him, in his answer to cross bill by defendant, to be in his possession, and to contain entries relating to payments of sums of money, as compositions corresponding in amount ments, the right to the possession or inspection with the money payments set up by the defendent which is not necessary to the proof, and is dant as modus relied on. The costs of all only consequential upon the existence of the proceedings had, for obtaining the discovery title he claims, that title not being admitted; by such means, must be paid by party so but where the court finds, upon the answer, that acquiring it. Firkins v. Lowe, 13 Price, 193;

The court will not, on bill for tithes praying question to be tried, the plaintiff is entitled to discovery of documentary evidence, order prosion in the answer that it would assist plain-But if there be enough shewn to tiff's case. give colour for the application, court will not give costs to defendant. Bligh v. Berson, 7 Price. 205

Plaintiff in tithe cause, lessee of vicar, ordered on motion of defendant, to bring in, &c., books, &c., stated to be in his possession by affidavit, and to belong to vicar, who was not a party to cause.

Foreman v. Cooper, 11 Price, 515. The plaintiffs claimed to be owners in fee simple of land, and the defendant alleged that they were freehold tenants of a manor, of which he was the lord; and that they had only cus-tomary rights over the land. The plaintiffs asked for inspection of the court rolls of the manor :- Held, that they were not entitled to

inspection. Owen v. Wynn, 9 Ch. D. 29; 38 L. T. 623; 26 W. R. 644—C. A. A., having lands contiguous to B.'s, brings his bill that B. may discover the boundaries of his estate, as they appear by his deeds. B. is not obliged to make this discovery. Hungerford v.

Gorcing, 2 Vern. 38.
Bill charging that the defendants had got the title deeds, and mixed the boundaries, prayed a discovery, possession, and an account; demurrer allowed. Loker v. Rolle, 3 Ves. 4. But st Champernoon v. Totnes (Borough), 2 Atk. 112. But sec

Bill to establish a right of dues for weighing and stallage of goods in a market under a grant by the lords of the market —Held, that the grant did not pass the dues, &c., and therefore plaintiff could not except to the answer for insufficiency in not giving discovery in aid of an account, the right to which depended on the title. Russell v. Benkey, 8 Ir. Eq. R. 559.

In a bill by one partner for an account on foot of the dissolved partnership, certain letters written by the defendant to the plaintiff, after the dissolution, were set out as in plaintiff's possession, and forming the basis of the partnership agreement, but which the defendant, in his answer, denied. A motion by the defendant for the production of the letters, refused. Palmer v. Mahony, 16 Ir. Eq. R. 504.

A document, not put in issue by the plaintiff in his bill, which was for account of partnership dealings, but stated in the answer as part of defendant's defence, and admitted to be in his possession, and offered to be brought in, he cannot be compelled to bring in, if no partnership property is shewn in it. Shehan v. Glynn, 2 Moll. 387.

The defendants had brought an action against the plaintiffs, to recover a sum alleged to be due for town dues. The plaintiffs filed their bill, alleging that the defendants had in their enstody cases for the opinion of counsel, by which it would appear that the defendants had no right to levy the dues, and also various charters, deeds, &c., by which the truth of the statements in the bill would appear. The defendants admitted in their answer that they had in their custody several cases, two of which were prepared many years ago, and without reference to the existing proceedings, but which contained mistaken representations as to the nature of their title to the dues, and the rest of which were prepared pending, or in contemplation of the existing proceedings; and that they

duction of a tithe book of former rector shewn copies of accounts, from public offices, which to have been in the possession of defendant's evidenced their title to the dues. A motion by attorney, unless it clearly appear from admisted the plaintiffs for a production of all the documents was granted as to the two old cases only.

Bolton v. Liverpool Corporation, 3 Sim. 467. And see S. C., 1 Myl. & K. 88; Coop. temp. Brough, 19; 1 L. J., Ch. 166.

The heir is not entitled to see any deeds in the hands of the jointress without confirming her jointure, though the jointure was made after marriage. Towers v. Davys, 1 Vern. 479.

Executors having admitted assets in an administration suit by legatees whose legacies are charged on real estate, are not bound to set forth a list of documents relating to the real estate of the testator. Forbes v. Tanner, 9 Jur. (N.S.) 455; 11 W. R. 414; 1 N. R. 464.

Bankruptcy of Defendant—Effect of.]—A defendant, by his answer, admitted documents in his possession, and, by the decree, was ordered Upon some to produce them before the master. he had borrowed money, and handed them over to the lenders; others he retained, and resisted their production. He became bankrupt, and the master afterwards issued a certificate of default :- Held, that the certificate was bad, as the bankruptcy had put it out of the power of the defendant to produce the documents. Bainbridge v. Blair, 1 Jur. 256.

Reference to Document in Pleading. ]-The court will compel the production of a document referred to by the answer of a defendant as in his possession, although such document refers merely to the defendant's title. Plumptre v. O'Dell, Fl. & K. 589; 4 Ir. Eq. R. 602. And see cases ante, cols. 760-762.

Documents not Protected-Tending to Support Plaintiff's Case. ]-A defendant is bound to produce anything which may tend in the least legree to make out the plaintiff's case. Jenkins v. Bushby, 35 L. J., Ch. 400; 14 L. T. 431; 14 W. R. 531.

Therefore, where the issue was whether land and unnes belonged to the plaintiff or to the defendants, and the question was one of boundary, the defendants, admitting the possession of documents relating to the matters in issue, notwithstanding that they denied that such documents would establish the plaintiff's title, were ordered to give discovery, with liberty, however, to seal up everything not relating to the matters in issue. Ib.

A plaintiff is entitled to the production of maps, rentals, &c., in the possession of and belonging to the defendant, which elucidate the right of the plaintiff. Potts v. Adair, 3 Swanst. 268.

Where an issue is, whether a piece of land called O. is or is not identical with or part of land called F., the plaintiff averring the negative is entitled to production of whatever documents may aid him in establishing his negative averment, notwithstanding such documents may also evidence the defendant's title. Earp v. Lloyd, 3 Kay & J. 549.

Therefore, in a case of this description, the defendant was ordered to produce all maps. plans, and terriers, and all deeds and other documents relating to the matters at issue, but with liberty to seal up such parts of the deeds and other documents as did not describe or also had in their custody charters, deeds, and relate to parcels. Ib.

Property in London was granted for a lease of of one, a different management was entered into ninety-nine years in 1763. At the expiration of between his executors (one of whom was the lease the reversioner found difficulty in surviving partner) and his widow, who was identifying a part of the property, which had beneficially interested under the will, by which and lying dispersedly in the common fields at Walworth, commonly called Lock's Fields." The property had, during the lease, been underlet and dealt with by instalments some of which tify the houses and lands now in the defendant's ments:-Held, that he was entitled to the discovery. Brown v. Wales, 42 L. J., Ch. 45; 15 L. R., Eq. 142; 27 L. T. 410; 21 W. R. 157.

In 1763, B. and P. demised to C. for ninety-nine years, at a rent of 50l., "seven acres and a-half of meadow or pasture land (more or less) lying dispersedly in the common fields of Walworth, commonly called Lock's Fields," together with other lands as to which no question arose. In 1862, the lease having expired, the sneeessor in title in fee to B, and P, obtained possession of all the land demised in 1763, except the seven and a-half acres. This seven and a-half acres had been underleased and repeatedly dealt with from time to time, and by reason of the whole property having been built over, he was unable to establish his right to them in an ejectment without obtaining from the defendants discovery of the underleases and assurances of the leasehold interests which had been carved out of the demise of 1763. A bill was then filed against persons who, according to the allegations in the first class, when he had received such debts, bill, were in wrongful possession of portions of the seven and a-half acres, for discovery of the documents in their possession which would clearly shew that the land occupied by them was included in the denise of 1743, the plaintiff intending at once to make all the defendants parties to the ejectment. The defendants demurred for want of equity and multifariousness :- Held, that, on the case made by the bill, the plaintiff was entitled to the discovery sought, and demarrer overruled. Ib.

The establishment of identity of parcels is as much an element in the right to discovery as devolution, and gives a lessor the right to discovery as against lessees holding over and their under-tenants. Ib.

A partition was made of part of a manor, and A, and B, were tenants in common of the parts not severed. In 1829 C., who was seised of four ancient tenements within the manor, obtained a conveyance from B, of all the rights, &c., over the ancient tenements and the adjoining waste. A. claimed to be tenant in common over these wastes; but B. set up an exclusive title thereto as attached to the four ancient tenements :-Held, under the circumstances, that C. was bound to produce the deed of 1829; for, having acquired the manorial rights conveyed to him by the deed of 1829, he had become subject to the liabilities to which he would not have been subject as owner of the ancient tenements. Att.-Gen. of the Prince of Wales v. Lambe, 11 Beav. 213; 17 L. J., Ch. 154; 12 Jur. 386.

By articles of partnership, in case of the death

been generally described in the original lease as the surviving partner was to take the stock at a "seven and a half acres of pasture or meadow, valuation, and get in the credits, and pay the joint debts; and out of the share of the deceased partner in the surplus to pay his separatedebts, and the widow's legacy. The widow, by this bill, sought to set aside this arrangement for contained particular descriptions, which, as the frand, and to have an account of the partner-reversioner contended, would help him to idenship transactions, and of the profits subsequent. ship transactions, and of the profits subsequent to her husband's death:—Held, that the plainoccupation as his property, and he filed a bill tiff was entitled to the production of the for discovery of such underleases and instru-accounts of the business as carried on after the testator's death. Hue v. Richards, 2 Beav. 305.

One of two partners dying, it was agreed between the survivor and the executors of the deceased that the survivor should continue the business, and wind up the affairs of the partner-It appeared that the surviving partner divided the debts due to the firm into twoclasses. The first class he, without the concurrence of the executors, assumed to himself, and transferred to his new books, having debited himself with the amount of the same in the partnership books. The second class he did not assume; but having opened new accounts with some of the customers, when he received anything on account of such last debts, he entered the same in such new books, and also in the partnership books. He and his clerk swore that the entries in the partnership He and his books exactly tallied both in dates and sums with the entries in the new books :- Held, that he must produce for the inspection of the executors such new books, to see, as to the and what profits he had made of the same which the executors had a right to share; as to the second class, whether he had properly appropriated the payments made by such last debtors, in discharge of the old balances due to the firm, or whether first in discharge of his own advances. Toulmin v. Copland, 3 Y. & Coll. 655; 9 L. J., Ex. Eq. 5; 3 Jur. 1041.

On a defendant objecting to produce docu-ments, on the ground that he had procured the documents for another purpose, and that they were open to all, and to be procured in the same manner:—Held, that unless specially protected, he must produce them. Wright v. Fernan, 1 Drew. 344; 22 L. J., Ch. 447; 1 W. R. 138.

Assertion of Privilege-Sufficiency of Affidavit.]-A plaintiff will not be compelled to produce muniments of title which he swears do not, to the best of his knowledge, information and belief, contain anything impeaching his case, or supporting or material to the case of the defendant. Minet v. Morgan, 42 L. J., Ch. 627; L. R. 8 Ch. 361; 28 L. T. 573; 21 W. R. 467.

Where in an action for the recovery of land the defendant's affidavit of documents claims privilege for certain documents on the ground that they relate solely to his own title and do not tend to prove or support the title of the plaintiff, such affidavit is sufficient, though it does not go on to say that such documents do not impeach the defendant's title. *Morris v. Edwards*, 60-L. J., Q. B. 292; 15 App. Cas. 309; 68 L. T. 26—H. L. (E.)

of a partner, the survivor was to pay the amount of his capital, according to the last half-yearly areas, and to take the stock, &c. After the death alleged misrepresentation in the prospectus of

inrolled themselves as annual subscribers to the company, the defendants, in their affidavit of documents, stated that they had in their possession 12,500 applications by persons wishing to be inrolled as annual subscribers to the company, but that they objected to produce them, on the ground that they formed part of the evidence supporting their case, and did not support, or tend to support the plaintiff's case, and contained nothing impeaching the case of the defendants:—Held, that there being nothing to shew that the defendants had misconceived the nature of the documents, their affidavit was conclusive, and the plaintiff was not entitled to inspect them. Frankenstein v. not entried to inspect them. Francesseen V. Gazie's House-to-House Cycle-eleaning Co., 66 L. J., Q. B. 668: [1897] 2 Q. B. 62; 76 L. T. 747; 45 W. R. 547—C. A.

The expression "tending to make out the plaintiff's title" means his title to the relief

which he seeks by his bill to produce. Clegg v. Edmonson, 22 Beav. 125; 2 Jur. (N.S.) 824.

Bill for a discovery whether, in a mortgage made by A. to B., which had been assigned to the defendant, there was not some trust declared for the benefit of the plaintiff; defendant, by answer, denied that there was any trust declared for the plaintiff: the answer being replied to, the question at the hearing was, whether the defendant should be obliged to produce the deed, the court would not compel him to do it. Quare. Hall v. Atkinson. 2 Vern. 463.

It does not establish sufficient interest in a title-deed relating to real estate, to warrant an order for its production, that if its effect be such as is sworn to by the party claiming the estate under it, legatees will lose the benefit of legacies bequeathed to them by that party's ancestor, from whom he immediately derives title. Wilson

v. Forster, M'Clel. & Y. 274.

Defendant need not set forth an account of the transactions of a trade in which the plaintiff pretends to have been a partner, if there is a clear denial of the partnership. Jacobs v. Goodman, 2 Cox, 282.

A mere statement by a defendant that the production of the documents will not help the plaintiff's alleged title, will not protect them from being produced. *Manuell v. Feenoy*, 2 J. & H. 320; 4 L. T. 437; 9 W. R. 610.

Inaccurate Affidavit.]—Plaintiff made an affidavit of documents claiming privilege as to all documents in the schedule thereto, on the ground that they supported the plaintiff's title, and did not support the title of the defendant. Defendant took out a summons for production. notwithstanding the privilege claimed when the judge in chambers ordered production of one of the documents, and adjourned the hearing of the rest of the summons into court. On hearing the adjourned summons :- Held, that the inaccuracy of the affidavit as to one document did not of itself destroy the plaintiff's privilege as to the rest of the scheduled documents. Leslie v. Care, 56 L. T. 332; 35 W. R. 515.

When Insufficient. |- In a cross-bill filed against a corporation, which claimed an exclusive right to metage of grain and other articles, it was alleged, that the right was of modern origin, and ments to be in their possession, which were and submitted that no discovery could be asked: exidence of their title, and the officers of the —Held, that all the circumstances might be.

the company that more than 12,000 persons had | corporation denied, as to their belief only, that the books and documents would prove the allegations to the cross-bill :- Held, that this was not sufficient to protect them, but that the corporation were bound to produce the books and documents. Combe v. London Corporation, 15 L. J., Ch. 80; 10 Jur. 57.

In a snit instituted against the corporation of London for discovery in aid of a defence to a bill by them to recover alleged dues claimed by prescription, the corporation admitted the possession of certain charters, &c., relating to the matters in question, which they alleged formed part of their title, but which they did not with sufficient precision deny might form part of plaintiff's title, or contain matter respecting their own defence :- Held, that the plaintiffs were entitled to production of such documents. S. C., 1 Y. & Coll. C. C. 631 : 6 Jur. 74.

Where the bill charges that the defendant is in possession of documents which relate to the matters in question in the snit, the defendant cannot protect himself from setting out a list and description of such documents by merely alleging his belief that they do not contain evidence of or tend to show the plaintiff's title, but he is bound distinctly to negative the allegations in the bill. Att. Gen. v. Landon Corporation, 2 Mac. & G. 247; 2 H. & Tw. 1; 19 L. J., Ch. 314; 14 Jur. 205.

The authorities on the above points examined and commented on. Ib.

Where, on an information for tin dues, on the part of the Duke of Cornwall, raising the question whether certain lands were part of manorial wastes, it appeared that the defendant being seised of an ancient tenement, a party, tenant in common with the duke, conveyed to the defenarising within the manor, reserving the rights of tin and of shooting, &c.; the defendant, by his answer, set forth a portion of the deed of conveyance to him, and stated, as to the boundaries, that they would appear from the deed :- Held, that the defendant was bound to produce it, that it might be seen whether the answer set it forth correctly; and also because the Crown, being jointly interested with the party conveying to the defendant, might take advantage of his acts of ownership. Att.-Gen. v. Lambe, 3 Y. & Coll. 162; 8 L. J., Ex. Eq. 23; 2 Jur. 698.

The plaintiff was entitled to a legacy, which the testator had charged on his estates not in settlement. The defendant stated that the testator was tenant in tail of part of the estate, but did not specify it, and he admitted the possession of a copy of a deed creating the entail, but he stated that it did not make out the plaintiff's case :-Held, he was bound to produce it for the plaintiff's inspection, as tending to show what estates were in settlement. Ferrers, 4 Beav. 97; 10 L. J., Ch. 273. Herey v.

Where a strong prima facie case is shown by the bill, a defendant cannot be excused from giving discovery on the ground that such discovery only tends to establish his own case. Farrier v. Attwool, 14 W. R. 582.

A bill alleged that money had been placed in the hands of the defendant for certain payments. and inquired into the application of such money. The answer averred, that the particular sum had, that the fees for metage had varied. The cor-poration admitted metage-books and other doon-defendant without recourse from the plaintiff, essential in deciding the construction of the agreement, and the answer was insufficient. Bleckley v. Rymer, 4 Drew. 248.

Denial of Opponent's Interest or Title in Pleadings. - See supra, cols. 763-765.

Time for Production—Not before Defence.]—
A plaintiff cannot generally be compelled to produce to the defendant a document relating to ins own title only, though such document is referred to in his pleadings, until the defendant has put in his defence. Brokester v. Whowall, 49 L. J., Ch. 704; 15 Ch. D. 120; 42 L. T. 868; 28 W. R. 951; and see Ducks v. Williams, 49 L. J., Ch. 352; 13 Ch. D. 550; 42 L. T. 469; 28 W. R. 282.

Under Former Practice at Common Law—Action for Wrongful Dismissal. —In an action by a superhitendent against a railway company for improperly dismissing him from their employ, he is entitled to have an inspection of all minutes or entries in the company's books having any reference to his employment. *Hill* v. G. W. Ry., 10 C. B. (cs. 2) 148.

Lunatic Asylum-Statutory Entries. ]-In an action against the licensed keeper of a private lunatic asylum, under 8 & 9 Viet. c. 100, by a person who had been confined in it as a lunatic, for mismanagement and improper treatment of him while a patient there, the court on application by the plaintiff, under 14 & 15 Vict. c. 99, s. 6, directed inspection of the following books, required by the first-mentioned statute to be kept, i.e. "The Medical Visitation Book," "The Case Book," "The Visitors' Book," and "The Patients' Book" (that of the book of admissions and book of entries having been consented to); together with the order and medical certificate under which the plaintiff was admitted into the establishment as a patient. The inspection, however, was ordered to be conducted before the master, who should seal up, uninspected, all parts of the books not relating to the plaintiff's ease. Hill v. Philp, 7 Ex. 232; 21 L. J., Ex. 82; 16 Jur. 90.

Agreement for Lease-Specific Performance-Production of Lessor's Title—Easement—Vendor and Purchaser Act, 1874.]—The owners in fee of freehold land commenced an action for the specific performance of an agreement by the defendant to accept a lease of the land for a term of years. The agreement contained (inter alia) stipulations for the free use by the defendant of a certain "drive" as a means of access to the estate. By his defence the defendant denied that the plaintiffs had any power to demise the land, and alleged that it was subject to restrictive covenants:—Held, that, by virtue of s. 2 of the Vendor and Purchaser Act, 1874, the defendant was not entitled to discovery and production from the plaintiffs of the documents in their possession relating to the freehold title, though, if he had raised specifically any particular objection to the title, he might have had discovery of the documents bearing upon that point:-Held, also, that the contract as to the "drive" was a contract to grant a lease of land, and that therefore the plaintiffs were protected from production of their title thereto by the Vendor and Purchaser Act, 1874, s. 2. Jones v. Watts, 43 Ch. D. 574; 62 L. T. 471; 38 W. R. 725—C. A.

## b. Interrogatories.

General Principles.]—A defendant who files interrogatories for the examination of a plaintiff is entitled to an answer with respect to all matters which tend to destroy the plaintiff's case, but not with respect to matters which tend to support the plaintiff's case, Swerre Commissioners v. Glusson, 42 L. J., Ch. 345; L. R. 15 En. 302, 92 L. T. 433, 21 W. R. 509.

Eq. 302; 28 L. T. 438; 21 W. R. 520. When, therefore, a bill was filed to establish a right of common, and the defendant filed interrogatories requiring the plaintiff to set forth any instance in which the right e latined by the bill had been enjoyed:—Held, that the plaintiff was not bound to answer. Ib.

Scuible, that the plaintiff would have been bound to answer interrogatories with respect to instances in which the right had been claimed and successfully resisted. Ib.

A defendant cannot compel a plaintiff to answer any interrogatory, which in effect asks him what evidence he has in favour of his case. Each party may obtain discovery of all matters relating to his own case, and is entitled to know what the opponent's case is, but not what is his evidence of it. S. C. it. 21, J. C. h. 34.

evidence of ft. 8. C., 42 L. J., Ch. 345.
Bill on behalf of the occupiers of land within
a forest, whether residing within or without a
certain manor, to establish rights of common
over waste lands within that manor. Interrognatory by defendant asking for instances in
which rights of common over lands within the
manor had been exercised by persons residing
without it. Answer, declining to set out instances.
Exception overruled with costs. Ib.

Upon a bill of discovery in equity, in aid of an action, the plaintiff is only entitled to a discovery of such matters as make out his own title, and cannot compel a discovery of the particulars of his adversary's title, and how he makes it out. Ingilby v. Shafto, 33 Beav. 31.

A plantiff is entitled to discovery from the defendant, not only of that which constitutes his the plantiffs little, but also for the purpose of repelling what he anticipates will be the case set up by the defendant. This does not extend, however, to a discovery of the evidence upon which the anticipated case of the defendant is to be supported. Att.-Gen. v. Loudon Cuprartion, 2 Mac. & G. 247, 2 Hall & Tw. 1; 19 L. J., Ch. 314; 14 Jur. 205.

The object of the Act 21 Jac. 1, c. 14, was to put a defendant litigating with the Grown in the same situation as any other defendant; but this statute does not apply in equity, where, in the matter of discovery, the Crown and a subject litigating together are precisely on the same

footing as ordinary parties. Ib. Semble, a defendant cannot protect himself from discovery on the ground of disclosing the ovidence of his title, where his only allegation of title is negativing the title of the plaintiff. Ib.

What must be Answered.]—Where discovery is sought in relation to matters in which the plaintiff has no interest, but as consequential or resulting from a character or title denied by the answer, and not otherwise appearing on the record, the plaintiff has no equity entitling him to discovery. If, however, the plaintiff is interest in the discovery sought results from a character and title alleged in the bill, and if the bill properly avers that the discovery will establish tacks are the discovery will establish a case

the plaintiff's remedies, the defendant cannot 8 Hare, 116. withhold the discovery by generally denying the character and title claimed by the plaintiff.

2. IN AC Stainton v. Chadwick, 3 Mac. & G. 575; 15 Jur.

1139. Affirming 13 Beav. 320.

Although a litigant party has no right to a discovery of the evidence of his opponent's title, yet he has a right to a discovery of the evidence in support of his own title, and in proof of any fraud which has been committed to his injury and the plaintiff's right to a discovery of material evidence in support of his own case and title is not repelled, because, by exercising that equitable right, the defendant may be compelled to disclose the evidence in support of his (the defendant's) case and title. Ib.

The plaintiff and defendant respectively deduced their title from the heir-at-law of A., who died intestate in 1768, equitably entitled to certain premises, the legal estate of which was outstanding. In 1842 the defendant obtained ex parte a conveyance of the outstanding legal estate under Sir E. Sudgen's Acts. The plaintiff then filed his bill, alleging that the defendant had obtained the conveyance of the legal estate to himself, as the heir-at-law of A., by false and fraudulent evidence. The bill contained interrogatories addressed to the discovery of the alleged false and fraudulent evidence. The defendant, having by his answer asserted his own title as heir-at-law of A., and having denied that of the plaintiff, refused to answer any of the interrogatories relating to the evidence on which he had obtained the conveyance, asserting that the discovery would disclose the evidence of his own title, and denying that the evidence was false or frandulent, or that it would establish any of the allegations of the bill :- Held, that he was bound to make the discovery. Ib.

The rule that party is not bound to discover his own case is confined to matters of title, not to matters of account. Corbett v. Hawkins, 1

Y. & J. 426.

Plaintiff having recovered indement at law for 1,400L against J. brings a bill, charging that J. had conveyed his estate to trustees, and lent might be liable to plaintiff's debts, defendant demurs, for that in his lifetime he was not bound to discover his personal estate, and demurrer overruled. Smithier v. Lewis, 1 Vern. 398. S. P., Angell v. Draper. Ib.

And see Bidder v. Bridges, 51 L. T. 818; 33 W. R. 272, supra, col. 819,

- Plaintiff's Claim Established as to Part of Subject-matter-Consolidated Title.]-Where an informant has made out his right to discovery in respect of part of the foreshore of a port, the whole of which is elaimed by the defendants under one consolidated title, he is entitled to discovery in respect of the whole foreshore of everything which may repel the defendant's title, and acts of ownership by the defendants on other parts of the property are admissible as evidence and are subject-matter of discovery. Att. Gen. v. Newcastle-upon-Tyne Corporation, 66 L. J., Q. B. 593; [1897] 2 Q. B. 384; 77 L. T. 203—C. A.

Instead of Production.]—The court will in many cases compel a defendant to answer direct questions, the answer to which the court may be less ready to allow a plaintiff to seek by examining deed which destroys his title as heir-at-law.

of fraud, by the defendant affecting or destroying | the papers of his opponent. Att.-Gen. v. Thompson,

2. IN ACTION FOR RECOVERY OF LAND.

# a. Discovery by Plaintiff.

Liability of Defendant to Discover. ]-A defendant in an ejectment is not exempt from liability to make discovery of documents under Ord. XXXI. New British Mutual Investment Co. v. Peed, 3 C. P. D. 196; 26 W. R. 354.

When Production not Enforced-Documents. relating only to Title of Defendant. - The owner in possession of property cannot be compelled to produce his title-deeds, or give evidence which may put his rights in danger. Muskerry v.

Chinnery, 2 Hog. 272. It is not, by the practice of this court, required of a party charged by a bill to have deeds and documents, &c., in his possession, material to the case on the other side, that he should protect himself from producing them by plea. The court will take care that he be not called on without good reason to produce his securities, for they watch with jealousy proceedings instituted for that purpose, and will require an unanswerable case to warrant their interference in making an order for their production. Vansittart v. Barber, 9 Price, 641.

A defendant will not be compelled to produce title-deeds, on the simple allegation that they contain recitals which will prove the plaintiff's title. The plaintiff must produce the admission by the defendant of that fact. Chapman v.

Serera, 5 L. J., Ch. 11.

A plaintiff (in an ejectment action) is not entitled to see letters, pedigrees and counterpart leases described as evidences of the defendant's own title, merely to assist him in impeaching the defendant's legal title. Dunn v. Ferrier, 18 W. R. 129.

On the death of a lunatic a bill was filed by one person claiming to be heir against another, for the appointment of a receiver pending the determination of the title. An order appointing a receiver was discharged on appeal, 1,000L to A., in B.'s name, and praying that this defendant had got into possession :- Held, that the bill having thereupon become a mere ejectment bill, the court would not order the production of documents by which the plaintiff hoped to impeach the defendant's title; and that the case was not altered by there being in court a sum received on account of rents. Ib.

An estate being in lease, A, enters and receives. the rents during the continuance of the lease, and afterwards continues in possession up to a period more than twenty years distant from the time of his entry. Within twenty years after the expiration of the lease B, brings an ejectment, and files. a bill for discovery: though the ejectment might be maintained at law, a denurrer to the discovery is good. Cholmondeley v. Clinton, Turn. & R. 107.

Where adult female before marriage agreesto accept in lieu of dower a rent-charge, she is bound to see that granter has title to lands charged therewith. And, therefore, a purchaser of other lands of grantor, which might otherwise have been liable in ease of failure of such security, is not entitled to see by title-deeds that grantor has title to such charged lands. Simpson v. Gutteridge, I Madd. 609; 16 R. R. 276.

Heir-at-law is not entitled to inspection of the

Mountmorris (Lord) v. Dungannon (Lord), 2 | ment, or to give any discovery as to it. Chichester

aid of a possessory suit. Malone v. M' Eroy,

Wall, Lvn. 319.

To a bill of discovery in aid of an action of intrusion brought by a remainderman, in a devise, after a lapse of thirty-nine years from the death of the tenant for life, and twenty-seven years from the time when the remainderman attained the age of twenty-one, demurrer allowed. Cuthbert v. Creusy, 4 Bli. 125. And see Pim v. Good-win, Id. 133. Foster v. Blake, Id. 140.

After twenty years' possession, and a descent cast, the heir-at-law of a former owner filed a bill for discovery of title of occupant, suggesting pretended devise from his ancestor; demmrer allowed. Muthory, Smith, 3 Austr, 709; 4 R. R. 854.

Heir-at-law out of possession cannot raise an equitable jurisdiction for court to decree possession of estate by adding to his bill for that purpose a prayer for delivery up of title deeds, Taulor v. Glanville, 3 Madd, 179: 18 R. R. 210.

Under a suspected title to a lease granted by a corporation, a trust being set up against the lessee, on motion to compel the corporation to produce surrendered leases, counterparts of renewed leases, &c., no order was made. Cock v. St. Bartholomew Hospital, 8 Ves. 138.

- Oath of Defendant, ]-A plaintiff in an action to recover possession of land cannot obtain production of documents in the defendant's possession, which the defendant swears to relate solely to the defence of his own title. Lyell v. Kennedy, 51 L. J., Ch. 409; 20 Ch. D. 484; 46 L. T. 752; 30 W. R. 493. But see 52 L. J. Ch. 385; 8 App. Cas. 217; 48 L. T. 585; 31 V. R. 618,

A plaintiff who claims common appurtenant ver the waste of a manor is not necessarily ntitled to production of documents relating to he manor, and admitted to be in the possession f the lord of the manor, where the defendant Lenies that they contain anything supporting the

claim. Minet v. Morgan, 11 L. R., Eq. 284; 24 L. T. 120; 19 W. R. 374.

A plaintiff filed a bill in equity to establish a right of common of vicinage over a common within a manor of which the defendant was lord. By his answer the defendant denied the plaintiff's right :-Held, that he was entitled to production of the records of, and documents relating to, courts baron held within the manor, to the production of accounts and memoranda relating to the digging of gravel and cutting of turf on the common, and to have a list of the documents relating to the title of the lord of the manor; but not to have such documents produced, the defendant stating by affidavit that they related exclusively to his own title as lord of the manor, and did not in any way tend either to establish the rights claimed or to defeat the defence to the

- Against Mortgagees. - By a deed of settlement a general power of appointment over estates was reserved to the settlors, subject to which the estates were limited to the settlors for their lives, with remainders to other persons in strict settlement. power of appointment by mortgaging the estate:

oll. 317. v. Doneyall (Marquis), 39 L. J., Ch. 694; L. R. 5 A bill does not lie for discovery of evidence in Ch. 497; 22 L. T. 458; 18 W. R. 531.

Where an executor and trustee of a testator was also a mortgagee of part of his estate, he was allowed to withhold from production the mortgage and other title deeds of the security, but not certain accounts and writings relating thereto, which, it was said, might also affect the testator's general estate. Freeman v Trigg, In re. 9 L. T. 405; 12 W. R. 94. Freeman v. Butler,

Where a defendant appears to be a bare trustee for the plaintiff, and offers no explanation to the contrary, the court will compel the production of deeds and documents admitted by his answer to be in his possession. The court will not, upon the motion before the hearing, compel an incumbrancer to produce at the hearing deeds which are admitted by his answer, but which are his title deeds, even though the plaintiff may have an interest in such deeds : but, under circumstances, the court will direct them to be proved before the examiner. Sparke v. Montriou, 1 Y. & Coll. 103.

The mere circumstance of a defendant incorporating a deed in his answer, whether by referring to the schedule or otherwise, is not a ground for compelling its production, if in other respects such compulsion would be inequitable. Ih.

Mortgagee insisting, by his answer, that he is not bound to produce his title deeds, but admitting that he is mortgagee of part of certain estates, is not bound in answer to the inquiries of the bill to say what part, as that would be stating the contents of his title deeds. Addison v. Walker, 4 Y. & Coll. 442.

- Against Volunteer. ]-One claiming under a voluntary conveyance from tenant in tail, not compellable by the issue in tail to discover the deed of entail. Bunce v. Philips, 2 Vern. 50.

When Production Enforced. ] - In a snit instituted in aid of proceedings at law to establish plaintiff's title as the heir-at-law of a certain person, the defendants filed a plea to the whole of the relief, traversing the fact of his heirship, and put in an answer to a part of the discovery sought by the bill, merely stating their inability to set forth whether the plaintiff had descended from an ancestor of the person whose heir he claimed to be :-Held, that notwithstanding the plea, the plaintiff was entitled to have the usual affidavit as to documents made by the defendants. Kettleu 375: 24 L. T. 420. Kettlewell v. Barstow, 40 L. J., Ch.

A party claiming to be heir to the lunatic, permitted, after the possession of the estate had been given up to the parties reported to be the heirs, to inspect deeds and documents remaining in the master's office, which it seems may be retained till a proper investigation has taken place, En parte Clarke, Jac. 589: 23 R. R. 150. See Small v. Attwood, 1 Y. & Coll. 37.

A bill was filed on the 7th January, 1837, and stated that in 1773 T. M. devised some estates to be sold to pay certain charges, and subject thereto to his wife for her life, and after her death to "the incorporated society in Dublin for promoting English Protestant schools in Ireland," and their successors for ever, that the wife paid The settlors executed their the charges, and in 1801, assigned all her title in the estates to L. N. R., subject to the charges -Held, that the mortgagees could not, in a suit after her decease; that in 1801 the wife died; for redemption brought by one of the remainder-that afterwards the plaintiffs got possession of men, be ordered to produce the deed of settle-part of the estates, but that I. N. R., and the

defendants as his devisees, retained possession of account on foot thereof should be closed, and covery of the common title deeds, and to have whether any sum was due on the charges affecting all the estates, and also because the defendants, who claimed under the will of T. M., had 300; 56 L. T. 778; 36 W. R. 243—H. L. (E.) no right to resist that part of the bill which sought to establish the will against the heir. Incorporated Society v. Richards, San. & Sc. 559.

Where the respective titles alleged by the plaintiff and defendant were antagonistic, the plaintiff claiming the reversion in lands, alleged to be in the possession of the defendant as lessee. and the defendant claiming to be entitled in fee to such lands, but admitting that he derived his title under a person alleged by the plaintiff to have been lessee only, and that the parcels mentioned in the deed under which he claimed, in some respects, although not wholly, corresponded with the parcels described in the demise to such alleged lessee, it was held that the plaintiff was ontitled to a discovery of such parcels, and to a production of so much of the purchase deed as described them. Att.-Gen. v. Thompson, 8 Hare,

A statement that the plaintiff has been in adverse possession twenty years, sufficient to support a bill of discovery. Jurvis v. Leans, 2 Jur, 639,

- Question as to Boundaries . - Where there is a dispute as to boundaries or unity of possession a defendant must set forth how he is entitled. Champernoon v. Totness (Borough), 2 Atk. 112.

Mortgagee of an estate partly in settlement must discover the boundaries. Strode v. Blackburne, 3 Ves. 225.

Defendant standing in a Fiduciary Relation to Plaintiff. |-Obligation of a party holding a fiduciary office under another, to make discovery of the particulars of an adverse title set up by him. Att.-Gen. v. London Corporation, 12 Beav. 8; 18 L. J., Ch. 314. Affirmed 2 Hall & Tw. 1; 13 Jur. 973.

A trustee, under the circumstances ordered to produce the title deeds (mentioned in the schedule to his answer) of an estate charged in the bill to have been purchased with the trustmoneys, though his answer alleged that it was purchased with his own money, and that the deeds constituted his own title. Farrer v. Hutchinson, 3 Y. & Coll. 692; 9 L. J., Ex. Eq. 10; 3 Jur. 1119.

— Documents produced by Defendant to Defeat Plaintiff.]—The court does not usually compel a party to produce his title deeds as evidence; but where a party produces them to defeat his adversary, the opposite side is entitled to an inspection of them. Grange v. Cass, 2 Y. & J. 241,

- Plea of Purchase for Value without the greater portion of the estates, and were also Notice. -Au action having been brought in the no greater person to the estates, that were need notices, an across making been forwight in the in possession of all the common title decis, which is changed which or recover possession of land they refused to deliver up. The bill charged chinning production and delivery of documents that the defendants alleged the charges were alleged to be material to the plantiffs, title, the still unpaid, and that after the death of the wife, defendants pleaded that they were purchasers for I. N. R. never denied the plaintiffs' right to the valuable consideration without notice, and on estates subject to his own lien for the charges, this ground objected to the discovery and probut merely professed to hold the lands until the duction of certain documents of title .- Held, that the objection was invalid for the following even offered to refer to arbitration all questions reason :- Before the Judicature Act, 1873, a plea touching such account as the only matters in of purchase for valuable consideration without dispute between him and the plaintiffs:—Hebl, notice was not available against either discovery that independent of the question upon the Irish or relief claimed in those cases in which the enactments, a demurrer on the record was too court of chancery had concurrent jurisdiction extensive, the plaintiffs being entitled to a dis- with the common law courts upon legal titles; s. 24, sub-s. 2, of that act, therefore, gives no them brought into court, and to be informed protection to the defendants, the court having now complete jurisdiction over the whole action.

> Documents must be included in Affidavit of Documents, though they need not be Disclosed. -The defendant, in an action to recover posses sion of demised premises on a forfeiture for breach of covenant, may be ordered to make an affidavit of documents, but he may refuse to disclose any documents which would establish the case of forfeiture against him. Seaward v. Dennington, 44 W. R. 696-C. A.

> In Action for Title Deeds.]—Action for title deeds. Plea, that the title deeds belonged to P., deceased, under whom the plaintiff claimed; and P., being indebted to N., agreed with him that he should hold them as a security by way of equitable mortgage, and he so held them, the debt remaining unpaid; and that N. died, and appointed the defendant executrix. In answe to interrogatories, the defendant admitted the she had in her possession a memorandum the the deeds should remain in the possession of N until repayment of the money :- Held, that th plaintiff was entitled to an inspection of the memorandum; and also to have particulars o. the lien relied upon by the defendant. Owen v. Nickson, 3 El. & El. 602 : 30 L. J., O. B. 125 : 7 Jur. (N.S.) 497; 3 L. T. 737.

Assertion of Privilege - Sufficiency. - See ante, cols, 954, 955,

By Interrogatories.] - In an action for the recovery of land the plaintiff is entitled to discovery as to all matters relevant to his own and not to the defendant's case. In an action for the recovery of land the plaintiff claimed as assignce of co-heiresses of a deceased intestate owner of the land, and the defendant relied on his possession and also set up the Statute of Limitations:—Held, that the plaintiff was entitled to interrogate the defendant as to matters relevant to the pedigree and heirship of hisassignors and as to alleged admissions by the defendant that his possession of the land was as trustee for the intestate and her heirs, even though the plaintiff might have other means of proving the facts inquired after; and that the defendant must answer the interrogatories in substance, subject to any privilege against particular discovery which he might be entitled to claim. Lyell v. Kennedy, 52 L. J., Ch. 385; 8 App. Cas. 217; 48 L. T. 585; 31 W. R. 618.—H L. (E.). And see Wrentmore v. Hagley, 46 L. T. 741. The bill stated the plaintiffs title to an undivided mojety of an estate, and that the deeds. Egremont Burial Board v. Egremont plaintiff had purchased the other mojety, but Iron Ore Cb., 49 L. J., Ch. 623; 14 Ch. D. 158; that the defendants alleged that they were 42 L. T. 179; 28 W. R. 594. entitled to that moiety under a settlement and a will antecedent to the plaintiff's purchase, from 1822 to 1855, and his father had previously The prayer was for a declaration of the rights to 1822 been in possession of the same lands, The prayer was for a declaration of the rights to 1822 been in possession of the same lands, of the parties and a petition. The bill required in the year 1855 R, brings ejectment for the the defendants to discover whether they had lands claiming to assert a title through people not represented that they were entitled under named F. and W. G. alleged that no such contents of those instruments and the nature of their title, and to set forth a schedule of documents in their power, in the usual way. they were not bound to make this discovery, and, after admitting the possession of certain others relating in any manner to the title of the plaintiff :- Held, on exception to a report of the master, finding the answer sufficient, that the defendants were bound to set forth whether they had made the alleged representations as to their title, but not whether such representations were true, or to discover the nature of their title, and that they must set forth a schedule of all documents in their power. Potter v. Waller, 2 De G. & Sm. 410.

Bill prayed that the defendant might state the particulars of his pedigree as heir, and of the births, baptisms, marriages, deaths, or burials; demurrer allowed. Iry v. Kekewick, 2 Ves. J. 679: 3 R. R. 30.

And see ante, cols. 817, 818.

# b. Discovery by Defendant.

Bill lies to discover the title of a person bringing ejectment, and to see if it is not in some other. Metculf v. Harrey, 1 Ves. 249.

A. brought an ejectment against B., whereupon B. filed a bill of discovery in equity against o A., seeking to discover under what title he e claimed at law, and how he made it out: t Held, that B. was not bound to give this dis-ocovery. Ingilling v. Shafto, 38 Beav. 31; 32 3'L. J., Ch. 807; 9 Jur. (S.S.) 1141; 8 L. T. 785. To bill to stay proceedings in an action

brought by defendant, as landlord, on account of dilapidations of buildings by plaintiff as tenant, and for a discovery whether defendant has not since commencement of action assigned his interest in buildings, defendant cannot pro-tect himself from discovery by plea, that when dilapidations were committed defendant was entitled, and that they had ever since continued out of repair. Bedford (Duke) v. M'Numara 1 Price, 208.

In a suit by the owner of lands adjoining a manor to establish a right of common appurtenant to his tenement :—Held, that the defen-dant, though not a tenant of the manor, was entitled to require the production of all doenments which might support his claim. Minet v. Morgan, 18 W. R. 1015.

The defendants, before putting in their statement of defence, moved for the production by the plaintiffs of the conveyance under which they held their land, in order to ascertain whether it contained a reservation of minerals :-Held,

G. had been in undisturbed possession of lands the settlement and will, and to set forth the people as F. or W. had ever been interested in or connected with the property, and filed a bill of discovery against R., praying that the defendant might discover and set forth "in what character The defendants, in their answer, submitted that or right, and under or through what person or persons, he claimed to be entitled to the possession of the premises; or what was the nature of documents, denied having in their power any his claim, and how he made out the same"; and also praying for an injunction to restrain the action until the discovery given. Injunction granted until answer. Garle v. Rabinson, 3 Jur. (N.S.) 633.

Obligation of a party holding a fiduciary office over property under another to make a discovery of the particulars of an adverse title set up by him. The corporation of London, as conservators of the river Thames under the crown, claiming the freshold of the bed and shores:—Held, bound to discover the charters under which they held. Att.-Gen. v. London Corporation, 12 Beav. 8; 18 L. J., Ch. 314. Affirmed 2 Hall & Tw. 1: 13 Jur. 973.

A cross-bill for discovery of cvidence charged that the defendant was aware that the evidence. to be given in support of his pedigree in the original bill was not true, and sought for a discovery of the residence, profession, marriage, age and period of the death of each of his ancestors as stated in the original bill, and of the children of each, the nature and particulars of the evidence of the defendant's pedigree, what inquiries he had made of his witnesses, with the name and residence of each witness, together with the facts which each could prove, and when and where the defendant got possession of any deeds, &c., evidencing his poligree. A demnirer to a discovery of these and other similar matters was overruled; the court holding that a defendant in a cross-cause cannot resist a discovery of matter as to which he might himself have enforced a discovery in the original suit. A party defending a possession is entitled to more consideration in a court of equity than a claimant seeking to disturb it. A discovery of evidence is not confined to a disclosure of such facts only as will tend to establish affirmatively the case of a plaintiff in possession. A person in possession is not to be called upon by a claimant to disclose his title-deeds, unless it be shown that there is a common title, or that they will affirmatively establish the claim. O'Connor v. Malone, San. & Sc. 516.

A demurrer was allowed to be amended by confining it to so much of a cross-bill (not in aid of a defence at law) as sought for a discovery of the names and residence of the witnesses for the plaintiff in the original suit, and of the evidence which they could give. Id. 551.

A. being in possession of an estate under a decree in 1783, B, filed a bill against him to it contained a reservation of minorials.—Held, decree in 1783, B. filed a bill against lim to that, the land having been conveyed to the recover the estate, and brought a write of right plaintiffs in fee simple, they were prima facie for the same purpose. A. then filed a bill entitled to the land down to the centre of the lagainst B., seeking for a discovery of matters earth, and unless the defendants could shew relating to B.'s pedigree, and praying that B. that they were not so entitled, the plaintiffs might elect whether he would proceed at law or could not be compelled to produce their title in equity, and that, if he elected the former, that ing at law to recover the estate. B. demurred, because the bill sought a discovery of matters constituting his case at law, and because the order for putting him to his election ought to be obtained on motion, and not at the hearing. Denurrer overruled. Loundes v. Davies, 6 Sim. 468

In a redemption suit by a second mortgagee against the first mortgagee, he is bound to state in answer to interrogatories not only the amount due upon his security, but also what securities he holds for his debt. West of England and South Wules Bunk v. Niekolls, 6 Ch. D. 613.

Counterpart. ] - In ejectment on the title. where the question was, whether the lands in dispute were included in a lease which had been lost, but of which a counterpart was in the possession of the plaintiff, he was ordered to permit the defendant to inspect and take a copy of the counterpart. Barry v. Scully, Ir. R. 6 C. L. 449.

## VI. PUBLIC POLICY.

Affairs of State. |- In an action against the secretary of the Board of Trade for acts done by the board's servants, an order having been obtained for discovery of documents, he made an affidavit stating that he had, as secretary to the board, certain official documents in his official enstody and control, and that he objected to state anything further with respect to them on the ground of public policy :- Held, that this was insufficient to establish the privilege claimed. Kain v. Farrer, 37 L. T. 469.

Semble, it is not enough to state, in a mere formal affidavit, that discovery is objected to on the ground of public policy ; but it should appear that the mind of a responsible person has been brought to bear on the question of the expediency to the public interest of giving or refusing the

information asked for. Ib.

In such an action, the defendant not having denied his responsibility for the acts of the servants of the board, possession of documents by the board which are under his official control, is

possession by himself. Ib.

When a collision occurs between one of the queen's ships and a ship belonging to a private owner, and the captain of the queen's ship makes (in accordance with the usual practice) a report to the lords of the admiralty, the court of admiralty will not, in a cause against the captain, in which an appearance has been entered by the queen's proctor by order of the lords of the admiralty, order it to be produced for inspection by the opposite parties if the secretary to the lords of the admiralty makes an affidavit to the effect that such production would be prejudicial to the public service. H.M.S. Bellerophon, 44 L. J., Adm. 5; 31 L. T. 756; 23 W. R. 248.

If production of state paper would be injurious to public service, public interest must be considered before interest of a private suitor. Beatson v. Skene, 5 H. & N. 838; 29 L. J., Ex. 430; 6 Jnr. (N.S.) 780; 2 L. T. 378; 8 W. R. 544.

The question of injury to public service is to be determined not by judge, but by head of department. Ib.

he might be perpetually restrained from proceed- production cannot be enforced in a court of law. M'Elveney v. Connellan, 17 Ir. C. L. R. 55.

In an action for libel the plaintiff, in his affidavit of documents, stated that he had in his enstedy, in his capacity of governor of a colony, copies of communications which had passed either between the secretary of state for the colonies and himself as such governor, or between the royal commissioner appointed to inquire into the affairs of the colony and himself as such governor, or between the commissioner and the secretary of state; and that the attention of the secretary of state had been directed to the nature and dates of the documents, and that he had directed the plaintiff not to produce them, and to object to their production, on the ground of the interest of the state and of the public service, and that the plaintiff, therefore, objected to produce them on those grounds :--Held, on motion for liberty to inspect the documents, that the motion must be refused. Hennessy v. Wright, 57 L. J., Q. B. 530; 21 Q. B. D. 509; 59 L. T. 323; 53 J. P. 52.

Documents belonging to Colonial Government.]-An action was brought against the agent-general to a colonial government by persons who had entered into a contract with that government and who claimed relief in respect of a sum of money which they alleged had been received by the defendant from that government as trustee for the plaintiffs, and afterwards, in breach of trust, repaid by him to that government. On an application by the plaintiffs for discovery of documents by the defendant, he made an affidavit specifying certain documents, but objecting to produce some of them on the ground that he had no property in them; that they were the property of the colonial government (which was not a party to the action), and had been acquired by him merely in his capacity of agent-general, and subject to the directions of that government; and that the prime minister of the colony had directed him not to produce the documents, except under an order of the court, and to object to their production on the ground of the interest of the state and of the public service. The plaintiffs then took out a summons to compel production of the documents, which the defendant objected to produce :-Held, that an official was only entitled to take copies for his own protection, and to use them for that purpose and not for ordinary purposes, and that it would be a dereliction of duty on the part of the defendant to produce documents which he knew his superiors objected to produce, and that the court had no jurisdiction to order him to do so. Wright v. Mills, 62 L. T. 558.

Affairs of East India Company. ]-A correspondence having passed between the court of directors of the East India Company and the commissioners for the affairs of India (in pursuance of the requisitions of the 3 & 4 Will. 4, c. 85), relating to a dispute which had arisen with respect to a commercial transaction in which the company had been engaged with a third party, is, on the ground of public policy, a privi-leged communication. Smith v. East India Cv., 1 Ph. 50; 11 L. J., Ch. 71.

An independent sovereign prince was possessed Official Communication.]—Reports made in the of two promissory notes of the East India Comdischarge of the duties of their respective offices pany. In the course of a war between this by government officials to the crown, or its sovereign and the company the notes were taken representatives, are state documents and their as spoils of war. The prince filed a bill in equity

against the company for the recovery of the private dancing, not to public places only, notes; and upon the coming in of the answer, | Clarke v. Scarle, 1 Esp. 25. moved for the production of documents :- Held, that he was not entitled to their production, they being political communications, relating to matters of government and state affairs, which had passed between the company and their agents. Csorg (Rajah) v. East India Co., 25 L. J., Ch. 345; 4 W. R. 421; 8 De G., M. & G. 182; 2 Jur. (N.S.) 407.

The refusal to compel such production is grounded on the reason that such production would be prejudicial to the public interests, and therefore against public policy, and also that such matters are, from their nature, exempt from

municipal jurisdiction. 1b.

Semble, that documents not in the nature of political communications are not protected from production by having been sent along with documents which are protected as having a political character. Ib.

Books of Bank of England. ]-To a bill for discovery of stock standing in the name of the plaintiff's late father, either alone or jointly, for twenty years before and at his death, and for an inspection of the bank books containing the entries of such stock, the bank, in their answer, set forth an account of the stock, but declined on public grounds to set forth a list of the books containing the entries :-Held, that they were not exempted from the production of their books, and therefore ought to set forth a list of them. Heslop v. Bank of England, 6 Sim, 192.

And see EVIDENCE (PUBLIC DOCUMENTS).

# DISENTAILING DEED.

See FINES AND RECOVERIES.

# DISORDERLY HOUSE.

- 1. Unlicensed Places of Entertainment, 969,
- 2. Brothels, 972.
- 3. Sunday Entertainments, 974.

# 1. Unlicensed Places of Entertainment. Stage Plays. - By 10 Geo. 2, c. 28, all places

for the exhibition of stage entertainments must. be licensed. Rev v. Hundy, 6 Term Rep. 286.

But tumbling is not an entertainment of the stage within the meaning of that statute. Ib.

a building which he gratuitously allowed to be used on a few occasions for the performance of stage plays, to which the public were admitted on payment, for the benefit of a charity. The appellant had no licence for the performance of stage plays in such building:-Held, that he was rightly convicted of having or keeping a house for the public performance of stage plays without a licence under 6 & 7 Vict. c. 61, s. 2. Shelley N. Behlell, 58 L. J., M. C. 16; 12 Q. B. D. 11; 49 L. T. 779; 32 W. R. 276; 48 J. P. 244. See also THEATRE.

c. 36, extends to houses kept for the purpose of be by the public. Guaglieni v. Matthews, 6

 Taking Money. ]—And it is not absolutely necessary that the party who keeps the house should take money at the door. Archer v. Willingrice, 4 Esp. 186; 6 R. R. 851.

Where a room above the bar of a public-house was used for music and dancing every night, although no payment was required, and there was no public invitation to the room, the keeper of the house is liable to the penalty of 100L. under 25 Geo. 2, c. 36, s. 2. Frailing v. Messenger, 16 L. T. 494.

--- "Keeping" House for Occasional Use.]

A house is not "kept for public dancing or other public entertainment of the like kind" within the 25 Geo. 2, c. 36, s. 2, if a concert to which the public is admitted on payment of money is given on one day in the year, although the house may be used on other days in the year for dramatic entertainments under a licence from L. T. 402; 21 W. R. 524, But a mark 1.

But a mere temporary use of a room in a public-house for the purpose of dancing on a particular festival or occasion, does not subject the owner to the penalty of the statute. Shutt v. Lewis, 5 Esp. 128; 8 h. R. 140.

In an action to recover the penalty for keeping an unlicensed house for public dancing, it appeared that music, dancing, &c., had occasionally taken place at the defendant's house (a publichouse), that no money was taken by him for admission, but the rooms were let to persons who sold tickets and received money for admission at the door; but there was no direct evidence that the defendant knew of this practice :- Held, that there was evidence to go to the jury of a keeping of the house by the defendant for the purposes mentioned in the statute, and that the judge was wrong in directing a nonsuit. Murks Y Benjamin, 5 M. & W. 565; 2 M. & R. 225; 9

L. J., M. C. 20; 3 Jur. 1194. A room in which musical performances are regularly exhibited, though it is not kept or used solely for that purpose, is within the statute, and requires a licence. Bellis v. Beale, 2 Esp.

A room used for public music or dancing is within the statute, although it is not exclusively used for those purposes, and although no money is taken for admission; but the mere accidental or occasional use of a room for either or both those purposes will not be within the statute, Gregory v. Tuffs, 6 Car. & P. 271; 1 M. & Rob. 313. S. P., Gregory v. Tavernor, 6 Car. & P. 281.

age within the meaning of that statute. It.

— Evidence that House Unlicensed.]—Proof that there is nothing painted on the building which he gratuitously allowed to be described by the content of the c facie evidence in an action for penalties that it is unlicensed. Ib.

- Essential part of Entertainment. - A local act in language very similar to 25 Geo. 2, c. 36, s. 2, enacted that "no house, room or other place within the borough shall be kept or used for public dancing, music or other public entertainment of the like kind" without a licence :-Held, that to bring a case within the statute, the music and dancing must be an essential part of the entertainment, and not merely accessories Music and Dancing.]-The statute 25 Geo. 2, to it. It is not necessary that the dancing should

Where dancing is not the principal part of a public entertainment, even though it is the principal part of a particular performance in the entertainment, if that particular performance be not a principal part of the entertainment, a dancing licence is not required under 25 Geo. 2, c. 36, s. 2. Tay v. Bignell, 1 Cab. & E. 112.

Refreshment Room.]—A. kept a room which was used as a supper room and place of general refreshment, there being at the end of it a raised platform, on which stood a piano, and where songs were constantly sung. Programmes of the performance were laid about in different parts of the room. The company was respectable, and no money was paid for admission, nor any extra charge made for the articles consumed there. An action having been brought for a penalty under 25 Geo. 2, c. 36, the judge directed the jury to say whether the room was used for the purpose of supplying refreshments in the manner of an hotel, the music and singing being incidental merely, or whether it was used princi-pally for musical performances; and ultimately he directed them to consider whether the room was used for both purposes, in which latter case the informer would be entitled to the verdict. The jury found that the room was used for the purpose of an hotel, and found a verdict for A. : -Held, that although the verdict might be against the evidence, there was no misdirection.
Hall v. Green, 2 C. L. R. 427; 9 Ex. 247; 23 L. J., M. C. 15.

Held, also, that it would have been a misdirection to state that the question was, whether the keeping of the room as an hotel was the principal

or secondary object. Ib.

- For Purpose of Instruction. -A room kept by a dancing-master for the instruction of his scholars and subscribers, and to which persons are not indiscriminately admitted, is not. Bellis v. Burghall, 2 Esp. 722.

\_\_\_\_ Tavern and Hotel.]—The statute extends to licensed taverns and hotels; and it is no defence that the company frequenting the performances was respectable, or that the admission money was not received for the benefit of the keeper of the house. Green v. Botheroud, 3 Car. & P. 471.

The rink was inclosed by a wall, and was partly roofed with canvas and partly open to the air. It was open for skating in the daytime and in the evening. In the daytime there was no music. In the evening a band played operatic and dance music while the public skated. The defendant had no licence under 25 Geo. 2, c. 36, s. 2:— Held, that he might properly be convicted of keeping a place for public entertainment of a like kind to music and dancing without a licence. Reg. v. Tucker, 46 L. J., M. C. 197; 2 Q. B. D. 417; 36 L. T. 478; 25 W. R. 697; 13 Cox, C. C. 600.

Licence granted for Music only. ]-Under 25 Geo. 2, c. 36, s. 2, which empowers justices to licence a house for public dancing, music or other bawdy-house, in consequence of which he

B. & S. 474; 34 L. J., M. C. 116; 11 Jur. (N.S.) house, with a music licence only, is liable to the 636; 13 W. R. 679. remains not keeping a noise witcome a netwerth in the permits public dancing in the house. Brown v. Nagent, 41 L. J., M. C. 166; L. R. 7 Q. B. 588; 26 L. T. 880; 20 W. R. 989—Ex. Ch.

> - Revocation of Licence. - By a local act for the government of Cardiff, no house or room shall be kept or used for public dancing or music without a licence from the justices on their general annual licensing day, and any house or room so kept and used without such licence shall be deemed a disorderly house, and the person occupying or rated as the occupier of the same, shall, on conviction before any two justices, be liable to a penalty. An inscription on the door or entrance is to be affixed, "Licensed pursuant to act of parliament." No house or room, although licensed, shall be opened for any of the said purposes except between the hours stated in the licence, and notice as to the inscription and the limitation of time was to be inserted in the licence. In case of a breach of these conditions the licence might be forfeited, and revoked by the justices at any subsequent annual licensing day. Provided that it shall be lawful for every person who shall think himself aggrieved by any order of such justices to appeal therefrom to the queen's bench. L. received from the justices a licence for a room in 1870, and in each subsequent year until 1873, when they refused a further renewal. The licence in 1871 contained no limitation as to time, but the others both before and after were for one year. In 1871, L. transferred all his interest in this room to H., and some of his performances were indecent. On these grounds the justices revoked the licence in 1873, and neither L. nor H. appealed. H. afterwards opened the room as before, and was convicted for so doing without a licence: —Held, that the conviction was right, Hoffman v. Bond, 32 L. T. 775.

- Grant of, by County Council. - See LOCAL GOVERNMENT.

Suing for Penalties.]—A person keeping a house open is (at all events during the same licensing year) liable only to one penalty, Garrett v. Messenger, 36 L. J., C. P. 337; L. R. 2 C. P. 583; 16 L. T. 414; 15 W. R. 164; 10 Cox, C. C. 498.

Sect. 13 of 25 Geo. 2, c. 36, which gives a — Skating Rinks.]—The defendant kept a form of declaration, extends, twenty miles of London formers. Green v. Hotherwood. 3 Car. & P. 471. formers. Green v. Botheroyd, 3 Car. & P. 471.

### 2. Brothels.

Meaning of. ]-A place where one woman has been accustomed to receive men is not a brothel, within the meaning of s. 13 of the Criminal Law Amendment Act, 1885. Singleton v. Ellison, 64 L. J., M. C. 123; [1895] 1 Q. B. 607; 15 R. 201; 72 L. T. 236; 43 W. R. 426; 18 Cox, C. C. 79:59 J. P. 119.

Prosecution for-Right of Informant to Reward.]-In an action upon 25 Geo. 2, c. 36, by one of the two inhabitants who has given information to the parish constable, of A. keeping a public entertainment of a like kind, the justices prosecuted to conviction, it is necessary, in order have a discretion to grant a licence for one of the purposes only, viz., music; and the keeper of a recover the reward of 10l. from the overseers,

that the prosecution should have been conducted; that the prosecution should have been conducted. To render persons indictable for keeping a by the parish constable, Clarkev. Rice, 1 B. & Ald. common and disorderly house, it is not neces-694; 19 R. R. 422.

In an action upon 25 Geo. 2, c. 36, s. 5, by one of the two inhabitants who had given information to the parish constable of A. keeping a disorderly house, in consequence whereof he was indicted at the next sessions and pleaded guilty, but was not brought up for judgment until some months afterwards :- Held, that A, was not convicted, "within the meaning of the statute, until sentence pronounced; and, consequently, that the action was well brought against the licensed victualler or licensed to sell beer by reoverseers who were then in office. Burgess v. Boetefeur, 8 Scott (N.R.) 194; 7 Man. & G. 481; 13 L. J., M. C. 122; 8 Jur. 621.

Held, also, that a demand upon the overseers, and a neglect or refusal by them to pay the reward, entitled the plaintiff to maintain an action that they have in fact met for purposes of prosagainst them for the penalty imposed by the act, notwithstanding no demand had been made upon

the churchwardens. Ib.

The constable, under 25 Geo. 2, c. 36, s. 5, or the overseers, under 58 Geo. 3, c. 70, s. 7, must be the real and bona fide prosecutors of the indictment, Ib,

Removal of, by Certiorari. -No indietment for keeping a disorderly house can be removed by certiorari, whether the indietment is at the prosecution of a constable, or at the instance of a private individual. Reg. v. Sanders, 9 Q. B. 235; 15 L. J., M. C. 158; 10 Jur. 1080.

— Jurisdiction of Quarter Sessions.]—There is nothing in 25 Geo. 2, c. 36, which takes away or prevents the quarter sessions for a borough from having jurisdiction to try an indictment against a person for keeping a disorderly house.

Meg. v. Churles, 31 L. J., M. C. 69; 7 Jur. (x.s.)

1308; 5 L. T. 328; 10 W. R. 62; 9 Cox, C. C. 18.

Keeping-What amounts to.]-An owner of a house, proved to be a common bawdy-house, let it out to weekly tenants, but did not appear to have got any additional rent by reason of the purposes to which the house was applied. He was frequently remonstrated with as to the manner in which the house was conducted, and called upon to abate the nuisance, and was told that unless he did so, an indictment would be preferred against him. He, however, took no steps, and allowed matters to go on as before :-Held, that he was not guilty of keeping a common bawdy-house, or of being an accessory thereto. Reg. v. Barrett, 1 L. & C. 263; 32 L. J., M. C. 36; 7 L. T. 435; 11 W. R. 124; 9 Cox. C. C. 255.

A landlord was indicted for keeping and maintaining a common bawdy-house, and a disorderly house. The house was let out in apartments to young women, by distinct takings as weekly tenants, but the landlord did not occupy any part, nor keep the key, nor reserve to himself any right of entry. The tenants so occupied the house as to cause it to be a scandal to the neighbourhood. The only profit the landlord derived Non-gratuitous Entertainment — Action for was the increased rent. Complaints were made Penalties—"Keeper"—"Person managing or to the landlord, and he well knew the use to which the apartments were applied by his tenants, but he took no steps to remove the for dancing and music on week-days in his own lodgers :- Held, that the landlord did not keep name, and let it to a Sunday lecture society in longers:—Rea, one the infinition of the latest and the letter of the latest letter of the lat

sary that the disorderly conduct should be seen from the exterior of the house. Evidence of men and prostitutes constantly meeting there for immoral purposes is sufficient to sustain the Infinitial purposes is studietine to sustain the indictment. Reg. v. Rice, 35 L. J., M. C. 93; L. R. 1 C. C. 21; 12 Jur. (N.S.) 126; 13 L. T. 382; 14 W. R. 56; 10 Cox, C. C. 155.

By a local act a penalty was imposed, recoverable before a justice, on any person keeping a shop where refreshment is sold, not being a tail to be drunk on the premises, if he knowingly permits disorderly conduct in such shop, or knowingly suffers prostitutes to meet together and remain there :- Held, that if the justice inferred from prostitutes coming together to such shop, titution or other disorderly conduct, he should, whether there has been actual disorderly conduct or not, convict the owner of the shop who has knowingly permitted this, but not otherwise. Greig v. Bendeno, El. Bl. & El. 133; 27 L. J., M. C. 294; 6 W. R. 474.

— Aiding and Abetting in keeping.]—A. was charged with aiding and abetting U. in keeping a disorderly house. A. was the head waiter in the establishment, and servant to C., and in the absence of C., against whom several warrants were out for keeping the establishment in a disorderly manner, A. acted as manager on certain nights, when it was conducted in a disorderly manner :-Held, that these facts would have been sufficient to justify the magistrate in finding A. guilty of the charge made against him : and that the existence of the relationship of master and servant between himself and C. constituted no defence to the charge. Wilson v. Stewart, 3 B. & S. 913; 32 L. J., M. C. 198; 9 Jur. (N.S.) 1130; 8 L. T. 277; 11 W. R. 640; 9 Cox, C. C. 354.

Summary Proceedings against Keeper-Procedure.]-By s. 13 of the Criminal Law Amendment Act, 1885, the directions contained in 25 Geo. 2, c. 36, s. 6, for the arrest of a person accused by two inhabitants of a parish of keeping a disorderly house, are applicable to summary proceedings under the Criminal Law Amendment Act. Rey. v. Newton, 61 L. J., M. C. 121; [1892] 1 Q. B. 648; 66 L. T. 830; 40 W. R. 688; 17 Cox, C. C. 530 ; 56 J. P. 408.

In a prosecution of a brothel-keeper under s, 13 of the Criminal Law Amendment Act, 1885, it is competent to the prosecutor either to proceed summarily under that act independently of the earlier acts, or he may, at his option, comply with the preliminary steps specified in s. 5 of 25 Geo. 2, c. 36, as amended by s. 7 of 58 Geo. 3 c. 70, and then become entitled to a reward Kirwin v. Hines, 54 L. T. 610; 50 J. P. 230.

#### 3. SUNDAY ENTERTAINMENTS.

Non-gratuitous Entertainment - Action for conducting Entertainment." |-- Where an agent of the owner of a hall obtained a licence for it person having the care, government or management of the hall, so as to be liable, under 21 Geo. 3, c. 49, to penalties in respect of entertainments, open to the public on payment, given there upon Sundays by the lessees. A person who acts as chairman at a lecture, which is found to be a public entertainment on Sunday within 21 Geo. 3. c. 49, but who has no control over the entertainment, is not a person managing or conducting the entertainment within the statute. Reid v. the entertainment within the statute. Heid v. Wilson, 64 L. J., M. C. 60; [1895] I Q. B. 315; 14 R. 94; 71 L. T. 739; 43 W. R. 161; 18 Cox, C. C. 56; 59 J. P. 516—C. A.

# DISSEISIN.

Se ESTATE.

# DISSENTER.

See RELIGION-CHARITY.

# DISTANCE.

See WEIGHTS AND MEASURES.

# DISTRESS.

[By J. RITCHIE.]

- A. FOR RENT AND CHARGES ON LAND,
  - 1. Persons Distraining.
    - a. Generally, 976.b. Mortgagees, 978.

      - e, Annuitants and Grautees of Rentcharges, 981.
      - d. Agents, 984.
    - c. Other Persons, 987.
  - 2. For what Reuts

    - a. Ordinary, 991.
      b. Rent Services, Seck, Chief and Feefarm Rents, 996.
  - 3. What Distrainable.
    - a. Chattels in Course of Trade or Manu-
    - facture, 998.

    - b. Growing Crops, 1001.
       c. Beasts of the Plough and Sheep, 1002. d. Goods of Strangers, 1003.

    - c. Fixtures, 1006.
      f. Goods of Persons becoming Bankrupt, 1007.
    - g. In other Cases, 1008.
  - 4. When to be made, 1010.
  - 5. Where to be made, 1012.
  - 6. How to be made, 1012.
  - 7. Warrant of Distress, 1014.
  - 8. What amounts to a Distress, 1015.
  - 9. Notice of Distress, 1017.
  - 10. Tender of Reut, 1018,
  - 11. Abandonment and Retaking, 1019.
  - 12. How Goods disposed of, 1020.

- 13. When Right of Distress suspended, 1024. 14. Fraudulent Removal, 1025.
- 15. Injunction restraining Distress, 1030.
- 16 Second Distress, 1032.
- 17. Other Matters relating to, 1033.
- B. DAMAGE FEASANT.
  - Animals—See Animals.
  - 2. Other Things, 1036.
  - 3. For Injury to Chattels on the Land, 1036.
- C. INDEMNITY ON DISTRESS, 1036.
- D Costs of Distress, 1038.
- E. REMEDY FOR WEONGFUL, IRREGULAR OR. EXCESSIVE DISTRESS.
  - 1. When and How Maintainable, 1039.
  - 2. Pleadings in Actions, 1044.
  - 3. Evidence, 1044.
  - 4. Damages, 1045.
- F. EFFECT AS A DISCHARGE, 1047.
- G. FOR POOR RATES-See RATES.
- H. FOR TITHE RENT-CHARGES-See ECCLE-SIASTICAL LAW (Tithes.)
- I. FOR HIGHWAY RATES-See WAY.
- J. POUND AND POUNDAGE-See ANIMALS.
- K. PROTECTED IN BANKRUPTCY-See BANK-PUPTOV
- L, ON WINDING-UP OF COMPANIES-See COM-PANY.
- A. FOR RENT AND CHARGES ON LAND. 1. Persons Distraining.

## a. Generally.

Must have Reversion of Interest.]-Where A, being seised in fee, leased premises to B. for 61 years, and afterwards granted a lease to C. of the same premises, to commence at the expiration of the 61 years:—Held, that by the lense to C., A. did not part with his reversion, so as to disentitle him to distrain for rent due from B. under his lease. Smith v. Day, 2 M. & W. 684; M. & H. 135; 6 L. J., Ex. 219.

Reversion severed.]—The plaintiff was tenant to six in number, who were joint-tenants of the reversion. Four executed a conveyance of the reversion to H.; the other two did not execute it. Afterwards the six distrained the plaintiff's goods for rent due to the six before the conveyance :- Held, that by the severance of the reversion the right to distrain for this rent was gone. Staveley v. Alevek, 16 Q. B. 636; 20 L. J., Q. B. 320; 15 Jur. 628.

Assignment of Term. ]-A lessee for years, who assigns his term, cannot distrain for rent, but must bring his action on the contract.

v. Cooper, 2 Wils, 375.
A., lessee of two farms, agreed with B. that he should have them during the leases; B. to remain tenant to A. during that period; and at the leaving the farms, B. was to be paid for the fallows and dung. B. took possession, and paid one year's rent to A., who afterwards distrained for your intervent. for rent in arrear :- Held, that he was not

Taunt. 593; 20 R. R. 575.

One who had a term which expired on the a demise for the whole of his term, he had no distrain. Flesher v. Trotman, 6 L. T. 218—right to distrain. Freeze v. Corrie, 5 Bing. 24: | Ex. Ch. | Ex. Ch. |

Where a lease came into the hands of the original lessor, by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sun over and above the rent annually, towards the goodwill already paid by such assignce"; such agreement operated as a surrender of the whole term. The sum in the agreement is considered as a sum to be paid annually in gross, not as rent, and the assignee cannot distrain either for that or for the original rent; but he has a remedy by action for the sum reserved for the goodwill. Smith v. Mapleback, 1 Term Rep. 441; 1 R. R. 247.

By a deed of settlement a mortgage term of 1,000 years was created, and lands settled to R. for life, subject thereto, with divers remainders over. The deed contained a power to R. to lease for ten years, or for seven years, to commence from her death. She demised under the power for seven years from her death, reserving the rent to the person who should be entitled for the time being to the freehold or inheritance :-Held, that the trustees of the term for 1,000 years were the parties entitled to the reversion; and consequently, that their assignee might distrain on the lessee. Rogers v. Humphreys, 4 A. & E. 299; 5 N. & M. 511; 1 H. & W. 625; 5 J., K. B. 65.

Held, also, that the fact of the trustees having joined in the ejectment against the lessee, which was still pending, did not prevent such distress.

Tenant from year to year Underletting. ]-A tenant from year to year, underletting from year to year, has a reversion which entitles him to distrain. Curtis v. Wheeler, M. & M. 493.

Lessee against Agent in Occupation. -- Where A, took a lease in writing, in his own name, of premises, and subsequently occupied part only, and paid rent for so much as he occupied to B., as whose agent he, in fact, took the lease :-Held, that B. might distrain for the part so occupied, and that A. was precluded in replevin from disputing his title. Clarke v. Waterton, 2 M. & Rob. 87; 8 Car. & P. 365.

Husband and Wife. ]-The wife of a defendant in replevin had, at the time of her marriage, the equity of redemption in the locus in quo, which was then settled to her separate use. She was allowed to enjoy the property, and she and the defendant (or he in her name) let it to the plaintiff, she receiving the rents until she died. The defendant then distrained for rent subsequently accruing:—Held, that it was not lawful for him to do so, and that he was liable in replevin. Howe v. Scarrott, 4 H. & N. 423; 28 L. J., Ex. 325.

Apportionment of.]-C. occupied two parcels of land upon an understanding that he should gagee to the tenant to pay the rent does not

entitled so to do, as the agreement operated as let off a portion of it when he could. He paid the an absolute assignment of all A.'s interest in the rent agreed upon for more than a year, and he Parmenter v. Webber, 2 Moore, 656; 8 then let off a portion of each parcel to A. and B. separately, who paid rent to D., and C, continued to hold the residue himself. The rent becoming 11th November, let the premises verbally from in arrear, the landlord distrained :- Held, that the 11th September to that day, for a certain there was evidence that the rent was apportion-rent payable immediately:—Held, that as it was able, and that the landlord was entitled to able, and that the landlord was entitled to

> No Lien on Replevied Goods. - Goods taken on distress for rent, and replevied, the distrainor has no lien on the goods, but is left to his remedy on the replevin bond. Bradyll v. Ball, 1 Bro. C, C, 427.

#### b. Mortgagees.

Tenant in Possession under Lease prior to Mortgage. ]-A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards; and he may distrain for it after such notice. Moss v. Gallimore, 1 Dougl. 279.

If a lease is granted by a mortgagor prior to the mortgage, the mortgagee has the same rights against the lessee and those claiming under him that the mortgagor had, and no other than he had; and his remedy must be on the lease as assignce of the reversion, so long as the lease is in existence and the tenant acknowledges his title. If, however, the lease is subsequent to the mortgage, then the mortgagee may treat the lessee and all those who may be in possession as wrongdoers, and may bring ejectment, but he cannot distrain or bring any action for the rent they have contracted to pay, as there is no re-lation of landlord and tenant between them. If the tenant chooses to pay the rent to the mortgagee, and he accepts it, a relation of landlord and tenant is created between the mortgagee and the tenant; and the remedy of the mortgagee will depend upon the particular circumstances of each case. Rogers v. Humphreys, 1 H. & W. 625; 4 A. & E. 299; 5 N. & M. 511; 5 L. J., K. B. 65.

A lessee for a term sublet a house for a period less than his term to the plaintiff at a rent reserved and made payable by equal quarterly payments on the four usual quarter days. He after-wards mortgaged the premises to the defendants as security for money advanced by them for a term less than his own, but greater than the plaintiff's. Without knowledge of this mortgage, but after it was entered into, the plaintiff paid his lessor a sum of money for rent before it was due. Between the payment and the rent day the defendants gave the plaintiff notice of their mortgage, and required him to pay them the rent due upon his lease. Afterwards they distrained for this rent:—Held, that this payment was no discharge of the plaintiff's liability to pay rent when it became due, and therefore the defendants were justified in distraining.

Do Nicols v. Saunders, 39 L. J., C. P. 297;
L. R. 5 C. P. 58; 22 L. T. 661; 18 W. R.

- Under Lease subsequent to Mortgage.]-Where a lease is granted by a mortgagor after the date of the mortgage, notice by the mortfor rent in arrear after the notice. Esnas v. Elliott, 1 P. & D. 256; 9 A. & E. 342; 1 W.W. & H. 144; 8 L. J., Q. B. 51.

Where, after notice, the mortgagee distrained for half a year's rent, and rent was paid by the -Held that tenant subsequently to the distress :this did not constitute a tenancy by relation back, so as to entitle the mortgagee to distrain for the rent due previously.

Mortgagor Tenant to Mortgagee. - A mortgage deed, executed by the mortgagor only, contained, in addition to the usual clauses, the following: that "for better securing the interest, the mortgagor does attorn and become tenant of the premises to the mortgagee, at the rent of 40%, payable half-yearly, so long as the principal sum shall remain secured." The mortgagor having continued in possession of the premises, and having made several of these half-yearly payments, which, however, were described in the receipts given by the mortgagee as being for interest :- Held, that the relationship of landlord and tenant existed between the parties, and that the former had the right to distrain for the amount of a half-year's arrears. v. Fritche, 3 Ex. 216; 18 L. J., Ex. 50.

By a mortgage deed it was provided that the mortgager in the event of his making default in payment of the moneys advanced to him, should immediately, or at any time after such default, hold the mortgaged premises as yearly tenant to the mortgagees from the date of the deed at a specified rent, and that they should have the same remedies for recovering the rent as if it had been reserved upon a common lease. The mortgagor having made default, the mortgagees, without having given him any notice of their intention thenceforward to treat him as a tenant, distrained, after the lapse of more than a year from default, as for a year's rent in arrear:— Held, that not having given him notice of their intention to treat him as a tenant, they were not entitled to distrain. Clowes v. Hughes, 39 L. J., Ex. 62; L. R. 5 Ex. 160; 22 L. T. 103; 18

B., in consideration of advances from his by a deed reciting that one portion was already mortgaged in fee upon trusts for the sale of the land and application of the purchase-money; and as a further security for the principal and interest for the time being due from him in respect of the advances, he attorned and became tenant to the bankers, their heirs and assigns, at and from the date of the deed, of such of the premises thereby conveyed " as were in his occupation for and during the term of ten years, if that security should so long continue, at and under the yearly rent of 800L, to be paid yearly on every 1st October in every year, the first yearly rent to be paid and payable on the 1st October then next, provided that notwithstanding anything therein contained, and without any notice or demand of possession, it should be law-ful for the mortgagees, their heirs, executors, administrators or assigns, before or after the execution of the trusts of sale therein contained, to enter into and upon the mortgaged premises or any part, and to eject B. and any tenant or person claiming or to claim under him therefrom, and to determine the term of ten years, notwith to the defendant, at the yearly rent of 150%, for standing any lease or leases that might have which rent it should be lawful for the defendant

constitute a tenancy between the mortgagee and | been granted by him." This deed was not exetenant, so as to enable the mortgagee to distrain ented by the mortgagees, the bankers, but B. continued his exclusive occupation of the premises until the mortgagees distrained upon them for arrears of rent. No rent had ever been paid: -Held, first, that the non-execution of the deed by the mortgagees was no objection to the right to distrain, as the effect of the deed was to create not a term of years but a tenancy at will. to which B. had assented by attorning and continning to occupy the premises. Morton v. Woods, 9 B. & S. 632; 38 L. J., Q. B. 81; L. R. 4 Q. B. 293; 17 W. R. 414—Ex. Ch.

Held, secondly, that after having attorned and continued so to occupy he could not object that the deed shewed that he and his mortgagees had only an equitable interest in part of the premises mortgaged, or deny that the relation of landlord and tenant subsisted between himself and the mortgagees. Ib.

Held, thirdly, that the deed was not void as against the assignees in bankruptcy of the mortgagor for want of registration as a bill of sale.

B., by deed of 23rd September, 1856, mortgaged his interest in leasehold premises, and goods therein to V. & Co., and thereby to the intent that they might "have, for the recovery of the interest accruing on the principal secured, the same powers of entry and distress as are by law given to landlords for the recovery of rent in arrear." B., attorned tenant to V. & Co. of the premises from year to year, at a fixed rent. On 18th February, 1857, he further mortgaged the same premises and goods to the defendant, the deed reserving a power of entry to the defendant, on default in payment by B. B. having made default in payment of principal and interest, the defendant, on 27th October, 1858, paid off V. & Co.'s mortgage, and took an assignment of it from them, containing the usual nower of attorney. On the same day the defendant took possession of the premises, B, continuing in occupation, with notice that the defendant had done so. On 12th November, 1858, the defendant gave B. notice to quit, with which he did not comply. On the following 20th November the defendant entered and seized and sold goods on the premises, for payment of interest by way bankers, conveyed to them two pieces of ground of rent in arrear due to V. & Co. before the assignment of the mortgage :- Held, that the attornment clause in the deed of 23rd September, 1856, did not justify such seizure and sale. That such clause created a tenancy, but gave V. & Co. a right to distrain only so long as such tenancy continued, and that such tenancy was put an end to by the assignment from V. & Co. to the defendant. Brown v. Metropolitan Counties Life Insurance Society, 1 El. & El. 832; 28 L. J., Q. B. 236; 5 Jur. (N.S.) 1028.

Held, also, that such clause did not support a plea of leave and licence, for that the defendant could not justify as the servant of V. & Co., even if the clause amounted only to a personal licence to V. & Co. to seize chattels, such licence not being transferable, and V. & Co. having no power to act under it after the assignment.

- Sufficiency of Averments in Plea-Trespass.]-Trespass to goods. Plea, that by a deed, made in 1847, between Q, and the defendant, who was possessed of premises for an unexpired term, that Q. should hold the premises as tenant at will to distrain, as landlowls may, for rents reserved, on leases for years; that Q, held the premises under the deed; that three years and a partier arrears of rent became due during the time Q, held the premises as such tenant, and the defonant was possessed of them as a foresaid; and that the defendant distrained the goods for rent. The plaintiff set out the deed, from which it appeared that Q, having become, in 1847, the elsesse of the premises under M. for twenty-one years, wanting one day, and having borrowed money from the defendant, demised the premises to the defendant by way of mortgage at a peppercorn rent, and that the defendant redemised the same to Q, at a yearly rent of 1504, with power of distress:—Held, that the plea was bad in not shewing such an interest in the premises on the part of the defendant as entitled him to distrain. Pinhorn v. Sonster, 8 Ex. 763; 22 L. J. Ex. 18; 16 Jur. (8.8.) 1001; 1 W, R. 386.

For Arrears of Interest.]—A mortgager in possession may give a mortgage in fee a power to distrain for interest in arrear. Chapman v. Beecham, 8 G. & D. 71; 3 Q. B. 723; 12 L. J., Q. B. 42; 6 Jur. 968.

A mortgagee, under a power in a mortgage deed, embling him to distrain for arrears furcrest "in like manner as for rent," distrained after the date of the demise in the declaration, but for arrears due before such demise, the mortgagor having (without any express provision in the deed enabling him to do so) continued in possession:—Held, that such distress did not amount to a recognition of the mortgagor as tenant, so as to disable the mortgage from bringing ejectment. Doe d. Wilkinson v. Goodier, 10 Q. B. 957; 16 L. J., Q. B. 485.

Mortgagor on behalf of Mortgagoe.]—If a lessor, having mortgaged lits reversion, is permitted by the mortgagoe to continue in the receipt of the rent incident to that reversion, he, during such reversion is presumptione juris authorised, if it should become necessary to realise the rent by distress, and to distrain for it in the mortgagoe's name as his bailiff. \*Trent v. \*Linnt\*, 9 Ex. 14; 22 L. J., Ex. 318; 17 Jur. 899; 1 W. R. 481.

Assignee of Equity of Redemption on behalf of Mortgages.]—Where a mortgage by demise has been paid off by the assignee of the equity of redemption, who takes from the mortgages an undertaking to exeeute a transfer of the mortgage, there is an implied authority to the assignee of the equity of redemption to distrain in the name of the mortgages. Suelt v. Einelt, 13 C. B. (N.S.) 351; 7 L. T. 47; 1 J. W. R. 341.

In Possession. ]—A mortgagee in possession is not chargeable as for wilful default, in declining to defend an action of replevin brought by the owner of property which was on the premises, and seized under a distress for rent Levied by the mortgagee. Cocks v. Gray, 1 Giff, 77; 26 L. J., Ch. 60; 3 Jur. (N.S.) 1115; 5 W. R. 749.

#### c. Annuitants and Grantees of Rentcharges.

Rent-charges binding a Legal Interest in Land.]—An annuitant may distrain for arrears, though a term is vested in himself to secure the payment. Fairfax v. Gran, 2 W. Bl. 1326.

A distress may be taken for arrears of a rentcharge, created by will; although the testator does not in terms give a power to distrain. That power is a consequence drawn by law from the rent-charge. *Rodham v. Berry*, 4 L. J. (o.s.) K. B. 202.

A devise of lands to A, for life, remainder to B, in fee, subject to and charged with the payment of 20*l*. a year to C, during her life, to be paid by A, as long as she should live, and after her decease to be paid by B, is a charge on the land, for which C, may distrain. Buttery v. Robinsan, 3 Bing, 392; ‡ L. J. (0.8.) C, f. 108; 28 R, R, 656.

A mortgagor who had the equity of redemption in fee, and the mortgagee the legal owner of lands in fee simple, conveyed the lands to and to the use of second mortgagees and their leirs, with a power of sale. There was a provise that, in the event of the second mortgagees, or of any one claiming under them, entering under that power, the land should theneforth for ever be charged with the payment to the mortgagor, his heirs and nesigns of an annual sum of 40th recoverable by distress. The deed was not executed by the second mortgagees. The latter in default of payment, entered the lands and sold them to A, subject to this annual sum. A, entered, and until he sold the land to the plaintiff, paid the mortgagor this annual sum. A land was conveyed by A, to the

plaintiff, so far as the same might be legally chargeable on or affect the lands. This rent-charge of 40th afterwards vested in the defonant, who distrained for the same, the plaintiff neglecting to pay:—Held, that the defendant was justified in distraining, as the rent-charge was well created and valid at law under the Statute of Uses, and that it was not void as commencing at a period too remote, and so commencing the rule against perpetuities. Gill-bertson v. Richards, 5 H. & N. 453; 29 L. J., Ex. 213; 6 Jun. (N.S.) 672—Ex. Ch.

Ex. 215; 6 Jur. (N.S.) 612—Ex. Ct.
Replevin for taking goods and standing corn.
Cognisance, that by deed of 25th September,
1806. A. granted to B. an annuity, charged on the premises, with power to enter and distrain for the arrears and the distresses "to detain, manage, sell and dispose of, in the same manner in all respects as distresses for rents reserved on leases for years," and that C. as B.'s bailiff entered and distrained for arrears of that aunuity. Plea in bar, that by a (previous) deed of 7th May, 1806, A. granted to D. an annuity charged on the (same) premises; and for better securing the payment, granted, sold and denised them to E. for 99 years with power of distress; and that arrears had accrued and were due :-Held, first, that as no entry appeared by E., the first grantee, or by any person in privity with him, after the demise of 7th May, 1806, no estate vested in him at common law by that deed; secondly, that as no election appeared by E., the first grantee, to take under that deed as a bargain and sale, pursuant to the Statute of Uses, and as the plaintiff in replevin was not shewn to be other than a stranger to that deed, the court could not, at his request, make that election for E., which would defeat the distress by B. under the subsequent deed of 25th September, 1806. Miller v. Green, 2 C. & J. 143; 2 Tyr. 1; 8 Bing. 92; 1 M. & Scott, 199; 1 L. J., Ex. 51—Ex. Ch.

 created, except by a grant binding some legal; same verson, who is owner of the rent, becomes entitled to the whole legal estate in the land out of which it issues. Freeman v. Edwards, 2 Ex. 732; 17 L. J., Ex. 258.

The interest of a mortgagor in possession is not a legal estate at all, and consequently cannot support a rent-charge with powers of distress. Ib.

A grant purporting to be the grant of a rentcharge, with powers to distrain, made by a person having no legal estate in the land, may operate as an irrevocable licence by the grantor to seize such goods as may be on the land at the time the grantee seizes and to treat them as a distress : and may therefore instify the seizure of the goods of the granter himself, and give the grantee an interest in them after seizure; but it does not give any interest in the goods of the grantor before seizure, and does not justify the seizure of the goods of third persons at all. Ib.

In Lieu of Tithes.]-By an inclosure act, the tithes payable in respect of certain old inclosures were extinguished, and in lieu a corn rent substituted, which was directed to be paid for ever afterwards to the impropriator and vicar, by the person, who for the time being, should be in the possession or occupation of the land out of which the rent should be issuing; and a power of distress was given for its recovery, the same as for rent service, or other rent in arrear; for several years, part of such land remained antenanted and wholly unprofitable to the owner, who, during that time, resided else-where; the land was then demised to a tenant. who entered and brought it into cultivation :-Held, that the goods of the tenant, coming in under him, were liable to be distrained for such rent in arrear. Newling v. Pearse, 2 D. & R. 607; 1 B. & C. 437; 1 L. J. (o.s.) K. B. 140. And see Bendyshe v. Pearce, 4 Moore, 99; 1 Br. & B. 460.

By a local inclosure act titles were abolished, and yearly rents imposed in lieu, which rents it declared should be charged on the land, and should be paid at the rectory house. The rector, in addition to all present powers for recovery of tithes and compositions, was to have the same powers and remedies for recovering the yearly rents when in arrear, as by common law or statute are provided and given to landlords for the recovering of rack rent. Provision was made for the apportionment of the rent-charge on the division of the lands, which apportioned part was "to be recovered from the lands or hereditaments so charged therewith, or from the owners, in such and the same manner as the whole of the yearly corn rents" were thereby made re-coverable. The commissioner was to determine what yearly sums, according to the aggregate annual amount, were equivalent to the tithes of each proprietor's old inclosed lands within the parish, which yearly sums were to be charged upon the old inclosed lands of the proprietors as yearly rents payable thereout:—Held, that the statute did not authorise an action by the rector against the owner of inclosed lands in his parish for the nonpayment of such rent-charge. Bedford v. Sutton Coldfield, 3 C. B. (x.s.) 449; 27 L. J. C. P. 105; 4 Jur. (x.s.) 133.

Held, also, that a distress for the aggregate amount of a rent-charge imposed upon lands acquired before the act, and of a rent-charge imposed on lands acquired subsequently was illegal. Ib.

Held, however, that a distress on the occupier interest in the land, and ceases to exist when the for the amount of the whole rent-charge on all the lands in the parish of the same proprietor, though comprising lands not in the occupation of such occupier, was a legal distress. Ib.

> Under Lands Clauses Act, 1845.]—The owner of a rent-charge, granted under the Lands Clauses Act, 1845, s. 10, has no power of distress other than that given by s. 11, and it does not extend to goods which the railway company has assigned for the benefit of creditors. Eyton v. Denbigh, Ruthin and Corwen Ry., 38 L. J., Ch. 74; 16 W. R. 928.

## d. Agents.

Authority given to Tenants to pay Rent to. ]-An authority to tenants to pay rent to S., whose receipt shall be their discharge, does not entitle S, to distrain, although he receives the rent for his own benefit. Ward v. Shew, 9 Bing, 638; 2

M. & Scott, 756; 2 L. J., C. P. 58.
S., a bankrupt, received from his assignces the following memorandum: "Mr. S. having completed an arrangement with H. & Co., his assignees, for the five houses in Chequer-alley, and the arrears of rent thereon, the tenants on the respective premises are hereby authorised to pay their rents to S., whose receipt shall be their discharge":—Held, that this memorandum gave S, no anthority to distrain in the name of the assignees. Ib.

Power of Attorney to appoint. - A power of attorney was executed to H. R., which contained authority to demand and recover rents, "and one attorney or attorneys under him, H. R., to depute," &c.:—Held, that H. R. had power to authorise another to make a distress for rent. Eagleton v. Gutteridge, 11 M. & W. 465; 2 D. (N.S.) 1053; 12 L. J., Ex. 359.

Authority to Act as Bailiff-Certificate—Company.]—By s. 7 of the Law of Distress Amendment Act, 1888, no person shall act as builtiff to distrain for rent unless he is authorised to act as bailiff by a certificate in writing under the hand of a county court judge, and any person not holding a certificate under the section who levies a distress contrary to the provisions of the act is to be deemed to be a trespasser. The defendant, who was the managing director of a limited company, levied a distress upon the plaintiff's goods for rent due in respect of certain premises of which the plaintiff was tenant to the company. The defendant was not the legal owner, nor had he any statutory authority to levy the distress, and he held no certificate to act as bailiff as provided by s. 7:—Held, that as the defendant could not justify levying the distress in any other character than as bailiff to the company, and as he had no certificate, under s. 7 to act as bailiff, he was a trespasser within the meaning of the section. Hogarth v. Jennings, 61 L. J., Q. B. 601; [1892] 1 Q. B. 907; 66 L. T. 821; 40 W. R. 517; 56 J. P. 485—C. A.

Area of Authority .- A distress was levied upon a holding to which the Agricultural Holdings (England) Act, 1883, applied by a person having authority to act as a bailiff under the act from a county court judge, but not from the judge of the county court district where the holding was situate :- Held, that the enactment of s. 52-

that "no person shall act as a bailiff to levy any plaintiff to levy a distress for rent on the goods distress on any holding to which this act applies of distress on any holding to which this act applies of the plantiff is tenant for 13. The defendant unless . authorised to act as a bailff by realised 20. 11s., and deducted 61. Is, for the the judge of a country contr "—was satisfield by authority from the judge of any county that "'county court' in relation to a holding means the county court within the district 61. 1s :- Held, that the plaintiff was entitled to whereof the holding or the larger part thereof is situate." is situate." Sergeant, Ex parte, Sanders, In re. 54 L. J., Q. B. 331; 52 L. T. 516; 49 J. P. 582.

Improper Act of Bailiff.]—A landlord employed an attorney to distrain for rent, who prepared a warrant of distress, which the landford The attorney instructed the bailiff not to receive the rent, but to refer the tenant to him; and the bailiff thereupon refused a tender of the rent and expenses. In trover by the tenant for the goods distrained:—Held, that the authority given by law to the bailiff to receive the rent could not be restrained by the landlord or his attorney. *Hatch* v. *Hale*, 15 Q. B. 10; 19 L. J., Q. B. 289; 14 Jur. 459.

A laudlord authorised bailiffs to distrain for rent due to him, from his tenant of a farm, directing them not to take anything except on the denised premises. The bailiffs distrained cattle of another person, supposing them to be the tenant's, beyond the boundary of the farm. The cattle were sold, and the landlord received the proceeds:-Held, that the landlord was not liable in trover for the value of the cattle, unless it was found by the jury that he ratified the acts of the bailiffs with knowledge of the irregularity. or that he chose, without inquiry, to take the risk upon himself, and to adopt the whole of their acts. Lewis v. Read, 13 M. & W. 234; 14

L. J., Ex. 295. A landlord distraining is primâ facie liable for the act of his bailiff in taking goods privileged from distress, though they never come to his hands. But if, when he knows the circumstances, he disclaims and repudiates the act, he is not bound by it, Hurry v. Richman, 1 M. & Rob, 126.

A landlord gave a warrant to a broker to distrain the chattels of his tenant for rent due from him as tenant of a house. The broker, after taking the furniture, removed a shed, used as a workshop, and sold the materials, as well as a copper, which was also a fixture. The landlord received the proceeds, but without knowledge that any portion thereof had been derived from property illegally seized:—Held, that the landlord was not liable in trespass. Freeman v. Rosher, 13 Q. B. 780; 18 L. J., Q. B. 340; 13 Jur. 881.

- Collateral Tortious Act. ]-The defendant delivered a warrant to bailiffs to levy a distress The tenant and others resisted the for rent. distress, and in the affray one K. was killed by the bailiffs or those assisting them. There was no evidence that the defendant authorised the bailiffs to distrain in an illegal manner :- Held, that the illegal manner in which the distress was effected did not render the defendant liable in an action under Lord Campbell's Act; that K.'s death was caused by an act collateral to the distress, and was not expressly or impliedly the result of the authority given to the bailiffs. Kinsella v. Hamilton, 26 L. R., Ir. 671.

costs and charges of distress, which was more than is allowed by 57 Geo. 3, c. 93; the tenant y intractive from the planes of any county on the plantiff paid his county court' in relation to a holding excessive distress, and the plantiff paid him recover from the defendant the amount the plaintiff had paid the tenant in satisfaction of his claim for excessive distress. Megson v. Mapleson, 49 L. T. 744; 32 W. R. 318.

> False Representation as to Right to Distrain by. |-Action against husband and wife for falsely representing to the plaintiff (a bailiff) that the wife was entitled to distrain certain goods for rent in arrear, whereby the plaintiff, who had distrained, was made the defendant in a replevin snit, and obliged to pay certain sums of money. Mrs. B. (the wife) signed a warrant of distress for rent, supposing herself entitled to do so, and banded it to the plaintiff who acted upon it, and had thereby been damnified, the legal estate in the property distrained upon not being in Mrs. B., but in her trustees :-Held, that it was properly left to the jury to say whether Mrs. B. signed the warrant in error or fraudulently; and that, the jury having found that she signed it in error and not fraudulently, the verdiet was properly entered for the defendants. Rawlings v. Bell. 1 C. B. 951; 14 L. J., C. P. 265; 9 Jur. 973. See Liverpool Adalphi Loan Association v. Fair-hurst, 9 Ex. 422.

Alleging Distraint was for Rent due to himself.]-The right of a person to do an act with regard to the property of another depends upon the authority or right which he really has to do the act, and not upon that which he says he has. Therefore, if a person having anthority to distrain for rent due to another, says at the time that he distrains for rent due to himself, he may nevertheless justify as bailiff of the other. Trent v. Hunt, 9 Ex. 14; 22 L. J., Ex. 318; 17 Jur. 899: 1 W. R. 481.

Exceeding Authority.]—An attorney distraining upon a tenant whom he had put into possession on the part of the owner, and contrary to an agreement he supposed he had authority in law to make in the owner's name, but which he had not, is not liable in trespass. Ovenham v. Smythe, 2 F. & F. 220. See S. C., 6 H. & N. 690; 31 L. J., Ex. 110.

By Mortgagor in his own Name. |- A mortgagor in possession has, in the absence of interference by the mortgagee, an implied anthority from the mortgagee to distrain upon the tenant of the mortgaged property for the rent due in respect thereof; and, although it may be necessary for the mortgagor to justify the distress as bailiff of the mortgagee, it is not necessary that the distress should be made in the mortgagee's name. Reece v. Strousberg, 54 L. T. 133; 50 J. P. 292.

Percentage-Who entitled to,]-In distress for rent under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), the landlord, and not Liability of Balliff to compensate Land-nder s. 49, and is therefore entitled to the lord.]—The defendant was employed by the "percentage" referred to in the 2nd schedule to

In a distress for rent the bailiff and not the landlered is entitled to the percentage fee for "levying distress" specified in the 2nd schedule to the Agricultural Holdings (England) Act, 1883. Conde v. Johns (17 Q. B. D. 714) dissented from. Philipps v. Rees, 59 L. J., Q. B. 1; 24 Q. B. D. 17; 61 L. T. 713; 38 W. R. 58; 54 J. P.

### e. Other Persons.

Receivers of the Court of Chancery.] - A receiver appointed by the court of chancery has a right to distrain for rent, without any special authority from the court for that purpose, Bennetty, Robins, 5 Car. & P. 379. S. P., Brandon

v. Brandon, 5 Madd. 473.

In replevin a defendant made cognisance as bailiff of W. for rent in arrear from the plaintiff under a demise from W.; on the production of the lease under which the plaintiff held, W. was described as a receiver appointed by the court of chancery, and the rent was made payable to him or any future receiver:—Held, that W. was entitled to distrain for rent in arrear, and that the plaintiff was estopped by his own deed from pleading non tenuit. Danser v. Hustings, 12 Moore, 34; 4 Bing. 2; 5 L. J. (0.s.) C. P. 3; 29 R. R. 740.

. An attornment by a tenant of land to a re-ceiver appointed by the court of chancery to collect the rents, and payment of rent to such receiver, create a tenancy by estoppel between the tenant and the receiver, but do not enure to enable the person who is found ultimately to have the legal title to the land to treat the tenant as his tenant, and to distrain for rent. Erans v. Mathias, 7 El. & Bl. 590; 26 L. J., Q. B. 309; 3

Jur. (N.S.) 793.

- Outgoing Tenant-Sale under the Court.] -A farm was sold under the direction of the court, subject to such tenant-right as the outgoing tenant should possess. The day for completion was the 29th September, and the purchaser was on payment of his purchase money to be let into possession as from that date, and to pay all outgoings after that date. The purchase-money was paid, and the purchaser let into possession on the 13th October, but no conveyance had been executed. The property was in the occupation of a tenant whose tenancy determined on the 29th September. The rent which then became due not having been paid, the receiver on the 24th October, at the instance of the persons having the legal estate, distrained upon certain hay and straw produced during the last year of the tenancy. Under the tenancy agreement, the tenant was bound to leave on the premises hay and straw remaining unconsumed, receiving an allowance therefore at the spending or consuming price; he was also bound to (inter alia) stack corn and grain and hay, and for that purpose was to be allowed, so far as necessary the use of the barns and yards until the 25th March following the expiriation of the tenancy. The purchaser moved to restrain the receiver from remaining in possession of or selling the hay and straw distrained :- Held, that the persons who had the legal estate had a right at law to distrain, but that in equity they must be regarded

the act. Coole v. Johns, 55 L. J., Q. B. 475; allowed to exercise their legal right in such a way 17 Q. B. D. 714; 55 L. T. 290; 85 W. R. 47; 51 as to prejudice the purchaser. Powers, In re. J. P. 21. (1998) W. R. L. 1998; S. P. S. 1998; S. 1998; S. P. S. 1998; S. 1998; S. P. S. 1998; S. 1998; S. P. S. 1998; S. 1998;

Other Receivers.]-By a deed executed contemporaneously with a mortgage which it recited, the mortgagor and mortgagee appointed a receiver, and constituted him their agent and attorney to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver, and there was a proviso that, if default should be made in payment of the mortgage money or interest at the times appointed, the mortgagee might enter and avoid the tenancy created by the attornment. There was also a proviso that nothing therein contained should lessen the rights, powers or remedies of the mortgagee under the mortgage. On the mortgagor being found bankrupt:—Held, that the relation of landlord and tenant had been ereated between the receiver and mortgagor by the receivership deed, and that the receiver was entitled to distrain, and take the goods which belonged to the mortgagor on the mortgaged premises. Jolly v. Arbuthnot, 4 De G. & J. 224; 28 L. J., Ch. 547; 5 Jur. (N.S.) 689; 7 W. R. 532.

When property over which a person claims a right to distrain is in the hands of a receiver the court of chancery will give leave to distrain, naless it is clear that the property is not within the power of distress. Eyton v. Denbigh, Ruthin and Corwen Ry., 38 L. J., Ch. 74; 16 W. R.

Executors.]—The executor of a person seised in fee of land, and demised by him for a term of years, reserving a rent, could not distrain for arrears of rent accrued in the testator's lifetime ; for the latter was not a tenant in fee-simple of a rent, within 32 Hen. 8, c. 37, s. 1. Prescott v. Boucher, 3 B. & Ad. 849. S. P., Jones v. Jones, 3 B, & Ad, 967.

Where a distress was made by command, and in the name of a landlord, but he died before the distress was actually made :- Held, that the bailiff might make cognisance as the bailiff of his executrix, under 32 Hen. 8, c. 37, s. 1, who ratified the distress, although before probate. Whitehead v. Taylor, 2 P. & D. 367; 10 A. & E. 210; 9 L. J., Q. B. 65; 4 Jur. 247.

One of three co-executors to whom land was devised in trust agreed with the others to pay a rent for it, and entered into possession, and paid rent :- Held, that the two might distrain for rent in arrear. Cowper v. Fletcher, 6 B. & S. 464; 34 L. J., Q. B. 187; 11 Jur. (N.S.) 780; 12 L. T. 420; 13 W. R. 739.

Tenants by Elegit.]—A tenant by elegit has a right to distrain without atternment. Lloyd v. Davies, 2 Ex. 103; 18 L. J., Ex. 80.

Tenants for Life.]-Where a tenant for life, having a power to lease for twenty-one years, leased for fifty-three years to the defendant, who nine years after the death of such tenant, underlet to the plaintiff, and, in the following year, the remainderman, after giving the plaintiff and defendant notices to quit, granted the former a new lease, and received the rent due thereon for as trustees for the purchaser, and could not be six years; at the expiration of which period, the defendant, who had acquiesced in the transaction and B., and C. had therefore a right to distrain during the interval, distrained on the plaintiff's for a molety of the rent, the effect of the repregoods for six years' rent :-Held, that such distress was illegal, and that, after such acquiescence, the plaintiff might plead non tenuit to the defendant's avowry under the lease which the plaintiff accepted from him, and thereby deny the title of the party under whom he derived possession. Neave v. Moss, 8 Moore, 389; 1 Bing, 360; 2 L. J. (o.s.) C. P. 25; 25 R. R. 650.

Overseers and Churchwardens. ]-The 59 Geo. 3, c. 12, s. 17, enacts, that all buildings, lands, &c., purchased or taken on lease by the churchby the authority and for the purposes of that act, shall be conveyed, demised, &c., to the churchwardens and overseers of every such parish and their successors, in trust for the parish; and such churchwardens and overseers are empowered to take and hold in the nature of a body corporate all buildings, lands, &c., belonging to such parish:—Held, that the act made the churchwardens and overseers a corporation of a peculiar kind, differing from ordinary corporations, the object of it being the care and proper management of the parochial property, and that it was competent for any one of the churchwardens or overseers to authorise a distress for rent in arrear, Gouldsworth v. Knights, 11 M. & W. 337; 12 L. J., Ex. 282.

Joint-tenants.] - One of two joint-tenants may demise his part to the other, with the usual incidents of a reversion and right to distrain. Cowper v. Fletcher, 6 B. & S. 464; 11 Jur. (N.S.) 780 ; 12 L. T. 420 ; 13 W. R. 739.

One of several joint-tenants may sign a warrant of distress, and appoint a balliff to distrain for rent due to all, if the others do not forbid him; and if, when applied to, they merely decline to act, that will not prevent him from proceeding. Robinson v. Hoffman, I M. & P. 474; 4 Bing, 562; 3 Car. & P. 284; 6 L. J. (o.s.) C. P. 113; 29 R. R. 627.

A rent-charge may be divided by will, or by deed operating under the Statute of Uses, so as to make the tenant liable, without attornment, to several distresses by the devisees or cestuis que use, Ricis v. Watson, 5 M, & W. 255; 9 L. J., Ex. 67.

By a deed of the 7th of August, 1832, a farm was conveyed to A. for life (subject to a term of 1,000 years), with power to lease for three lives, with a remainder over, which ultimately become vested in B. and C. The term of 1,000 years was created for the securing 3,000l, and was at the time of such settlement vested in two trustees, one of whom was A., the tenant for life. In exercise of the leasing power, A. granted a lease of the farm for three lives, under which lease the plaintiff became tenant, subject to the rent thereby reserved, and which rent was paid by the plaintiff to B. and C. (or to R. and D., their attorneys) upon their coming into possession of the property. Subsequently R. and D., as the attorneys for B. and C., wrote to the plaintiff, stating that the legal estate under the term for 1,000 years was in S., and directing him to pay the rent to S.; and in consequence of that communication, the plaintiff allowed S, to recover judgment against him in an action for rent under the lease. B. and C. afterwards distrained for rent as due to them, whereupon the plaintiff brought replevin:—Held, that, as the term of 1,000 years had (as to one moiety) merged in A. | Ex. 6.

sentation by R. and D. would not estop B. and C. from recovering rent which the plaintiff had not paid in consequence of such representation, or had not made himself liable to pay under the judgment obtained against him by S. Greenish v. White, 11 C. B. (x.s.) 209; 31 L. J., C. P. 93; 8 Jur. (N.S.) 563.

Tenants in Common.]—A tenant in common, demising his share to his companion, may distrain the goods and chattels of such companion. Brennan v. Hood, 4 Ir. C. L. R. 332.

A terre-tenant, holding under two tenants in common, cannot pay the whole rent to one, after notice from the other not to pay it; and if he does, the other tenant in common may distrain for his share. Harrison v. Barnby, 5 Term Rep. 246; 2 R. R. 584. And see Die d. — v. Mitchell, 1 Br. & B. 11.

Land was demised by four persons (whose original title did not appear), at one entire rent, to be divided and paid separately, in equal portions; and one of the four distrained upon the tenant for her own share of the rent :- Held, that the distress was regular, for whatever might have been the interest of the landlords as between themselves, as between them and the terretenant they were tenants in common, and entitled each to a separate distress. Whitley v. Roberts, McClel, & Y. 107.

Co-Heirs in Gavelkind,]-One of several co-heirs in gavelkind may distrain for rent due to himself and his co-helts, without an express authority from them. Leigh v. Shepherd, 5 Moore, 297; 2 Br. & B. 465; 23 R. R.

Railway Company-Tolls.] - A tender of a certain sum as being "all that is due" is bad, and a demand of a certain sum, made up of two sums claimed on two distinct grounds, is not a demand of either; and, therefore, where a railway company entitled to distrain for tolls, demanded a sum in gross made up of two sums, the one due for tolls, the other not so due, and the party tendered the amount due for tolls as being all that was due :-Held, that the comprecluded by the tender from recovering the toll, Field v. Newport Ry., 27 L. J., Ex. 396; 3 H, & N. 409.

For Duties-Ramsgate Harbour Act. ]-By the Ramsgate Harbour Act, certain duties are to be paid by the master or owners for every ship or vessel of a certain burthen passing from, to or by Ramsgate. By the act, masters or owners eluding payment shall stand charged and be liable to the payment of the same, and the same shall be levied and recovered by the same method. by which fines and penalties are by that act recovered, namely, by distress. The defendant, against whom the action was brought for the duties under the act, was the owner of a vessel which, during the year, made frequent voyages in ballast to Jersey, bringing back cysters which he laid in beds at Milton:—Held, that he was liable to be sued under the statute for the duties, and that the remedy by distress was merely cumulative. Shepherd v. Hills, 11 Ex. 55; 25 L. J.,

## 2. FOR WHAT RENTS.

#### a. Ordinary.

Demise must be Certain.]—A landlord cannot distrain unless there is an actual demise at a specific rent. Dunk v. Hunter, 5 B. & Ald. 322; 94 R R 390.

A., by a contract in writing demised to B., at a yearly rent of 1451, from the 14th May, 1851, premises, including a cottage occupied by C., at the rental of 5l. a year. B. took possession of all the premises included in the demise except the cottage, as C. refused either to go out or attorn to B. Before the day fixed for the first half-yearly payment of rent, A. and B. verbally agreed that A. should receive from C. some arrears of rent, and that A. should pay B. 70l. on the 14th November, 1851, and 70% on the 14th May, 1852:—Held, that this was a new demise, and that A, was cutitled to distrain for the 701, due on the 14th November. Watson v. Ward, 8 Ex. 335; 22 L. J., Ex. 161; 1 W. R.

An owner of a factory, consisting of several rooms, was in the habit of letting standings therein for lace-machines, himself supplying the power for working them, there being no demise of the room :-Held, that the weekly payments could not be distrained for as rent. Handwork v. Austin, 14 C. B. (N.S.) 634; 32 L. J., C. P. 252; 10 Jur. (N.S.) 77; 8 L. T. 429; 11 W. R. 833.

A proprietor of a house, and of a marl pit and brick mine, demised the house by an unwritten agreement to D, from a day named; and it was at the same time agreed between them, without writing, that D. should take the marl pit and bricks that he made. D. took the marl and made bricks accordingly, and paid the stipulated sums for a time, but they afterwards fell into arrear :- Held, that the agreement for the marl pit and brick mine was a demise of the land from year to year, at a rent capable of being ascertained with certainty, and for which, therefore, the lessor might distrain. Daniel v. Gracie, 6 Q. B. 145; 13 L. J., Q. B. 309; 8 Jur.

Half a room in a factory partitioned off from the rest, with a supply of sufficient steam power to drive certain lace-machines, was let to A. at a fixed annual rent, subject to deductions for hindrances to the working of the steam-engine: -Held, a sufficient demise to give a right of distress. Selby v. Greaves, 37 L. J., C. P. 251; L. R. 3 C. P. 594; 19 L. T. 186; 16 W. R.

A tenant of a small labourer's cottage, standing upon a close containing more than an acre of land, which was partly cultivated as a garden and partly sown with corn or planted with potatoes, is a tenant of a farm or lands and has a claim to emblements within 14 & 15 Vict. c. 25, s. 1, and the succeeding landlord, upon the death of the preceding lessor, who is entitled by that section to recover and receive a proportion of rent from the tenant, is justified in obtaining such rent by distress. Haines v. Welch, 38. L. J., C. P. 118; L. R. 4 C. P. 91; 19 L. T. 422; U7 W. R. 163.

Lessor assigning Interest. ]-See Parmenter Webber, col. 977.

Lessor's Title Defeasible.] - A defendant having only a defeasible title, demised to the plaintiff for years. Before the first quarter's rent was due, the plaintiff was evicted by title paramount to the defendant's, and remained out of possession for some weeks: he then entered again, under a new agreement with the person who had evicted him by title paramount:-Held, that the defendant was not entitled to distrain. Hoperaft v. Keys, 9 Bing. 613; 2 M. & Scott, 760.

Agreement for Lease.]—If, under an agreement for a lease at a certain rent, the tenant is let into possession before the lease is excented, the lessor cannot, during the first year, distrain for rent, for there is no demise express or implied. Hegan v. Johnson, 2 Taunt. 148.

A, entered into an agreement with M, that a valid lease in law should be forthwith prepared, to be duly executed by A. and M., of a house and premises, to A., to hold for the term of three years at the yearly rental of 841. The agreement specified how the rent should be paid, and what covenants should be inserted in the lease, and then contained this clause; "And it is mutually agreed that these presents shall operate as an agreement only, and that, until a lease shall be executed, the rents, covenants and agreements to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced in the same manner as if the same had been actually executed," A. entered into possession of the premises, and remained till rent became due, when he fraudulently conveyed away his goods :- Held, that a tenancy was created which gave M, a right to the brick mine, and should pay quarterly, at the distrain the goods, and consequently, to follow usual quarter-lays, 8d, per solid yard for all the after and take possession of them at the place mart that he got, and 1s.8d, per 1,000 for all the to which they were taken. Anderson v. Midtand. distrain the goods, and consequently, to follow Ry., 3 El. & El. 614; 30 L. J., Q. B. 94; 7 Jur. (N.S.) 411; 3 L. T. 809.

A. entered a farm under an oral agreement for a lease for ten years; and though the time for paying rent was settled, it did not appear what was the amount to be paid; the lease was never executed, but A. occupied according to the terms of the proposed lease, and paid a certain rent for two years :- Held, that the lessor might distrain, Knight v. Bennett, 3 Bing. 361; 11 Moore, 227; 4 L. J. (o.s.) C. P. 94, 95; 28 R. R. 640, 643.

-With Condition.]-A tenant entered under an agreement, containing stipulations for a lease at 251. a year, and an engagement by the landlord to complete certain erections. The erections were never completed, and the tenant never paid any rent; but, being called on after some years' occupation, said he was ready to pay what was due, provided the erections were completed, and an allowance made him for the expense of some repairs :- Held, that a demise at a rent certain could not be implied so as to entitle the

landlord to distrain. Regarrt v. Portor, 7 Bing. 451; 5 M. & P. 370; 9 L. J. (0.8.) C. P. 168.

M. agreed verbally with W. to take a house of the latter, furnished, at 170. a year rent, payable quarterly and in advance. The house was furnished only in part, but W. promised that it should be completely furnished, not specifying any time. M. was let into possession within a month after the treaty. After the expiration of a quarter, W. distrained for rent. The furniture not having been sent in as proposed, M. brought trespass:—Held, that it was a question for the

iury, whether the agreement was absolute, or on advance," in an agreement of tenancy is to make condition only of the furniture being sent in ; the rent payable a quarter in advance throughthat there was evidence for the jury to find that it was conditional, and therefore that the distress was not justifiable. Meckelan v. Wallace, 7 A. & E. 54, n.: 6 N. & M. 316.

Payable in Advance.]—By an agreement for the sale of a house and land, 75L, part of the purchase-money, was payable on signing the agreement, and 1,500L, the remainder of the puragreement, and thouse, the claims many claims money, was payable, with interest, on a day certain; and after stipulating for the delivery of an abstract of title and the time within which the title should be deemed accepted, the agreement stated that, as the purchaser was to be let into immediate possession, and for the purpose of securing the due performance of the several agreements therein contained, the purchaser admitted himself to be a tenant from L. J., C. P. 48. week to week to the vendor of the hereditaments thereby agreed to be sold, at the weekly rent of 801., payable in advance :- Held, that the agreement gave a right of distress to the vendor for the sum payable as a weekly reut. Yeoman v. Ellison, 36 L. J., C. P. 326; 17 L. T. 65,

Forehand rent may be distrained for by the landlord, although he is aware that an execution is about to be put in, at the suit of a judgment creditor. Harrison v. Barry, 7 Price, 690; 21 R R 781

A landlord let premises to a tenant from the 15th of June for five years at a yearly rent of 100%, to become due and pavable in advance (if demanded) by equal quarterly payments on the 15th of September, December, March and June in every year: provided always, that if the yearly rent reserved or any part thereof shall be in arrear and unpaid for twenty-one days next after any of the days appointed for payment thereof in advance, being first lawfully demanded upon or at any time after the twenty-one days, and not paid when demanded, then the lessor shall have power to re-enter. No rent was demanded until August, 1852, when upon its not being paid the landlord distrained:—Semble, that the construction of the demise was that the rent was payable in advance, but was not to be actually paid until demanded, and therefore that the landlord was cutitled to distrain. Williams v. Holmes, 8 Ex. 861; 22 L. J., Ex. 213.

Premises were let under an agreement that the yearly rent should be 1101, from the 15th of October, 1847, and that "the rent should be payable in advance if the landlord required the At the expiration of the first quarter the landlord demanded 271, 10s, for a quarter's rent then due; and as it was not paid, he distrained for the 1101. :- Held, that after such demand he had a right to distrain for the 271, 10s., but not for the 1101. Clarke v. Holford, 2 Car. & K. 540.

It was a condition in a lease of a farm that the tenant should pay the last half-year's rent in advance, which last half-year's rent should be considered as reserved and due on the 29th September preceding, if the landlord should see cause for such demand :-Held, that the landrent, and to distrain for it at any time between the 29th September and the expiration of the tenancy, without demand previous to the 29th September. Witty v. Williams, 10 L. T. 457;

The effect of the words "rent payable quar-

out, and the landlord is entitled to payment, or, in default, to distrain for the rent of the current quarter at any time during the currency of the onarter on giving reasonable notice of his demand. The question of the reasonableness of the notice is one of fact, and must depend upon the particular of fact, and that depend upon the particular circumstances of the case. London & West-minster Loan Co. v. L. & N. W. Ry., 62 L. J., Q. B. 370; [1893] 2 Q. B. 49; 5 R. 425; 69 L. T. 320; 41 W. R. 670.

Optional Periods of Payment. |- Rent being reserved, payable quarterly, or half-quarterly, if required : the landlord, having received the rent quarterly for a twelvemonth, cannot, without notice, distrain for a half-quarter's rent. Mallam v. Arden. 10 Bing, 299; 3 M. & Scott, 793; 3

After a tenant had signed a written agreement. not under seal, for hiring premises at an annual rent, he was asked by the landlowl how he would like to pay his rent, and replied, quarterly. Quarterly payments of rent were proved. The landlord having distrained for a quarter's rent, the distress was held illegal, as the original taking was not altered, and no new terms of letting had been agreed on between the parties. Turner v. Alldan, 1 Tyr. & G. 819.

Rent not Payable till after it becomes Due-Ordinary Course of Dealing.]—By s. 44 of the Agricultural Holdings Act, 1883, a landlord can-not distrain for rent which became due for more than a year before the distress, provided that, where according to the ordinary course of dealing, payment of the rent has been allowed to be deferred until the expiration of a quarter or halfyear after the rent legally became due, for the purpose of the section the rent shall be deemed to have become due at the expiration of such quarter or half-year, and not when it legally became due :- Held, that in a case within the proviso the landlord was entitled to distrain for rent then legally due, but not yet payable according to the course of dealing, and also for rent which had become legally due more than a year previously, but had become payable according to the course of dealing less than a year previously, although the total amount distrained for exceeded one year's rent. Bull, Ex parte, Bew, In re, 56 L. J., Q. B. 270; 18 Q. B. D. 642; 56 L. T. 571; 35 W. R. 455; 4 Morrell, 94; 51 J. P. 710.

Separate or Entire Rents.]-Replevin for goods taken in a dwelling-house, and for garden produce taken in a garden, and for corn taken in a close. Avowry, as to taking the goods in the dwelling-house and the garden produce in the garden, that the defendant took the same for rent of the house and garden in arrear. Avowry, as to taking the corn in the close, that the defendant took it for rent of the close in arrear. Pleas in bar, that the defendant did not make a separate and a distinct distress in and upon the dwelling-house and garden for and in respect of the rent alleged to have been in arrear for and in respect of the dwelling-house and garden, and also a separate and a distinct distress in and upon the close for and in respect of the close: but illegally made and took one joint distress as for and in respect of the several arrears of rent in and upon the dwelling-house and garden, and terly, and always, if required, a quarter in also in and upon the close,-are bad. Phillips

In replevin, avowry, that the avowant was entitled to a rent-charge of 300L, payable halfyearly, and avows for 751., parcel of one halfyearly payment. Plea in bar, that, before the seizure, the avoyant distrained in another part of the lands out of which the rent issued, for the same half-yearly payment, and took goods enough to satisfy the whole. Replication, that the first distress was for the half-yearly pay-ment, less the 791, distrained for :- Hold, that the grantee of the rent-charge could not divide the demand, and distrain for part on one part of the land, and afterwards for the residue on the other, Owens v. Wynne, 4 El. & Bl. 579; 3 C. L. R. 766; 3 W. R. 183.

A demise not under seal, of tithes, and also of a corporeal hereditament, at an entire rent, will not justify a distress for the rent reserved. Gardiner v. Williamson, 2 B. & Ad. 336; 9 L. J.

(0.S.) K. B. 233.

Rent of Furnished Lodgings. ]-A landlord may distrain for the rent of ready-furnished lodgings. Newman v. Anderton, 2 N. R. 224.

After Notice to Quit.]—A landlord has no right to distrain for double rent upon a weekly tenant who holds over after a notice to quit. Sullivan v. Bishop, 2 Car. & P. 359.

A tenant holding over after notice to quit given by the landlord, is not liable to a distress, without some evidence of a renewal of the tenancy. Jenner v. Clogg, 1 M. & Rob. 213.

After Serving a Writ of Ejectment. ]-A landlord, having treated an occupier of his land as a trespasser, by serving him with an ejectment, cannot afterwards distrain on him for rent, although the ejectment is directed against the claim of a third person who comes in and defends in lieu of the occupier, and the occupier is aware of that circumstance, and is never turned out of possession. Bridges v. Smyth, 5 Bing, 410; 2 M. & P. 470; 7 L. J. (o.s.) C. P. 143; 30 R. R. 681.

Where there was a lease for a yearly rent payable quarterly, with a clause of re-entry in case the rent should be in arrear for twenty-one days, and the three quarters' rent was due at Michaelmas, for which a distress was put in on the 2nd October, and on the 2nd November the landlord served a writ of ejectment, there being no suffi-cient distress on the premises:—Held, that the distress affirmed the continuauce of the tenant's estate up to Michaelmas, and therefore that a half-year's rent not being in arrear at the time of the writ served, the laudlord could not recover. Cotesworth v. Spokes, 10 C. B. (N.S.) 103; 30 L. J., C. P. 220; 7 Jur. (N.S.) 803; 4 L. T. 212; 9 W. R. 436.

After erroneous Allowance of Taxes. ]landlord's receiver allowed the tenant to make a deduction in respect of a payment for land-tax every year, for seventeen years, greater than the landlord was liable to pay, the landlord knowing or having the means of knowing all the facts :-Held, that he could not distrain for the amount

v. Whitsed, 2 El. & El. 894; 29 L. J., Q. B. 164; b. Rent Services, Seck, Chief and Fee-Farm 6 Jur. (N.S.) 727; 2 L. T. 278; 8 W. R. 494. Rents.

Rent Service.]—Replevin: avowry, that the plaintiff held the land as tenant to the defendant under a demise, subject to certain rents, provisions, conditions and stipulations, that is to say, that the plaintiff should not nor would, during the continuance of the tenancy, sell any hay produced during such continuance upon the premises of the same, under the penalty of 2s. 6d. for each yard of the hay sold, to be recovered by distress as for rent in arrear; and that the plaintiff sold off the premises 800 yards of hay, contrary to the stipulations and provisions, by reason whereof 1001, being at the rate of 2s. 6d. for each yard of the hay sold, became due, and recoverable by distress :- Held, first, that the 2s. 6d. per yard was not a penalty but a rent-service, and distrainable on nonpayment, as of common right. Polllitt v. Forest (in error), 11 Q. B. 949; 16 L. J., Q. B. 424; 11 Jur. 1032.

Held, secondly, that this being in the nature of a licence by the tenant to the landlord, in whom the reversion was remaining, the right to distrain was sufficiently granted by an instru-ment not under scal. Ib. S. C., 1 Car. & K. 560.

Where a tenaut holds premises by the service of cleansing the parish church, without any pecuniary render, such service is a rent for which a distress may be made within 3 & 4 Will. c. 27, ss. 1, 8. Doe d. Edney v. Benham, 7
 Q. B. 976; 14 L. J., Q. B. 342; 9 Jur. 662.

So the service (under the circumstances) of ringing the church bell at stated hours from Michaelmas to Christmas. Doe d. Edney v. Billett, 7 Q. B. 978; 14 L. J., Q. B. 343; 9 Jur. 663.

The right of distress is not so inseparable an incident to rent service, that it cannot be postpoued. Giles v. Spencer, 3 C. B. (N.S.) 244; 26 L. J., C. P. 237; 3 Jur. (N.S.) 820; 5 W. R. 883.

Therefore where A., a mesne landlord, let premises to an under-tenant by a written agreement which provided that no distress should be made till after A. had produced the receipt of the superior landlord, and A. afterwards distrained for his rent without producing such receipt:-Held, in an action by the under-tenant against the broker who executed the distress, that A.'s right was postponed, and that the broker was liable as a trespasser. Ib.

Some time after the first agreement A, and his under-tenant agreed by parol to substitute other premises for those originally taken, to be held on the same terms, and the under-tenant entered :-Held, that the taking of the second premises was a new contract, and not an alteration of the terms

of the first. Ih.

Rent Seck.] — In replevin, the defendant avowed that Henry the Eighth was seised in fee, in right of his crown, of the shop in which, &c., and by letters-patent granted it to W. in tail male, to be held by knight's service, paying to the king an annual rent of 41. 11s. 4d. at Michaelmas in every year. The avowry traced the title to the reversion through the successive sovereigns down to Charles the Second. That he, by letters-patent (made after the 22 Car. 2, c. 6, and 22 & 23 Car. 2, c. 24, and before the 24th of June, 1672, and referring to the lettersparent services and blowed, though the receipt given erroneously allowed, though the receipt given year showed the amount paid and the smount deducted. Brandard v. Robins, 4 Bing. 11:12 Moore, 68; 5 L. J. (o.s.) C. P. 13; 29 b. 408

an indenture, for a money consideration, granted within this statute. the rent to the dean and chapter of St. Paul's, and their successors, for ever; that the rent was duly paid for three years within the space of twenty years next before the session of parliament holden in the fourth year of George the Second, and because 277, 8a, of the rent for six years, ending the 11th of October, 1845, was due and in arrear to the dean and chapter the defendant well avowed: - Held, that the rent, being reserved upon an estate, the reversion whereof was in the Crown at the passing of 22 Car. 2, e. 6, and incident to that reversion, the grant of Charles the Second did not operate under that statute, or under 22 & 23 Car. 2, c, 24. Vigers v. St. Pant's Dean, 14 Q. B. 920; 19 L. J., Q. B. 84; 14 Jar. 1017—Ex. Ch.

Held, also, that the grant by Charles the Second was good, independently of those statutes, and converted the rent service into a rent seek, which could be distrained for under 4 Geo. 2, e. 28. Ih

If a mere termor affects to grant a lease for a term exceeding his own term in duration, and to reserve an annual rent, that would operate as an assignment of his term, and there would be no estoppel between him and the party to whom he assigned, and accordingly it would be doubtful whether the assignor would have any remedy for recovering the rent, and the 4 Geo. 4, c. 28, does not give power to distrain for such a rent. Langford v. Selmes, 3 Kay & J. 220; 3 Jur. (N.S.) 859

Chief Rent. ]—The 4 Geo. 2, c. 28, s. 5, gives the remedy by distress in eases of chief rents which have not been duly paid for the space of three years within the space of twenty years before the first day of the then session of parliament. In replevin, a defendant made cognizance as bailiff of B., alleging that B., deceased, was seised as of fee in a fee-farm rent of 11.9s. 3d. issning out of the dwelling-house in which, &c., and after deducing title down to the parties under whom he made cognizance, averred that the fee-farm rent had been duly paid for the space of twenty years next before the first day of the parliament holden the 28th of January, 1727. Plea, traversing the allegation of the rent having been paid for the space of three years within the space of twenty-six years before the 28th of January, 1727:—Held, after verdict for the de-fendant, first, that it was sufficient, if, for the remain, ms., time it was same ent, in, for the space of three whole years, within twenty years before the passing of the act, the rent was paid, though those years were not consecutive. Mustice of the passing of the act, the rent was paid, though those years were not consecutive. grave v. Emerson, 10 Q. B. 326; 16 L. J., Q. B. 174; 11 Jur. 732.

Held, secondly, that the allegation of a seisin in fee of the rent was a proper description, and that it was too late after verdict to take the objection that the avowry ought to have shewn the origin of the rent. Ih.

Held, thirdly, that the rent was brought within 4 Geo. 2, c. 28, s. 5, and, therefore, might be distrained for. Ib.

Held, fourthly, that an old book of rentals which was not signed, and an account for the same years, in which the person signing debited himself in certain sums of rent received, corresponding nearly with the amount in the book, were admissible. Ib.

Bradbury v. Wright, 2 Dougl. 624,

Grantee of fee-farm rents has the same power of distress as the king had, and so may distrain on other land of the tenant, though not subject to the rent. Att. Gen. v. Coventry, 1 P. W. 306 : 2 Vern, 713.

### 3. WHAT DISTRAINABLE.

#### a. Chattels in Course of Trade or Manufacture

Horses and Carriages-At Livery.]-Horses and carriages standing at livery are not exempt from distress for rent. Parsons v. Gingell, 4 C. B. 545; 16 L. J., C. P. 227; 11 Jur. 437. S. P., Francis v. Wyatt, 1 W. Bl. 483; 3 Burr, 1498.

\_\_\_ Let to Innkeeper. ]—A landlord may dis-train horses in a stable let by his tenant to an innkeeper during races. Crosier v. Tomkinson, 2 Ld. Ken. 439.

- Sent for Sale to Coachmaker. ] - A carriage sent to a coachmaker and commission agent for the sale of carriages, for the purpose of being sold by him, is not liable to be distrained for the rent of the premises upon which it is so exposed for sale. Findon or Finden v. M'Laren, 6 Q. B. 891; 14 L. J., Q. B. 183; 9 Jur. 369.

Goods delivered to Auctioneer for Sale. ]-The privilege from distress of goods delivered to an anctioneer for sale is confined to goods on the premises of the auctioneer, and does not extend to goods sold on the premises of the owner of the goods. Lyons v. Elliott, 45 L. J., Q. B. 159; 1 Q. B. D. 210; 33 L. T. 806; 24 W. R. 296.

A sale by auction of V.'s goods on his premises having been advertised, the plaintiff delivered some plate to the auctioneer to be sold along with V.'s goods. The auctioneer placed the plate on V.'s premises, where it was distrained during the auction by the landlord for rent in arrear; Held, that the plate was not privileged, and the distress was valid. 1b.

Goods deposited on the premises of an anctioneer, for the purposes of sale, are privileged from being distrained for the rent of those premises. Adams v. Grane, 3 Tyr. 326; 1 C. & M. 380; 2 L. J., Ex. 105.

So goods sent to an auctioneer to be sold in a room hired by him from one who has no authority to let, are privileged from distress, while they are in that room for the purpose of, being sold by auction. Brown v. Arundell, 10 C. B. 55; 20 L. J., C. P. 30.

The fact of such room never having been used as an anction-room before, and only being hired for the occasion, is immaterial as regards the privilege of the goods from distress, Ib.

So goods deposited in an open yard belonging to premises in the occupation of an auctioneer for the purpose of being sold by public auction are privileged from distress. Williams v. Holmes, 8 Ex. 861; 22 L. J., Ex. 283; 1 W. R. 391.

Of Principal—In Hands of Factor.]—Goods of a principal in the hands of a factor for sale are privileged from distress for rent due from such factor to his landlord, on the ground that the rule of public convenience, out of which the privilege arises, is within the exemption of a landlord's Fee-farm Rent.]—Distress is not incident to general right to distrain; and therefore such a fee-farm rent as such except the case is brought goods are protected for the benefit of trade, Gilman v. Elton, 6 Moore, 243; 3 Br. & B. 75; 23 R. R. 567.

In Hands of Agent-"Public Trade." - Where an agent under an agreement with a firm of was entitled to carry on other agency business. but was in fact agent for only one other firm :-Weston, 1 Cab. & E. 99.

Placed in Warehouse, I-Goods landed at a wharf, and consigned to a broker as agent of the consignor, for sale, and placed by the broker in the wharfuger's warehouse over the wharf for safe custody, until an opportunity for selling them should occur, are not distrainable for rent due in respect of the wharf and warehouse; as they were brought to the wharf in the course of trade. Thompson v. Mushiter, S Moore, 254: Bing. 383; 1 L. J. (o.s.) C. P. 104; 25 R. R. 624. Corn sent to a factor for sale, and deposited

by him in the warehouse of a granary keeper, he not having any warehouse of his own, is under the same protection against a distress for rent, as if it was deposited in a warehouse belonging to the factor himself. Matthias v. Mesnard, 2

Cor. & P 353

In replevin the defendant avowed for rent in arrear as landlord of the granary or warehouse in which the goods on which he levied the distress were found. In his plea in bar to the avowry, the plaintiff alleged that the goods in question were deposited in the granary or warehouse with one W. J., the keeper or proprietor of the said premises, which were then a public granary or warehouse, to be safely kept for purposes of trade. On special demurrer upon the ground that goods merely deposited with the keeper or proprietor of a public warehouse or granary, unless he exercised a public trade or received them for the purposes of that trade, were not privileged from distress for rent. The court advised an amendment in the pleading. Farrant v. Robson, 3 L. J., C. P. 146.

Goods at Furniture Depository. ] - Goods warehoused in the ordinary course of business at a furniture depository are privileged from distress for rent. Miles v. Furber, 42 L. J., Q. B. 41; L. R. 8 Q. B. 77; 27 L. T. 756; 21 W. R. 262.

The plaintiff deposited household furniture at a depository to be warehoused at the rate of 30s. a year. At the time he thought he was depositing them with a company with whom he had had name of the company, which name was also over the directors of the company; on which the plaintiff brought an action against them :- Held, that the goods were privileged from distress, as things delivered to a person exercising a public

from distraining as landlords by having allowed themselves to be held out as the persons with whom the goods were deposited. Ib.

Ship in process of Construction for Third. Party. Goods belonging to a third party which are on the premises of a person exercising a public trade for the purpose of being dealt with in the way of such trade, are not exempt from carpet manufacturers took premises, and put his distress for rent, unless they have been sent or principal's name outside as well as his own, and delivered to the trader. A shipbuilder contracted to build a ship on premises which he held as tenant to the defendants; the ship was to be but was in fact agent tor only one oner man, a paid for by instalments at certain stages of the "public trade" so as to exempt his principal's work. After the ship had been partly paid for, woods on his premises from distress. Tapling v. it was seized by the defendants as a distress for the defendant of the person for whom paid for by instalments at certain stages of the rent due from the buikler. The person for whom the ship was being built paid the rent under protest, and sued to recover the amount :-Held, that assuming the property in the ship to have passed to the plaintiff under the contract, still the ship, not having been sent or delivered to the builder, was liable to distress, and the plaintiff was not entitled to recover. Clarke v. Millwall Duck Co., 55 L. J., Q. B. 378; 17 Q. B. D. 494; 54 L. T. 814; 34 W. R. 698; 51 J. P. 5—C. A.

> Sent to be dealt with in the Way of Trade. ]-All goods sent to a tradesman for the purpose of being wrought upon in the way of his trade, are, during the time that they remain in his custody, protected from distress. Brown v. Shevil, N. & M. 277; 2 A. & E. 138; 4 L. J., K. B. 50.

> So is the carcase of a beast in the custody of a butcher, sent to him for the purpose of being

slaughtered for the sender. Ib.

So, although the sender is also a butcher. Ib. But brewers' casks sent to a public-house with beer, and left there until the beer is consumed, are liable to be distrained for the rent of the house. Joule v. Jackson, 7 M. & W. 450; 10 L. J., Ex. 142.

Salt was manufactured and publicly sold atcertain salt works, and carried away in the boats. of the purchasers, which came for the purpose of being loaded with it into a cut or canal on the premises, communicating with a public navigation. The boat of an alkali manufacturer, lying in this cut or canal for the purpose of receiving and carrying away salt bought by him for the purposes of his manufacture, is not privileged from distress for arrears of an ammity issuing out of the land on which the salt works were erected, and granted by the manufacturer and scller of the salt. Muspratt v. Gregory, 3 M. & W. 677; 1 H. & H. 184; 7 L. J., Ex. 385—Ex. Ch.

Materials in the house of a manufacturer for the purpose of his trade are not distrainable by his landlord for rent. Gibson v. Ireson, 3 Q. B.

Materials delivered by a manufacturer to a weaver, to be by him manufactured at his own. dealings before; and he received a receipt in the home, are privileged from distress for rent due from the weaver to his landlord; but a frame or the door of the depository. The fact was that machinery, delivered by the manufacturer to the the company had sold their business to B., and weaver, together with the materials for the purthe company had sold their business to B., and weaver, together with the materials for the pur-let the premises to him, but they had authorised pose of being used in the weaver's house in the the use of their name. B, being in arrears for manufacture of such materials, is not privileged, rent, the defendants seized and sold the plaintiff's unless there are other goods upon the premises. goods under a warrant of distress from two of sufficient to satisfy the rent due. Wood v. Clarke, 1 C. & J. 484; 1 Tyr. 315; 1 Price, P. C. 26; 9 L. J. (o.s.) Ex. 187.

Goods in pawn are privileged from distress even though they have been pledged for more trade to be managed in the way of his trade. Ib. than twelve months. Swire v. Leuch, 18 C. B. Held, also, that the company was estopped (N.S.) 479; 34 L. J., C. P. 150; 11 Jur. (N.S.) 179; 11 L. T. 630; 13 W. R. 385.

In an action by the pawnbroker to recover goods distrained under such circumstances, the

pawnbroker is entitled to recover the full value Dewis, 3 N. & M. 790; 1 A. & E. 641; 3 L. J., of the goods. Th.

Implements of Trade. | - Trover for churps. bedding, &c. Plea, a justification under a distress for rent. Replication, that the goods and chattels were implements of husbandry, and that there were other goods and chattels which might have been distrained :-Held, on special demurrer, that as some of the articles named could not be implements of husbandry, the replication was bad, for answering only part of the plen, when it professed to answer the whole. Duries v. Aston, 3 D. & L. 188; 1 C. B. 746; 14 L. J., C. P. 228.

An implement of trade, e.g. a threshingmachine, not a fixture, is liable to a distress for rent, unless in actual use at the time, or there is other sufficient distress upon the premises. Featon v. Logan, 3 M. & Scott, 82; 9 Bing, 676; 2 L. J., C. P. 102.

A, let to S, a threshing-machine; on Saturday afternoon S, ceased working it; and A, having a considerable distance to convey it home, it was left on the premises of S. till the following Monday morning, when it was distrained by the landlord for rent :- Held, that, in the absence of proof of sufficient distress aliunde, the machine was well taken. Ib.

An action of trespass lies, as well as an action on the case, for distraining tools of trade, though not actually in use, if there are other unprivileged goods upon the premises at the time of the dis-tress sufficient to satisfy the distress. Naryatt v. Nius, 1 El. & El. 439; 28 L. J., Q. B. 143; 5 Jur. (N.S.) 198.

Implements of trade may be distrained for rent if not in actual use at the time, and if there is no other sufficient distress on the premises, Gorton v. Faulkner, 4 Term Rep. 565; 2 R. R. 463.

C., a gas stoker, hired a sewing machine, and his wife a seamstress used it, and applied the earnings for the maintenance of the household. C.'s landlord distrained the machine for arrears of rent due from C. :—Held, that the machine was an implement of C.'s trade within s. 4 of the Distress Amendment Act, 1888, though used solely by the wite. Churchward v. Johnson, 54 J. P. 326.

Rolling Stock-Protected from Distress in certain Cases, 1-Sec 35 & 36 Vict. c. 50, and cases post, sub tit, RAILWAY.

#### b. Growing Crops.

Generally.]-A tenant, whose standing corn and growing crops have been seized as a distress for rent before they were ripe, cannot maintain an action on the case under 2 Will. & M. sess. 1, c. 5, s. 3, for selling the same before five days had elapsed after the seizure, as such sale was altogether void. Owen v. Legh, 3 B. & Ald. 470; 22 R. R. 455.

A distress on growing crops of corn of the vendee of the sheriff, for rent accruing due to the landlord, subsequently to the entry under the execution and sale, cannot be sustained, unless such vendee allows the crops to remain uncut an unreasonable time after they have become ripe, Peacock v. Purvis, 5 Moore, 79; 2 Br. & B. 262; 23 R. R. 465.

A tenant's growing crops, taken in execution and sold, and remaining on the premises a reasonable time for the purpose of being reaped, are price than was expected. Jenner v. Yolland, not distrainable by the landlord for rent become 2 Chit. 167; 6 Price, 5; 20 R. R. 608. due after the taking in execution. Wright v. An action is not maintainable for distraining

K. B. 181.

Such crops having been so taken, sold and left on the premises, and the arrears of rent paid pursuant to 8 Anne, c. 14, s. 1, the landlord cannot distrain them for rent subsequently due, on the ground that the purchaser has not entered into the agreement with the sheriff (to use and expend the produce in a proper manner), directed by 56 Geo. 3, c. 50, s. 3. Nor is he entitled to presume, from the absence of such agreement, that the straw of such crops was sold for the purpose of being carried off the land, contrary to s. 1. Ib.

Standing crops cannot be distrained under a clause in an annuity deed, giving a power to cuter and distrain for arrears in like manner as for arrears of rent. Miller v. Green, 2 Tyr. 1; 2 C. & J. 143; 8 Bing, 92; 1 M. & Scott, 199; L. J., Ex. 51—Ex. Ch. See Arnison, Exparte,
 L. J., Ex. 57; L. R. 3 Ex. 56; 17 L. T. 480;
 W. R. 368.

Where a landlord distrained growing crops under 11 Geo. 2, c. 19, s. 8, but sold them before they were cut, the remedy was held to be under s. 19, for the special damage sustained by that irregularity and no more. In such an action on the case, with a count in trover, the landlord is entitled to deduct the rent due to him from the difference between the price which might have been obtained had the sale been regular, and that which was obtained under the irregular sale; so where no such difference existed, from the crops having been sold for their full value, while the rent due exceeded the produce of that sale, the tenant recovered nominal damages only. Proudlore v. Twemlow, 3 Tyr. 260; 1 C. & M. 326; 2 L. J., Ex. 111.

Though growing crops seized under a fi. fa. are protected from distress at common law, yet, if an execution creditor, by reason of his claiming some things distrainable at common law, is driven to rely on 56 Geo. 3, c. 50, he is bound to bring himself in his pleading within the provisions of that statute. *Hutt* v. *Morrell*, 11 Q. B. 425; 16 L. J., Q. B. 240. Affirmed, 11 Q. B. 438; 12 Jur. 352—Ex. Ch.

Hay and Loose Straw. ]-Hay and straw loose, or in the stack, may be distrained for arrears of a rent-charge, under 2 Will. & M. sess. 1, c. 5, s. 3, and 4 Geo. 2, e. 28, s. 5. Johnson v. Faulkner, 2 Q. B. 925; 2 G. & D. 184; 11 L. J., Q. B. 193; 6 Jur. 832.

Trees in Nurseryman's Grounds. ]-Trees growing in a nurseryman's ground, who is a yearly tenant to the landlord, and removable by such tenant from time to time, are not distrainable for rent, under 11 Geo. 2, c. 19, s. 8. Clark v. Calvert, 3 Moore, 96; 21 R. R. 528. S. P., Clark v. Gaskarth, 2 Moore, 491; 8 Tannt, 431; 20 R. R.

## c. Beasts of the Plough and Sheep.

Beasts of the Plough. - Where a landlord distrains beasts of the plough, though there are other goods on the premises, he is not liable to an action for an illegal distress, if he uses due diligence to ascertain whether such goods are a sufficient distress without them; and he is not to be affected by a subsequent sale at a higher

beasts of the plough, when there is not other sufficient subject of distress on the premises but growing crosp. Pigapt v. Birtles, 1 M. & W. 441; 2 Gale, 18; 1 Tyr. & G. 729; 5 L. J., Ex. 193.

Beasts of the plough are distrainable for the poor rates. *Hutchins* v. Whittaker, 2 Ken. 204; 1 Burr. 579.

Agistment of Gattle—"Live Stook taken in to be fed at a fair price."]—Cattle were distrained while on a hodding pursuant to an agreement by which the tenant, in consideration of 2l., allowed the owner "the exclusive right to feed the grass on the land for four weeks":—Held, that the cattle were not "taken in" by the tenant "to be fed at a fair price," within the meant of the Agricultual Holdings Act, 1883 (46 & 47 Vict. e. 61), s. 45, and were therefore not privileged from distress. Masters v. Green, 29 Q. B. D. 807; 59 L. T. 476; 36 W. R. 591; 53 J. P. 591; 53 V. R. 591; 53 J. P. 591;

Live stock agisted for a fair equivalent is within 46 & 47 Viet. c. 01, s. 45 (the Agricultural Holdings Act, 1883), as taken in to be fed at a "fair price," and may therefore be exempt from distress, even although such equivalent be not money. Cows were agisted on the terms "milk for meat," is, that the agister should take their milk in exchange for their pasturage:—Held, that the agistment was within the act. London and Torkshire Brah v. Bellon, 64 L. J., Q. B. 568; 16 Q. B. D. 457; 34 W. R. 31; 50 J. P. 85

Colts and Steers.]—Cart colts and young steers, not broken in or used for barness or the plough, are not privileged from distress as beasts which gain the land. Keen v. Priext, 4 H. & N. 236; 28 L. J., Ex. 157; 7 W. R. 376.

Sheep.]—In case of a distress by a landlord for rent due from his tenant, the sheep of an under-tenant are privileged if there are other goods upon the premises sufficient to satisfy the rent. Ib.

A grazier driving a flock of sheep to London is encounaged by an imikeeper to put his sheep into pasture grounds belonging to the inu. The landlord seeing the sheep, consents they shall stay there one night, and then distrains them for rent; grazier relieved against this distress. Phocker v. Joyce, 2 Vern. 129.

If cattle escape into the next ground, and are distrained there for rent, equity will relieve against such distress, Ib.

# d. Goods of Strangers.

Of Lodger—Protection of Goods against.]-See 34 & 35 Vict. c. 79.

— Who is a Lodger.]—The mere fact of a person being an under-tenant is not sufficient to prevent his being a lodger within the meaning of the Lodgers' Protection Act, 1871 (34 & 35 Vict. e. 79). Phillips v. Henson, 47 L. J., C. P. 273; 3 C. P. D. 26; 37 L. T. 432; 26 W. R. 241.

F, who was a tenant of a house under a lense for a term of years, made an agreement in writing with the plaintiff, by which F. let to the plaintiff, as a quarterly tenant, and at a quarterly tenant, and at a quarterly tent, certain specified rooms, being all the rooms in such house except three, in which F. resided:

—Held, that such agreement was not inconsistent with the plaintiff being a lodger, and as such earlied to the protection given to lodgers by \$3 \times 3 \times (c. 79. Ib.

The appellant occupied the first floor and basement of premises at a yearly rent, carrying on the business of a publisher there, but sleeping and residing elsewhere. He had no key of the outer door, which was under the control of his immediate landlord, who admitted him every morning:—Held, that the appellant was not a "lodger" within the meaning of s. 1 of the Lodgers' Goods Protection Act, 1871. Hentonal V. Bone, 13 O. B. D. 179; 51 L. T. 125; 32 W. R. 752; 48 J. P. 710. See further, Næs v. Nephenson, 9 O. B. D. 245; 47 J. P. 134; and Morden v. Palmer, 51 L. J., Q. B. 7; 45 L. T. 426; 30 W. R. 115.

Sufficiency of Declaration.]—By s. 1 of the Lodgers' Goods Protection Act, 1871, if any superior landlond shall levy distress on any goods of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord with a declaration in writing made by such lodger may serve such superior landlord with a section of the superior landlord with the superior land what the superior land what if the superior landlord with the superior landlord in the superior landlord in the superior landlord in the superior landlord landlord in the superior landlord landlord

Second Distress after Withdrawal— Declaration and Inventory on First Distress.]— See *Thwaites* v. Wilding, 53 L. J., Q. B. 1; 12 Q. B. D. 4; 49 L. T. 396; 32 W. R. 80; 48 J. P.

Sale of Distress before Expiration of Five Days; —A landlord, having on the 17th of October distrained for rent goods of his tenant's lodger mon the centsed premises, sold the same on the \$2mt, i.e. before the expiration of five clear days from tellistress, contrary to the provisions of 2 Will, & M. sess, 1, c. 5, s. 2; —Held, that an action was not as a solid property of the pro

Previous to 34 & 35 Vict. c. 79.]—Goods of a tenant's lodger being distrained together with the tenant's, and sold first, after notice from the lodger, and the tenant's goods turning out to be sufficient to satisfy the rent and charges, the lodger is entitled to sue for an excessive distress. Wilkinson v. Ibbett, 2 F. & F. 300.

of Under-tenant.]—The property of an undertenant may be distrained by the original landlord. Brosier v. Tomkinson, 2 Ken. 39.

Of Licensee of Tenant—Estoppel.]—A third person not claiming possession to the land who has brought goods on to the land by the licence of the tenant is not estopped from disputing the lessor's title. Tadmon. V. Henman, [1893] 2 Q. B. 168; 5 R. 479; 57 J. P. 664.

Heal, that such agreement was not inconsistent with the plaintiff being a lodger, and as such antitled to the protection given to lodgers by 32 & 35 Vict. c, 79. Ib.

On Premises of Bankrupt.]—Goods of a third person on the premises of a bankrupt at the time of six committing an act of bankruptey, are not in his possession, order and disposition, if at the time of such act of bankruptey there is a distress

Jur. (N.s.) 654 : 13 W. R. 690.

Of Others. - Goods of a stranger on the land may be distrained for a rent-charge issning out of it. Muspratt v. Gregory, 2 Gale, 158; I M. & W. 633; in error 3 M. & W. 677; 1 H. & H. 184; 7 L. J., Ex. 385.

The goods of C. found upon land, out of which a rent-charge has been granted by A, to B, are liable to the distress of B., ppless C. has an interest in the land paramount to that which A. had at the time of the grant. Saffery v. Elynod, 3 N. & M. 346; I A. & E. 191; 3 L. J., K. B. 151.

The grantee of a rent-charge may take goods of a stranger, on the premises charged, as a distress for arrears. Johnson v. Funthuer, 2 Q. B. 925; 2 G. & D. 184; 11 L. J., Q. B. 193; 6 Jur. 832.

But a grant, purporting to be the grant of a rent-charge, with powers of distress, made by a person having no legal estate in the land, will not justify the seizure on the premises of the goods of third persons for the arrears of the rentcharge, Freeman v. Edwards, 2 Ex. 732: 17 L. J., Ex. 258.

If a mortgage is created by way of demise for a term of years, and the mortgagor attorns and becomes tenant to the mortgagee at a certain rent, the relation of landlord and tenant is created, and moon failure to pay the rent the mortgagee is entitled to distrain the goods even of a stranger. J., being lessee for a term of years, demised to P., by way of mortgage, all his interest in the term save one day, and J. attorned and became tenant to P. at a certain rent. J., and became tenant to P. at a certain rent, J., being mortgaged premises to K., who assigned his goods thereon to R. The rent due from J. to P. being unpaid, P. distrained the goods assigned by K. to R. No rent was then due from K. R. having brought an action against P. for the seizure of the goods:—Held, that, by the attornment, J. had become tenant to P., and that the distress was lawful. Kearsley v. Philips, 52 L. J., Q. B. 581; 11 Q. B. D. 621; 49 L. T. 435; 31 W. R. 909—C. A.

Execution against Goods of Third Party-Right of Landlord to claim for Rent. - By 51 & 52 Vict. c. 43, s. 160, when goods in a tenement for which rent is due are taken in execution under the warrant of a county court, the landlord may claim the rent due to him by delivering a notice to the bailiff making the levy, and such bailiff shall, in making the levy, in addition thereto distrain for the rent so claimed. Execution having issued upon a judgment in a county court against the defendant, goods belonging to him were taken in execution in a house of which the wife of the defendant was the lessee. The landlords gave to the bailiff making the levy a notice under s. 160 claiming arrears of rent due from the wife :-Held, that as the defendant's goods were rightly taken in execution, the claim of the landlords was good. Hughes v. Smallwood, 59 L. J., Q. B. 503; 25 Q. B. D. 306; 63 L. T. 198: 55 J. P. 182.

If a bailiff seizes, under a warrant of a county court, goods belonging to a stranger, he cannot, under 19 & 20 Vict. c. 108, s. 75, distrain such goods for the rent of the landlord, and if he does so, the true owner is entitled to have his goods back. Brard v. Knight, 8 El. & Bl. 865; 27 L. J., Q. B. 359; 4 Jur. (N.S.) 782; 6 W. R. 226.

Goods wrongfully removed from Premises brought back by Landlord. ]-A landlord eannot

for rent upon such goods. Sacker v. Childley, 11 distrain upon the goods of third persons brought by himself on to the demised premises without the authority of the third person, even though the goods had been originally placed on the premises by the authority of the third person, and wrongfully removed by some one else. Paton v. Carter, 1 Cab. & E. 183.

#### e. Firtures

Rails and Sleepers. |- The lessee of a colliery by deed demised it by way of mortgage, and assigned the plant, &c., comprised in a schedule, and all fixtures, buildings, and railways in and about the colliery, with a power of sale. The mortgagee having taken possession of the railways under the power, the landlord distrained them for rent due from the lessee. The railways were constructed for the better enjoyment of the colliery, and were so far permanent that they were intended to remain on the premises as ancillary to the working of the mines until the expiration of the term. The ground upon which they were laid was brought to a dry and uniform surface by spreading thereon, wherever the natural soil was moist or its surface depressed, such hard and dry materials as the soil afforded, with some further material of the same nature brought from elsewhere, so as to make it dry and level. On this surface so prepared the sleepers-were laid, and the rails were fastened to the sleepers by nails driven into the sleepers, and. firmly fixing the rails thereto. Large quantities. of such hard and dry materials, called ballast, were then packed under and about the sleepers, with the double object of keeping them dry, and so preventing their decay, and of keeping them in position. The usual mode of removing the rails was to wrench the rails out of the sleepers. In order to remove the sleepers the ballast was first loosened by picks, and then levers or bars of iron were driven under the sleepers. The removal of the sleepers caused hollow places to be formed by the falling in of the ballast:—Held, that the rails and sleepers forming the railways became fixtures, and therefore were not distrainable for rent, and the mortgagee was entitled to judgment for the value of the railways as re-Judgment for the value of the ranways as replaced in statu ono. Turner v. Cameron, 10-B. & S. 931; 39 L. J., Q. B. 125; L. R. 5 Q. B. 306; 22 L. T. 525; 18 W. R. 544.

Kitchen Ranges. - Fixtures (as kitchen ranges, stoves, coppers and grates) which a tenant may sever from the freehold, and take away during the term, are not therefore distrainable for rent. Darby v. Harris, 1 Q. B. 895; 1 G. & D. 234; 5 Jur. 988.

Those things only can be distrained for rent which the landlord can afterwards restore in the plight in which they were before the distress. Ib.

Machinery for the purposes of manufactureex. gr. mules used for spinning cotton-fixed by means of screws, some into the wooden floors of a cotton mill, and some by being sunk into the stone flooring and secured by molten lead, are at law distrainable for rent. *Hellawell* v. *Eastwood*, 6 Ex. 295; 20 L. J., Ex. 154.

Effect of Distraining.]—A mere distraining and purporting to sell fixtures affords no ground of action, as such a sale is merely a nullity. Beck v. Denbigh, 29 L. J., C. P. 273; 6 Jur. (N.S.) 998; 2 L. T. 154; 8 W. R. 392. The defendant distrained fixtures, and some days afterwards severed and removed them for sale: -Held, in trover, that though for the purposes of that action the plaintiff necessarily treated the fixtures as goods and chattels, the defendant, by whose wrongful act they had been brought into a chattel state, could not say that, as goods and chattels, he had a right to distrain them, Dalton v. Whittem, 3 G. & D. 260; 3 Q. B. 961; 12 L. J., Q. B. 55.

### f. Goods of Persons becoming Bankrupt,

Landlord's Right to Distrain.]—A landlord's distress for rent is not liable to be restrained as "an execution or other legal process" within the an execution of other legal process within the Bankruptey Act, 1869, s. 13. Birmingham and Staffordshive Gaslight Co., Ex parte, Funshaw, Ta re, 40 L. J., Bk. 52; L. R. 11 Eq. 615; 24 L. T. 639; 19 W. R. 603.

Under a local statute a gas company had the same rights with respect to recovering the rent or charge due for the supply of gas, as landlords have with respect to recovering rent. The company, after notice that a firm indebted to them for a supply of gas had filed a petition under the Bankruptey Act, 1869, s. 125, distrained in pursuance of its statutory rights upon their goods. The creditors of the firm afterwards resolved on liquidation, and a trustee was appointed :-Held, that the distress was not liable to be restrained as "an execution or other legal process" within s. 13; and that, assuming the filing of the petition to be equivalent to the commencement of a bankruptey, the company was entitled to distrain, after the filing, for one year's

supply of gas. Ib.

A landlord distrained for one year's arrear of rent on goods of a debtor in the hands of a receiver appointed by the Court of Bankruptcy. On an application by the receiver to the county court judge for an injunction, the landlord was restrained from proceeding with the distress, and was also committed for contempt of court. On appeal :- Held, that the landlord could distrain as against the receiver without the leave of the court; and further, that the position of a receiver in bankruptey is not the same as that of a receiver in chancery. Till, Experte, Mayhew, In re, 12 L. J., Bk. 84; L. B. 16 Eq. 97; 21

W. R. 574. A debtor covenanted to pay rent in advance. After he had filed a petition for liquidation, and while the trustee was still in possession of the premises, a further sum became due for rent under the covenant to pay in advance :- Held, that the landlord was entitled to distrain for such rent. Hale, Ew parte, Binns, In re, 45 L. J., Bk. 21; 1 Ch. D, 285; 33 L. T, 706; 24 W. R, 300.

If goods of tenant who has become bankrupt Plummer, Exparte, 1 Atk, 103.

Where the vendee had lived in the house of

bankrupt, and retained the goods there, and the landlord had proved under the commission, but three years after distrained the goods, it was held illegal. Grove, Ex parte, 1 Atk. 104.

Where a distress is made for more than a year's rent after an act of bankruptcy by the tenant, the court will allow the assignees of the tenant to avail themselves of 6 Geo. 4, c. 16, s. 74, and to pay a year's rent into court. But if the land-lord under such a rule accept the sum so paid into court, he is entitled to double costs under 11 Geo. 2, c. 19, s. 22. Alderson v. Gadsden, 7 L. J., K. B. 89,

By the statute 7 Geo. 4, c. 57, s. 31, "no distress for rent made and levied after the arrest of a person petitioning the Court of Insolvent Debtors. under that act, shall be available for more than one year's rent" :—Held, that a distress for more than one year's rent, made before arrest but not sold till after, was good for the whole. Wray v. Egremont (Earl) 1 N. & M. 188; 4 B. & Ad. 122; 2 L J., K. B. 48.

Unauthorised Distress-Scizure by Bill of Sale Holder. - According to the true con-struction of the New South Wales Insolvent Act (5 Vict. No. 17), s. 41, the prohibition of "distress for reut" after sequestration of the tenant's estate does not authorise the holder of a bill of sale to take his goods (the subject of such bill) out of the hands of the landlord's bailiff in possession thereof under such distress. Railton v. Wood, 59 L. J., P. C. 84; 15 App. Cas. 363; 63 L. T. 13.

Rent subsequent to Winding-up of Company. -Leave to distrain for rent subsequent to the commencement of the winding-up was refused where the liquidator, though he had derived an indirect benefit from the demised property, had not adopted the lease or used the property, House and Land Investment Trust, In re, Swith, Ex parte, 8 R. 232; 42 W. R. 572; 1 Manson, 148.
And see Company.

### g. In Other Cases.

Marshalling Goods Seized, ]-The common-law right of distress, exercisable immediately on default being made in payment of rent, is not destroyed by the insertion in a lease of an express right of distress, extending to articles which would not be affected by the common-law right, but exercisable only after the lapse of a certain time from default, if the lease contains no negative words; and, notwithstanding the existence of such an express limited right, the common-law right may be exercised immediately on default, but only as to goods to which that right extends. River Swale Brick and Tile Works, In re, 52 L. J., Ch. 638; 48 L. T. 778; 32 W. R. 202.

If in such a case the lessor distrains for two half-years' rent at once, before the expiration of the period after the second half-year's rent becoming in arrear which is fixed by the lease for the exercise of the power therein contained, and some of the goods scized under the entire distress are not seizable at common law, but only under the express power in the lease, the goods seized will be marshalled so as to set against the second half-year's rent in the first instance such of them as are seizable at common law, leaving the remainder of the seized goods to answer the first half-year's rent under the provision in the lease. Ib.

Sale of Stock by Landlord, ]-The 56 Geo. 3, c. 50, s. 11, which makes a purchaser of farmers' stock bound by the tenant's covenant to consume such stock on the premises, does not enable a landlord to sell his tenant's hay which he has distrained for rent, otherwise than for the best price. Hawkins v. Walrond, 45 L. J., C. P. 772; 1 C. P. D. 280; 35 L. T. 210; 24 W. R. 824.

Perishable Commodity, ]-Commodities which cannot be restored upon replevin in the same plight and condition as that in which they were when taken, are not distrainable for rent at common law; and therefore the flesh of animals lately slaughtered cannot be distrained. Murley v. Pincombe, 2 Ex. 101; 18 L. J., Ex. 272.

Chattels in Use—Wearing Apparel, ]—Wearing apparel may be distrained for rent. Bisselt v. Cildwell, Peake, 36; 1 Esp. 206, n; 3 R. R. 648. S. P. Baynes v. Smith, 1 Esp. 206.

So, implements of trade may be distrained for rent in not in actual use at the time, and if there is no other sufficient distrass on the premises. Gorton v. Bulkner, 4 Term Rep. 565, 2 R. R. 463, S. P., Roberts v. Juckson, 2 Peake, 36; 4 R. R. 885.

A stocking-frame in actual use is not distrainable, unless there is not sufficient distress besides. Watts v. Davies, 1 Selw. N. P. 676. S. P. Gorton v. Falkhar, 4 Term Rep. 565; 2 R. R. 463.

Trespass lies for taking under a distress for rent, tools of trade not in use, there being not distrainable goods of sufficient value on the premises; and a special action on the case, as for an unreasonable distress, is not the only remedy for such a wrong. \*Mergaft v. Nas, 1 El. & El. 439; 28 L. Ja. Q. B. 143; 5 Jur. (Ns.) 5 Jur. Charles

Partnership Property.]—Two tonants in common mortgaged an estate to secure a debt which they jointly and severally covenanted to pay, and each of them separately attorned tenant to the mortgages of a part of the estate of which they were jointly in occupation, at a rent equal to half the annual interest on the mortgage debt. The mortgagers were partners in the business of brickmakers, which they carried on upon that part of the estate which was in their joint occupation:—Held, that the mortgages could not distrain for the rent upon the purtnership property which was on the estate. Parke, Experta, Patter, Le re, 43 L.J., Bk. 130; L. R. 18 Eq. 381; 30 L. T. 618; 32 W. R. 768.

Furniture—Use for Life.]—Where A., by the trusts of his father's will, was allowed to use the furniture in the manison of B. during his natural life, and was prohibited from removing it thence without the consent of the trustees:—Held, that such furniture could not be distrained for A.'s personal taxes returned as payable at the manison of B.: and that it did not fall within the description of such "other goods and claatels" as might be distrained by force of 43 Geo. 3, c. 99, s. 33. Skaftedware (Eerd) v. Husselt, 3 D. & B. 84; 1 B. & C. 666; 1 L. J. (0.8.) K. B. 202; 25 B. K. 534.

Goods in Custody of the Law.]—The 8 Anne, c. 14, s. 1, makes it unlawful to remove goods taken in execution, without paying one year's rent; goods so taken are in custodia legis, and cannot be distrained on by the landlord for the year's rent, and they are equally in custodia legis for this purpose, whether they are in the hands of the sheriff or of his vendee. Wharton v. Naylor, 12 Q. B. 678; 6 D. & L. 136; 17 L. J., Q. B. 278; 12 Jur. 894.

If goods remain on the demised premises after a fletitious bill of sale made of them under an execution, they are liable to be distrained as before. Smith v. Russell, 3 Taunt. 400; 12 R. R. 674.

Goods seized by a messenger under a fiat in bankruptcy are not, while in his custody, privileged from distress for rent due from the bankrupt to his landlord. Briggs v. Sowry, 8 M. & W. 729; 11 L. J., Ex. 193. See Newton v. Scott, 9 M. & W. 434; 11 L. J., Ex. 121. Where a sheriff's officer executed a f. fa., by going to the house, and informing the debtor be eame to levy on his goods, and laying his hand on a table said, "I take this table," and then locked up his warrant in the table drawer, took the key, and went away, without leaving any person in possession; and after the fi. fa. was returnable, the landlord distrained the goods for rent:—Held, that the sheriff could not maintain trospass against him. Blades v. Arundale, 1 M. & S. 71; 14 B. R., 553;

Where after the making of an interpleader order the sheriff, with the consent of the execution creditor and the claimant, temporarily withdrew from possession:—Held, that the goods were no longer in custodial legis, and the landlord was entitled to distrain upon them, although he knew that the interpleader proceedings were pending. Cropper v. Wurner, I Cab. & E. 152.

Revival of Landlord's Right after Execution waived.]—A landlord's right to distrain revives upon an execution being waived. Seren v. Mihill, 1 Ld. Ken. 370.

A landlord may distrain upon the goods of his tenant for a year's rent, notwithstanding an outlawry in a civil suit. St. John's College, Oxford, v. Murcott, 7 Term Rep. 259.

A sheriff's officer being in possession of the tenant's effects under an onthawry, made a distress for rent, sold the goods so distrained, and afterwards the outlawry was reversed;—Ruled, that the officer was liable to pay the produce of the goods to the landlord, in an action for money had and received. Ib.

#### 4. WHEN TO BE MADE.

Limitation of Time for Making. ]—The twenty years within which, since 3 & 4 Will. 4, c. 27, a distress for rent must be made by the person to whom the right to make it has accured, begins to whom the right to make it has accured, begins to run from the last payment of the rent. Once v. De Benwoir, 16 M. & W. 547; 11 Jur. 488.

Affirmed, 5  $\mathbb{R}x$ , 166; 19  $\mathbb{L}$ ,  $\mathbb{J}$ ,  $\mathbb{R}x$ , 177— $\mathbb{E}x$ , Ch. Where a defendant avows for rent in arrear, it is unnecessary for the plaintiff to plead in bar that the rent has become extinguished by efflux of time under the 3  $\mathbb{R}4$  Will. 4,  $\mathbb{R}2$ , as stantamy be shown under non tenuit, although not under a plea of rieus in arrore.  $\mathbb{Z}1$ 

Time of Day.]—A landlord cannot justify making a distress for rent after dark. Aldenburg v. Peuple, 6 Car. & P. 212. A distress for rent before sunrise or after sun-

A distress for rent before sunrise or after sunset is illegal, although there may be daylight.

Tutton v. Durke, 5 H. & N. 647; 29 L. J., Ex.
271; 6 Jur. (N.S.) 983; 2 L. T. 361.

Quere, whether for such purpose the time of suurise is to be reckened from the first appeurance of the beams of the sun above the horizon, or from the time when the entire sun has emerged. Ih.

After Expiration of Tenancy.]—Before the 8 Anne, c. 14, s. 6, at common law, rent accruling before the expiration of a tenancy could not be distrained for after the tenance expired, though the tenant continued in occupation. Williams v. Stieva, 9 Q. B. 14; 15 L. J., Q. B. 321; 10 Jur. 804.

The 8 Anne, c. 14, s. 6, does not apply to cases where the tenancy is put an end to by the

tenant's wrongful disclaimer. Doe d. David v.

Williams, 7 Car. & P. 322.

A tonant, a few days after his lease expired, gave up possession to the incoming tonant; but, without the latter's permission, left some cattle in the fold-yard, which were afterwards distrained in the name of the landlord:—Held, that he was not possessed of the premises, and that the grazing of the cattle thereon did not constitute a possession under 8 Anne, c. 14, ss. 6, 7, and that the distress was consequently filegal. Tuylerson v. Peters, 7 A. & B. 110; 2 N. & P. 622; W. W. & D. 644; 1 Jur. 497.

A landlord, who permits his tenant to retain possession of part of a farm, after the tenancy has expired, may distrain on that part, within six months after the expiration of the tenancy. Nuttail v. Staunton, 6 D. & R. 155; 4 B. & C. 51; 3 L. J. (O.S.) K. B. 135; 28 R. R. 207.

À landlord may distrain corn left, under a custom that a tenant may leave his away-going erop in the bara, &c., of the farm, for a certain time after the leave his expired, and he has quitted the premises, for rent arrear, after is, months have expired from the determination of the term. Hereum v. Dudhang, I. H. B. 5; 2 R. R. 696, S. P., Levels v. Harris, I. H. Bl. 7; n.; 2 R. R. 698, n.

A termor, who lets to an under-tenant, cannot, after his term has expired, enforce the continuance of the under-tenancy by distress, if the under-tenant refuses to neknowledge him as landlord, or pays him under threat of distress; although the under-tenant still retains the possession. Burne v. Richardson, 4 Tant. 720;

14 R. R. 647.

By agreement, as well as by eastom of the country, a tenant was to have the use of the barns and gate-rooms to thresh out his cern, and fodder his cattle, till the May-day efter the expiration of his term; his term expired at Michaelmas, 1824; he was then restrained by injunction from carrying off the premises comin the straw; in January, 1825, his landlord distrained a rick of corn on the premises —Held, that the distress was valid. Kulght v. Benett, 3 Bing, 364; 11 Blorce, 227; 4 L. J. (O.S.) C. P. 95; 28 R. R. 643.

— Molding Over.—New Tenanoy.]—Where a new tonancy has been created as to part of the property comprised in a lense, of which notice to quit has been given, a landlord, after the expirition of such notice, is not entitled under S Anne, c. 14, ss. 6, 7, to distrain on such new tenancy for arrears of reut due in respect of the old tenancy. Wilkinson v. Peef, 64 L. J., Q. B. 178; [1895] I. Q. B. 516; 15 R. 213; 72 L. T. 151; 38 W. R. 802.

After Death of Tenant.]—Where a lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder, and after the expiration of it, a distress may be made for rent due for the whole term. Bruithwaite v. Cooksey, 1 H. Bl. 465; 2 R. 807.

But where A., being tenaut at will, at a yearly rent, died, leaving rent in arrear, and the day after his death the lessor distrained, the house being occupied by A. servants:—Held, that the distress was illegal, and that it was not made during the possession of the tenant from whom the ruth became due, within 8 Aune, c. 14, s. 6, Taviner v. Barnes, 2 B. & S. 435; 31 L. J., Q. B. 170; 3 Jun. (x.s.) 199; 10 W. R. 561.

5. WHERE TO BE MADE.

River close to Wharf, —Barges lying in a river close to a wharf, and fastened by a rope to piles, intended partly for the support of the wharf, and partly that barges may be attrached to them, may be distrained for rent due in respect of the wharf, they being as much on the premises demised as the nature of the thing will admit of. Buzzerd v. Cupel, 4 Bing, 137; 12 Moore, 339; 2 Car. & P.541; 5 L.J. (co. S. C. P. 123.

But afterwards, where it was stated in a special verdict, that, by an indenture, the defendant demised to plaintiff a wharf "with all ways, paths, passages, profits, commodities, and appurtenances whatsoever, to the wharf belonging"; and that, by the indenture, the exclusive use of the land of the river opposite to and in front of the wharf, between high and low water mark, was demised as appurtenant to the wharf, but that the land itself was not demised :- Held, that the meaning of this finding was, either that the land was demised as appartenant to another piece of land, viz. to the wharf, which, in point of law, could not be; or that the use and enjoyment of the land passed as appurtenant, which would be a mere easement or privilege, from which no rent could issue : consequently, no distress could be made of barges lying on such land, taking the finding of the jury in either way. Buzzard v. Capel, 8 B. & C. 141; 2 M. & Ry. 197; 6 Bing. 150; 3 M. & P. 480; 3 Y. & J. 844.

Road near Stable.]—A tenant rented a stable, and was in the habit of keeping his cart on a part of the read adjoining the stable, which had been paved for thin purpose by his landlord. In an action against the landlord for setzing his tenant's cart, while standing in the road, as a distress for rent:—Held, that the paved part of the road was to be considered a part of the demised premises, and that the landlord might lawfully soize the cart there as a distress for the rent of the stable. Gillingham v. Gwyer, 16 L. T. 40.

Mining Lease—"Adjoining or neighbouring" of Colliery, 1—A power in a mining lease for the landlord to distrain for rent in arrear upon chattels of the lesses in the denised colliery, or "any adjoining or neighbouring collieries" must be construed as limited to the denised colliery and such collieries only as might be or become connected with it by underground workings. Remainsond Colliery Co., In r., Lee v., Roundwood Colliery Co., 50, 15, 16, 185; [1897] J. Ch. 37, 57, L. 7, 61; 45 W. R. 324—C. A.

## 6. How to be Made.

By Breaking open Door.]—A forcible re-entry by breaking the onter door is justifiable, under a warrant of distress, where the party has been forcibly turned out of possession. Eagleton v. Gutteridge, 11 M. & W. 465; 2 D. (N.S.) 1053; 12 L. J., Ex. 359.

A landlord cannot break open the outer door of a stable, though not within the curtilage, to levy an ordinary distress for rent. Brown v. Glenn, 16 Q. B. 254; 20 L. J., Q. B. 205; 15 Jur. 189.

A landlord, in order to distrain, may open the outer door in the ordinary way in which other persons using the building are accustomed to open it. *Ryan v. Shillock*, 7 Ex. 72; 21 L. J., Ex. 55; 15 Jur. 1200.

Although in levying a distress, when a person | wall surrounding the yard of the house, and has once obtained peaceable possession of the premises, and been forcibly put out of them, he may legally break open a door or a window for the purpose of regaining possession; yet when a person has merely got his foot and arm between the door and the lintel, or by putting a pair of shears between the door and the lintel has prevented its being closed, this is not a possession which will entitle him to break open a door or a window for the purpose of gaining admission to the house. And therefore a distress made under such circumstances is illegal ab initio. Boyd v. Proface, 16 L. T. 431.

Certain demised premises consisted of a courtyard in which was a warehouse. The landlord's balliff, in levying a distress for rent, obtained entrance into the courtyard through a gate, and being there broke open the main door of the warchouse, and distrained therein :-Held, that the distress was illegal, as the door that was broken open by the bailiff was the "outer door" Oh. v. Hendry, 5 R. 331. Affirmed, 62 L. J., Q. B. 388; 5 R. 335, n.; 68 L. T. 742; 57 J. P. 788— C. A.

Through Window. ]-A declaration that the defendant broke and entered a dwelling-house of the plaintiff, seized divers goods and chattels, carried them away, and converted them to his own use. The defendant, who was landlord to the plaintiff, from whom rent was due to him, had, in order to make a distress, entered on the premises by forcibly breaking in a window, and seized and sold his goods :- Held, that this mode of entry on the premises being unlawful in itself, rendered the defendant a trespasser ab initio. Attack v. Bramwell, 3 B. & S. 520; 32 L. J., Q. B. 146; 9 Jur. (N.S.) 892; 7 L. T. 740; 11 W. R. 309.

A landlord is not entitled, for the purpose of distraining for rent, to open the window of a house which is shut but not fastened. Nash v. Lucys, 8 B. & S. 531; L. R. 2 Q. B. 590.

Where another person at the suggestion of the 2 Br. & B. 514. landlord, opened a window and entered the house and then opened the outer door, through which the landlord entered and distrained :-Held, that the distress was unlawful. Ib.

An entry to make a distress through an open window is lawful. Tutton v. Darke, 5 H. & N. 647; 29 L. J., Ex. 271; 6 Jur. (N.S.) 983; 2 L. T.

But an entry for the purpose of making a distress through a window which is fastened by means of a hasp, is not lawful. Hancock v. Austin, 14 C. B. (N.S.) 634; 32 L. J., C. P. 252; 10 Jur. (N.S.) 77; 8 L. T. 429; 11 W. R. 833.

On an indictment for forcibly entering and distraining in a dwelling-house, a verdict having been given for the prosecution, the court refused a motion to set it aside, which was made on the ground that the entry having been made by opening an unfastened window was lawful. Reg. . Lockwood, 4 W. R. 465.

Getting over Yard Wall—Illegality.]—A The solicitors had, on previous occasions, issued landlord's bailiff, being employed to distrain distress warrants in respect of other property of in a house for rent in arrear, elimbed over the the landlords—Held, not to be sufficient evidence

entered the house by an open window :- Held. that the climbing over the wall was not illegal, and that the distress was lawful. Eldridge v. and that the discress was lawful. Edwage v. Skacey (15 C. B. (K.s.) 458) approved; Scott v. Buckley (16 L. T. 573) overruled. Long v. Clarke, 63 L. J., Q. B. 108; [1894] 1 Q. B. 119; 9 B. 60; 69 L. T. 654; 42 W. R. 130; 58 J. P. 150—C. A.

Climbing over Fence.]—There is no illegality in distraining for rent by climbing over a fence, and so gaining access to the house by an open door. Eldridge v. Stacey, 15 C. B. (N.S.) 458; 10 Jur. (N.S.) 517; 9 L. T. 291; 12 W. R. 51.

A landlord in making a distress got over a fence or wall of from five to eight feet high at the back of the tenant's house, such being the only means of effecting an entrance, as the front door was locked:—Held, that such a mode of entry was illegal. Scott v. Buckley, 16 L. T. 573.

Calling in Police Officer.]-In making a distress for rent, eireumstances may occur which may require the presence of a police officer. But to justify the landlord in calling him in, it must be shewn that his presence was rendered neces-sary either from threats of resistance, or the apprehension of violence. Skidmore v. Booth, 6 Car. & P. 777.

By Breaking through Ceiling. - Trespass will not lie against a landlord who occupies an apartment over a mill demised to his tenant, from which it is divided only by a boarded floor without any eciling, for taking up the floor of his own apartment, and entering through the aperture to distrain for rent. Gould v. Bradstock, 4 Taunt. 562.

Premises must be thoroughly Searched.]-A clause of forfeiture in a lease, in case no sufficient distress be found on the premises, must be strictly pursued; and in case of a distress being made, every part of the premises must be searched. Rees d. Powell v. King, Forrest, 19;

#### 7. WARRANT OF DISTRESS.

Authority under.]—If, in replevin against a broker, it is proved that the landlord employs the attorney to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant. Duncan v. Meikleham, 3 Car. & P. 172.

A warrant to distrain upon goods was originally addressed by the defendant to the plaintiff or his agent. The plaintiff's clerk struck out the Entry into a house for the purpose of distrain-ing may lawfully be made by further opening a window which is partly open. Crabtree v Robinson, 5 t. J., Q. B. 544; 15 Q. B. D. 312; 33 W. R. 936; 50 J. P. 70. sufficiently authorised by the defendant, and that the alteration did not render the warrant void. Toplis v. Grane, 7 Scott, 620; 5 Bing. (N.C.) 636; 9 L. J., C. P. 180.

A warrant of distress was produced by the plaintiff, purporting to be issued by the solicitors of the landlords of certain property, the writing being in the hand of a junior partner of the firm.

of an authority by the landlords to distrain | particulars, and then went away; on the follow-

- Sewers Rate. |- Commissioners of sewers by a warrant under s. 7 of 12 & 13 Vict. c. 50, addressed to A., authorised a distress of K.'s goods. A. handed the warrant to B., who handed it to C. The latter entered, and was ejected and assaulted by K. K. was summoned for an assault on C. :-Held, that as the warrant was addressed to A., C. had no anthority to execute it, and was rightly ejected by K. Symonds v. Kurtz, 61 L. T. 559; 16 Cox, C. C. 726; 58 J. P. 727.

How Executed. ]-A warrant of distress directed to two jointly, in a matter pro bono publico, may be executed by one. Lee v. Vessey, 1 H. & N. 90; 25 L. J., Ex. 271; 4 W. R. 554.

By a local act for draining and preserving low lands in Lincoln, and for restoring and maintaining the navigation of a river, commissioners were authorised to impose rates for the purpose of such drainage, and, in case of default in payment after demand, to issue their warrant to their collector or collectors to levy the amount by distress. The commissioners having issued their warrant "to L, the collector, and M., bailiff," it was executed by M. alone:—Held, that it was regularly executed, and that an action of trespass was not maintainable against the commissioners or M. Ib.

The act also provided, that a distress made under the act should not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers on account of any defect or want of form in the warrant or other proceedings:-Held, that, supposing the execution of the warrant by M. had been irregular, this provision would have applied to cure the defect of the joint direction of the warrant, Ib.

# 8. WHAT AMOUNTS TO A DISTRESS.

Seizure necessary. ]—A landlord's agent walked round a demised wharf, left a written notice that he had distrained goods lying there for rent, and that they would be appraised and sold, if not replevied. He then went away, leaving no one in possession :- Held, an actual scizure. Swan v. Falmouth (Earl), 8 B. & C. 456; 2 M. & Ry. 534; 6 L. J. (o.s.) K. B. 374.

A. entered B.'s house, and said that he had come to make a distress, and began taking an inventory; but finding out that he had make a mistake, left the house without removing any of the goods :- Held, that the acts of A. did not amount to making a distress. Spice v. Webb, 2

A landlord's broker went to the tenant's house, and pressed for payment of rent alleged to be due, and 31, 3s. for expenses of the levy, but touched nothing, and made no inventory. The tenant paid him the rent and expenses under protest, on which he withdrew. In an action against the landlord for an excessive distress :-Held, that he could not say that there had been no actual distress. Hutchins v. Scott, 2 M. & W. 809; M. & H. 194; 6 L. J., Ex. 186.

Placing Hand on Cattle with Intention of Distraining. \_\_ The agent of the landlord went into a field on the farm where the tenant's cattle were feeding, and, placing his hand upon one of the beasts, said he distrained the whole for the

ing morning he left with the femant a notice, stating that he had distrained the cattle thereunder mentioned, and had impounded them on the premises :- Held, that this constituted an impounding, and that a subsequent tender of the rent, and of the costs of distress, was too late. Thomas v. Harris, 1 Scott (N.R.) 524; 1 Man. & G. 695; 9 L. J., C. P. 308; 4 Jur. 723.

Making Inventory and putting Man in Possession.]-A landlord entered upon a dwellinghouse held of him, to distrain for rent in arrear. To prevent inconvenience to the tenant, the landlord with the tenant's assent, instead of removing the articles of furniture upon which he proposed to distrain, made up, from a list given to him by the tenant, an inventory of the furniture in the house, put a man into possession, and handed to the tenant a notice of the distress referring to the inventory, which was also then handed to the tenant. The landlord did not go into the several rooms in which the articles were :- Held, that this constituted a distraining of the articles mentioned in the inventory, and that a tender subsequently made was too late, although the notice of distress did not state that the articles were impounded. Tennant v. Field, 8 El. & Bl. 336; 27 L. J., Q. B. 33; 3 Jur. (N.S.) 1178; 6 W. R. 11.

Refusal to allow Removal of Goods. -W. occupied lodgings in the defendant's house at a weekly rent. He brought a plane with him, which he had hired of the plaintiffs. The plaintiffs sent two men to fetch away the piano; the defendant's wife met the men in the passage of the house outside the room in which the piano was, and having been informed of their object, said, in the presence of W., who was at the door of the room, the piano should not leave the house unless what was owing from W. for rent and board were paid. The wife was acting by the defendant's authority; and there was rent due from W .: Held, that there might be a distress without actual seizure, and that what had occurred amounted to a distress, Cramer v. Mott, 39 L. J., Q. B. 172; L. R. 5 Q. B. 357; 22 L. T. 857; 18 W. R. 947.

The grantee, under a bill of sale of furniture, being in possession in the house of the grantor and intending to remove the goods from the premises, was told by the landlord (who was there for the purpose of distraining) that he would not allow them to be removed till the arrears of rent were satisfied, and that he was prepared to resist the removal by force. The grantee thereupon made no further attempt to remove the goods :-Held, that such assertion of the intention not to allow the removal of the goods did not, under the circumstances, amount to a conversion by the landlord. England v. Cawley, 42 L. J., Ex. 80; L. R. 8 Ex. 126; 28 L. T. 67; 21 W. R. 337.

Collusion-Void as against Third Party. - If A., the teuant of B., has paid all his rent, and has his landlord's receipt for it, but fearing that his goods will be taken on legal process, agrees with his laudlord to destroy the receipt, and that the latter should put in a distress for rent to protect the goods, and the landlord does so, and sells the goods, and keeps the proceeds :- This the bears, said in the limited the winds at the limited as against a third person, and A. can maintain no action against B. for it. Sims v. Tuffs, effects on the premises that may be required in 6 Car. & P. 207.

But if B. sold some articles not included in the inventary of the distress, A. may maintain an action in respect of these articles. Ib.

Impounding Distress. - Semble, that a distress is sufficiently impounded, in accordance the party distraining had seized the goods menwith 11 Geo. 2, c, 19, s, 10, where, with the continued in an inventory theremore written and sent of the tenant, the person distraining makes the inventory was for one clock, and any other an inventory of part of the goods distrained, serves it, together with notice of the distress, on the tenant, and leaves a man in possession on the premises, but does not disturb, lock-np, or remove any of the goods. Johnson v. Upham, 2 El. & El. 250.

On distraining for rent in a dwelling-house, which was chiefly occupied by lodgers, the distrainer took down, in the kitchen, at the dictation of the tenant's wife, an inventory of furniture in the other rooms. A man was left in possession, a copy of the inventory, with a notice that the articles enumerated therein had been distrained for rent, being also left. The tenant called the same day, and thanked the distrainer for the mode in which the distress had been conducted :-Held, that the tenant, having assented to what had been done, could not object that this was not an impounding within 11 Geo. 2, c. 19, s. 10, as against a subsequent tender by him of the rent. Tennant v. Field, 8 El. & Bl. 336; 27 L. J., Q. B. 33; 3 Jur. (N.S.) 1178; 6 W. R. 11.

Independently of the assent by the tenant, there was not an impounding. Ib.

- On the Premises.]-A tenant being in arrear for rent of a cottage, his landlord distrained the goods there, and locked up the cottage, and, after selling the goods, kept possession, the tenant saying " he would have done with it" -Held, in an action by the tenant for an expulsion, that the landlord was justified in impounding the distress on the premises, and in locking up the cottage to secure the distress.

Cow v. Painter, 7 Car. & P. 707.

Trespass for breaking and entering a plaintiff's dwelling-house, locking the doors, and expelling him. Plea, justifying all the trespasses except the expulsion under a distress for rent, alleging that the defendant kept and impounded it in the dwelling-house, and in order safely to impound and keep it necessarily locked and fastened the doors of the house, and afterwards caused the goods to be appraised and sold in satisfaction of the rent and costs of distress and sale :- Held, that the plea should have shewn that the house, or that part of it of which the doors were locked, was the most fit and convenicut place for securing the distress, or the tenant might be improperly kept out of posses-Woods v. Durrant, 16 M. & W. 149; 16 sion. Woods L. J., Ex. 313.

### 9. NOTICE OF DISTRESS.

belonging to several strangers, and a pony phae-ton of A., were taken under it. A notice of distress was left on the premises, the inventory tataclied to which, after specifying certain goods, but making no mention of those of A., possible v. Uphana, 2 El. & Bl. 250; 28 L. J., Q. B. 252; ceeded thus:—"And all other goods, charters and 5 draws. (X. L. Z. L

order to satisfy the above rent, together with all the expenses":—Held, that this notice was too vague and uncertain to justify a sale of the property of A. Kerby v. Harding, 6 Ex. 234; 20 L. J., Ex. 163; 15 Jur. 953.

Where a notice of distress for rent stated that tioned in an inventory thereunder written, and goods and effects that might be found in and about the premises, to pay the rent and expenses; and where it was proved that all the goods on the premises were in fact seized, and were intended to be seized:—Held, that the notice and inventory together must be taken to mean a notice that all the goods on the premises were seized; and that since all were seized, such a notice, though improperly vague, was a sufficient compliance with the statutes, which require that when a distress is made notice shall be given of it. Wademan v. Lindsey, 14 Q. B. 625; 19 L. J., Q. B. 166; 15 Jur. 79.

In Writing. ]-Under 2 Will. & M. sess. 1, c. 5, s. 2, the notice of distress for rent, to be given five days before sale, must be in writing. Wilson v. Nightingale, 8 Q. B. 1034; 15 L. J., Q. B. 309; 10 Jur. 917.

Want of . . A want of notice does not render a distress invalid. Trent v. Hunt, 9 Ex. 14; 22 L. J., Ex. 318; 17 Jur. 899; 1 W. R. 481.

In wrong Name. - Where notice of a distress for rent is given in the name of a wrong party. the distress is not vitiated, but the distrainor cannot proceed to sell the distress under 2-Will. & M. sess. 1, c. 15, and 11 (4co. 2, c. 19. Ib.

Under wrong Act. - When a distress is made under the authority of one local act, and the notice of distress states it to be made under another, and the plaintiff discontinues an action brought in respect of that distress, the mistake as to the act authorising the distress, does not interfere with the defendant's claim to treblecosts under that act in case of discontinuance, although the plaintiff may have adopted a form of action not contemplated by the protecting act. Debney v. Corbett, 5 D. P. C. 704.

## 10. TENDER OF RENT.

After Distress impounded. - After a distressfor rent has been impounded, tender of the rent and charges is too late. Ladd v. Thomas, 4 P. & D. 9; 12 A. & E. 117; 9 L. J., Q. B. 345; 4 Jur. 798. No action lies against a party for selling a distress after tender of the rent and costs, if the tender is made after the impounding; and the rule is the same, whether the pound be public or private. Ellis v. Taylor, 8 M. & W. 415; 10 L. J., Ex. 462. But see next case.

Must not be Vague.]—A distress for rent having been made at some livery stables, goods by the tenant of the rent due, and costs, to the Within five Days and before Sale, ]-A tenderperson distraining, within five days after the dis-tress is taken and before sale, though after the distress has been impounded, in accordance with

To whom made. ]-A tender of rent and expenses need not be made to the broker who distrains; if made to the landlord, a subsequent M. 371; 2 N. & M. 114; 4 B. & Ad. 413; 2 L. J., K. B. 192. detainer is wrongful. Smith v. Goodwin. 1 N. &

But a man merely left in possession of a dis-tress by the person who distrained, has no implied authority in law to receive from the tenant payment of the rent distrained for. Boulton v. Reynolds, 2 El. & El. 369; 29 L. J., Q. B. 11; 6 Jun. (N.S.) 46; 1 L. T. 166; 8 W. R. 62.

Tender made. ]-An action lies for detaining goods taken under a distress for rent, after a sufficient tender made before impounding. Loring v. Warburton, El. Bl. & EL 507; 28 L. J., Q. B. 31; 4 Jur. (N.S.) 634; 6 W. R. 602.

- Without Expenses. - A tender of rent without expenses, after a warrant of distress is delivered to a broker, but before it is executed, is a good tender. Bennett v. Bayes, 5 H. & N. 391 : 29 L. J., Ex. 224 : 2 L. T. 156 : 8 W. R. 320

Sale after.]-A landlord distraining for rent rent and costs made at any time within the five days. Johnson v. Upham, 2 El. & El. 250; 28 L. J., Q. B. 252; 5 Jur. (N.S.) 681.

#### 11. ABANDONMENT AND RETAKING.

Abandonment. ]-The landlord's agent walked round a demised wharf, left a written notice that he had distrained goods lying there for rent, and that they would be appraised and sold, if not replevied. He then went away, leaving no one in possession:—Held, an actual seizure; and no abandonment as between landlord and tenant. in an action for an excessive distress. Swan v. Falmouth (Earl), 2 M. & Ry. 534; 8 B. & C. 456; 6 L. J. (o.s.) K. B. 374.

After seizure of goods under a distress for rent, no notice thereof having been given to the party depositing them, the distrainor permitted him to take them off the premises for a temporary purpose, with an intention on the part of the distrainor, that they should be returned, which was done :- Held, that there was not any abandonment of the distress. Kerby v. Harding, 6 Ex. 234; 20 L. J., Ex. 163; 15 Jur. 953.

The man in possession of goods distrained for rent, having quitted the house for the purpose of refreshment, found, on his return, the door purposely locked against him by the tenant, and broke it open for the purpose of re-entering:— Held, that there being no evidence of an abandonment of the distress, the man in possession was justified in so re-entering. Bunnister v. Hyde, 2 El. & El. 627; 29 L. J., Q. B. 141; 6 Jur. (N.S.) 171; 1 L. T. 438.

A broker distrained for rent by climbing over

a garden fence and letting himself into the premises by the back-door, which was not locked, in the absence of the tenant. The tenant, on his return expelled the man in possession; but three weeks afterwards the premises were again entered by breaking in the front door :- Held, that the distress was lawful in the first instance, and that there was not an abandonment of it.

Eldridge v. Stacey, 15 C. B. (N.S.) 458; 10

Jur. (N.S.) 517; 9 L. T. 291; 12 W. R. 51.

Retaking.]—A bailiff distrained in a dwellinghouse, and remained there in possession longer than five days, and being then expelled, and afterwards retaking the goods distrained upon (finding them off the premises), but along with others not in-cluded in the distress :—Held, that the doctrine of confusion of property did not apply to preclude the owner from bringing trespass. Smith v. Torr. 3 F. & F. 505.

The plaintiff was possessed of a lathe, which was in the shop of S. The latter being indebted to his landlord (the defendant) for rent, and the plaintiff being about to remove the lathe (between six and seven o'clock in the morning), the defendant interposed, saying that "he would not suffer that, or any of the other things, to go off the premises till his rent was paid," and then left the shop. The plaintiff, however, removed the lathe, and about twelve o'clock the same day the defendant sent a broker to the premises to distrain, and followed and brought back the lathe. The plaintiff thereupon sued him in trover :-Held, that the distress being commenced by the landlord's saving in the morning, that he would not suffer the things to be removed until his rent was paid, and completed by the entry of the broker afterwards, the landlord had a right to ought not to sell the goods after a tender of the take and bring back the lathe, which had been carried away in the meantime. Wood v. Nunn, 2 M. & P. 27; 5 Bing. 10; 6 L. J. (o.s.) C. P. 198; 30 R. R. 528.

> Effect of Delay in.]—A broker's man having taken possession of properly under a distress for rent, after remaining two days, left the house in a state of great excitement bordering on insanity. The landlord thinking that his leaving had been procured by the drugging of his liquor by the parties in the house, but which was not proved, six days after broke into the house and took away the goods, without any previous demand of admission:—Held, that he had no right to enter again after so long a delay. and that the owner of the goods might maintain trover for them, Russell v. Rider, 6 Car, & P.

# 12. How Goods Disposed of.

Within what Time Sold. |- In constraing 2 Will. & M. sess. 1, c. 5, s. 2, which authorises the sale of goods distrained within five days next after the taking, the days must be calculated as the rule now is in other cases, inclusively of the last and exclusively of the day of taking. Robinson v. Wuddington, 13 Q. B. 753; 18 L. J., Q. B. 250; 13 Jur. 537.

If goods are distrained for rent, the landlord must wait five whole days, i.e. five times twentyfour hours, before he sells, and if he does not, he is liable to an action. Thus, where a distress was made on Friday at 2 p.m., and the sale was on the following Wednesday at 11 a.m., the sale was wrongful. Harper v. Taswell, 6 Car. & P.

If a landlord who has distrained for rent, does not sell within the five days by arrangement between him and the tenant, that is no proof of collusion per se. Harrison v. Barry, 7 Price, 690; 21 R. R. 781.

And a reasonable time after the expiration of five days from the time of distress, is by law allowed to the landlord for appraising and selling the goods distrained. Pitt v. Shew, 4 B. & Ald. 208. The request of the tenant will justify the as requires appraisement before sale of goods landlord in detaining the goods of a lodger upon distrained is repealed, except in cases where the the premises beyond the proper time of selling, if he did not know which were the goods of the lodger, and which those of his tenant. Fisher v. Algar, 2 Car, & P. 374.

— Lodger's Goods.]—See Sharp v. Fowle, 53 L. J., Q. B. 309; 12 Q. B. D. 385; 50 L. T. 758; 32 W. R. 539; 48 J. P. 680; ante, col.

When Appraised but not Sold. ]-Where goods are distrained, and at the end of five days removed and appraised, but not sold, such act does not take away the tenant's right to replevy them. Jacob v. King, 1 Marsh. 135; 5 Taunt. 451; 15 R. R. 550.

Notice of Sale.]-In a notice for the sale of a distress, it is not necessary to mention when the rent became due for which the distress was made. Moss v. Gallimore, 1 Dougl. 279,

Liability of Auctioneer.]—An auctioneer re-ceiving for the purpose of sale, from the distrainer, goods seized as a distress, who returns them, is not answerable in trover; although, while the goods were with him, he had notice that the distress was illegal, and refused to deliver them to the owner. Whitworth v. Smith, 1 M. & Rob. 193,

- Sale subject to Condition.]—Quere, whether a landlord, who has seized his tenant's hay and straw under a distress for rent, may sell it subject to a condition that the purchaser shall consume it on the premises, according to the custom of the country. Frusher v. Lee, 10 M. & W. 709; 12 L. J., Ex. 321.

Necessity of Sale. ]-The right of property in goods distrained for rent remains in the tenant until sale, and the taking of such goods to himself, at the appraised value, in discharge of the Self, as the appears of the country of the country of a hadlord, is not equivalent to a sale.

King v. England, i B. & S. 782; 33 L. J., Q. B.
145; 10 Jur. (N.S.) 634; 9 L. T. 645; 12 W. R.

Rights of Landlord where Goods unsold.] When a landlord distrains for rent and does not sell the goods, he cannot bring an action for the rent so long as he holds the distress, though it is insufficient to satisfy the rent. Lehain v. Phil-pott, 44 L. J., Ex. 225; L. R. 10 Ex. 242; 33 L. T. 98; 23 W. R. 876. See preceding case.

Where Sale is Insufficient. ]-When goods have been sold under a distress, and the proceeds are insufficient to satisfy the rent due, the landlord has a remedy by action or counter-claim for the balance. Philpott v. Lehain, 35 L. T.

Action does not lie against Landlord for not selling.]—The 2 Will. & M. sess. 1, c. 5, s. 2, by which the landlord after five days "shall and may lawfully sell the goods distrained," is permissive, not compulsory, and therefore no action lies for not selling. *Ib*.

distrained is repealed, except in cases where the tenant or owner of the goods, by writing, requires such appraisement to be made.

Under former Statutes. ]-The appraisement of goods distrained made by two sworn appraisers under 2 Will. & M. sess. 1, e. 5, is only prima facie evidence of the value of the goods. Cook v. Corbett, 24 W. R. 181-C. A.

The 13 Edw. 1, c. 37 (Westm. 2), which enacts, that no distress shall be taken except by bailiffs "sworn and known," does not apply to distresses taken for rent in arrear. Begbie v. Hayne, 2 Scott, 193; 2 Bing, (N.C.) 124; 1 Hodges, 266; 4 L. J., C. P. 308. S. P., Child v. Chamberlain, 3 N. & M. 520; 5 B. & Ad. 1049; 6 Car. & P.

If the tenant, to save expense, request that appraisers may not be called in, and in consequenee the broker who made the seizure values the goods, the tenant cannot, in an action, complain of that which was done as an irregularity. Bishop v. Bryant, 6 Car. & P. 481.

It is illegal to swear the person who distrains as one of the appraisers. Andrews v. Russell, Bull. N. P. 81.

A distress so appraised is irregular. Westwood v. Cowne, 1 Stark, 172.

The appraiser must be sworn before the constable of the parish where the distress is taken; the constable of the adjoining parish cannot interfere, though the proper constable is not to be found when wanted. Arenell v. Croker, M. & M. 172.

The constable who swears the appraisers must attend with the appraisers at the time of the appraisement, and must swear them before they make it. Kenny v. May, 1 M. & Rob. 56.
Where a distress is sold without previous

appraisement, the party distrained on can only recover the value of the goods minus the amount of rent due; but he may recover special damage sustained by such an illegal sale. Biggins v. Goude, 2 Tyr. 447; 2 C. & J. 364; 1 L. J., Ex. 120.

In an action for selling goods under a distress, without appraisement, if the sum produced is less than the fair value to the tenant, he may recover the difference without any allegation of special damage. Knotts v. Curtis, 5 Car. & l'. 822; 2 Tyr.

Although the reut, for which goods are distrained, does not exceed 20%, they must be appraised by two appraisers, under 2 Will. & M. sess. 1, c. 5, s. 2, notwithstanding the 57 Geo. 3, e. 93, regulating the costs of distresses for rent not exceeding 201,, the schedule to which preseribes the sum to be for appraisement, "whether by one broker or more." Allen v. Tricker, 4 by one broker or more." Allen v. Tricher, 4 P. & D. 735; 10 A. & E. 640: 9 L. J., Q. B. 42; 3 Jur. 1029.

Since the statute 57 Geo. 3, c. 93, where there is a distress for rent not exceeding 20% in amount, there need be only one sworn appraiser. Fletcher

v. Saunders, 6 Car. & P. 747; 1 M. & Rob. 375. In an action on the case for selling goods distrained, without appraisement, the plaintiff is not entitled to damages without deducting the amount of rent for which the distress was made: Briggins v. Goude, 1 L. J., Ex. 129; 2 Tyr. 447.

In an action for selling goods distrained for Appraisement of Goods seized.]—By the Law refine the statute 3 Will. § M., c. 5, minus the rent due. Knight v. Egerton, 7 Ex. 407. Overplus—Meaning of ]—The overplus, which | 13. When Right of Distribution | 13. When Right of Distribution | 13. When Right of Distribution | 14. When Right of Distribution | 14. When Right of Distribution | 14. When Right of Distribution | 15. When Right of Dist left in the hands of the sheriff, under-sheriff, or constable, on a distress, for the owner's use, means the overplus after payment of the rent and of the reasonable charges. Lyon v. Tomkies, 1 M. & W. 603; 2 Gale, 144; 1 Tyr. & G. 810; 5 L. J., Ex. 260

Where the tenant herself received from the broker the balance remaining, after payment of the rent and the actual charges, making no objection as to their reasonableness :- Held, that it was a question for the jury whether she accepted such balance in satisfaction, and if not, whether it was sufficient to satisfy the real balance; but that it was not correct to lay it down as matter of law, that such payment and receipt substantially satisfied the requisitions of the statute. Ib.

- Rights of Mortgagee, -A landlord who has sold his tenant's goods under a distress for rent is not liable in an action for money had and received, at the suit of the mortgagee of the goods, to recover the surplus money in the landlord's hands, the proper remedy being by an action on the case against him for not paying Yates v. over the overplus to the sheriff. Eastwood, 6 Ex. 805; 20 L. J., Ex. 303.

Duties of Broker. - Where goods distrained for rent in arrear have been removed to a convenient place for sale, and sufficient sold to satisfy the distress, the proper course is for the broker to leave the surplus money with the sheriff. and return the surplus goods to the premises whomen he took them. Evans v. Wright, 2 whence he took them. Even H. & N. 527; 27 L. J., Ex. 50.

In an action for an excessive distress, with counts for selling without an appraisement, and for less than the value, and for not leaving the surplus in the hands of the sheriff; and the jury finding that the rent for which the distress was made was due, but that the defendant seized to an unreasonable amount, but that the plaintiff had authorised the defeudant to seize and to sell the whole; and the defence being, that the surplus having been paid over to a judgment creditor of the plaintiff's under a garnishment order for the attachment of the money obtained by the creditor, in consequence of an intimation of the distress given to him by the defendant; and the jury finding that this was a juggle, and, under the direction of the judge, giving a verdict for the plaintiff for the amount of the surplus, the posten was afterwards altered by entering a verdict for the plaintiff, with nominal damages, on the first count, and for the defendant on the others, the payment over to the creditor, under the garnishment order, being held to be a legal justification. Cross v. Aures, 1 F. & F. 187.

Being unable to find the tenant is a sufficient excuse for not paying over the surplus to the tenant after a levy and sale of the goods. Notwithstanding 2 W. & M. c. 5, s. 2, it is the practice to pay over such surplus to the tenant and not to the sheriff. Stubbs v. May, 1 L. J., C. P. 12.

Demand for. |-The statute 27 Geo. 2. c. 20, s. 2, requires that a demand be made before an action is brought against parish officers for the overplus after a distress has been made by them. The bringing of the action is not a suffi-cient demand, and a tender does not dispense with proof of it. Simpson v. Routh, 2 B. & C. 682; 4 D. & R. 181; 2 L. J. (6.s.) K. B. 163.

arrear, does not take away the landlord's right of distress. Sherry v. Preston, 2 Chit. 245.

The plaintiff being desirons of taking apartments of B., but not willing to do so unless the defendant, the superior landlord, would relieve him from the risk of having his goods distrained for B,'s rent; the defendant engaged that as long as the plaintiff paid B. his rent, he (the defendant) would never trouble the plaintiff or his property. The plaintiff accordingly entered, but failed in the due payment of his rent:—Held, that the landlord's right of distress was not taken away, notwithstanding that the plaintiff had, before the distress, tendered to B. the balance of rent due to him. Welsh v. Rose, 4 M. & P. 484; 6 Bing, 638; S L. J. (o.s.) C, P. 246.

From an agreement to which the landlord of a farm is privy, for a sale by the temant of some entage of pasture to A., the amount produced by the sale to be paid to the landlord, a contract by him may be inferred not to distrain cattle put on the demised land to consume the catage. ford v. Webster, I C. M. & R. 696; 5 Tyr, 409; 1 Gale, 1: 4 L. J., Ex. 100.

Landlord taking from Tenant Bill of Exchange.]—A tenant being indebted to his handlord for rent, the agent of the landlord, without his authority or knowledge, took a bill of exchange from the tenant for the rent, and paid over the amount of the rent to the landlord in his settlement of account. The bill was afterwards dishonoured, whilst in the hands of a third party, and the rent was not paid by the tenant, whereupon the landlord distrained :-Held, to be a question for the jury whether the bill was discounted for, or the money lent to, the tenant by the agent, or whether it was an advance by the agent to the landlord; and that if the bill was discounted for, or the money so lent to, the tenant, the landlord was not entitled to distrain; otherwise he was entitled. Parratt v. Anderson, 7 Ex. 93; 21 L, J., Ex. 291,

So where, on the rent becoming due, the agent for both tenant and landlord paid the rent to the landlord without any anthority from either party, the tenant afterwards failed to pay the rent, and the landlord distrained. Griffiths v. Chichester.

7 Ex. 95, 11,

The fact of a tenant giving a bill of exchange to his landlord for rent overdue is of itself some evidence of an agreement by the latter to suspend his right to distrain until the maturity of the bill. Palmer v. Bramley, 65 L. J., Q. B. 42; [1895] 2 Q. B. 405; 14 R. 643; 73 L. T. 329—C. A.

- Promissory Note. - Where a promissory note, payable after date, was given by a tenant to his landlord on account of rent due, without there being any distinct agreement between the parties, that it should operate as a suspension of the right to distrain:—Held, that it had not that effect. Davis v. Gyde, 4 N. & M. 462; 2 A. & E. 623; 1 H. & W. 50; ± L. J., K. B. 84.

A note given by a tenant to his landlord, on account of rent due, is no extinguishment of the right to recover the amount by distress until it is

paid. 1b.

If a tenant on whom his landlord has distrained for rent, gives a note for the amount jointly with another person, to release his goods, and a subsequent distress is made on him for arrears of rent accruing due after the period to

which the note referred, the produce of the sale shew that they were removed with a view to of such latter distress must be applied in discharge of the note, and the landlord cannot apply it in discharge of the subsequent rent, and then sue the person who joined in giving the note for the former rent. Pulfrey v. Baker, 3 Price, 572

Contract by Lessee to Purchase Reversion. ]-A lease is not determined at law by a contract by the lessee to purchase the reversion; but, in equity, the landlord's right to distrain is suspended pending completion of the contract, so long as the contract is subsisting and enforceable by action for specific performance; if, however, the contract is released or abandoned, or the lessee by unreasonable delay loses his right to specific performance, the landlord may then distrain. Ellis v. Wright, 76 L. T. 522—C. A.

Agreement for Lease—Specific Performance—Interim Order for Possession. Plaintiffs in an action for specific performance of an agreement for a lease to the defendant company, having under an interim order entered into possession of the demised premises, claimed the right to distrain on the goods of strangers on the premises for past arrears of rent due from the defendant company as lessees :-Held, that the order had suspended the relationship of landlord and tenant, and there being no tenancy there could be no right to distrain :-Held, also, that the doetrine of Walsh v. Lonsdale (52 L. J., Ch. 2; 21 Ch. D. 9) had no application, for there was no v. Silkstone and Dodsworth Coal and Iron Co., 65 L. J., Ch. 111; 44 W. R. 198.

Action Barred or Extinguished. ]-An arrangement between the parties respecting the sale of the goods distrained, after the distress but before sale, does not divest the plaintiff of his right of action; because a right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done. Willoughby v. Backhouse, 4 D. & R. 539; 2 B. & C. 821; 2 L. J. (O.S.) K. B. 174; 26 R. R. 566.

A recovery in replevin is a bar to an action for an excessive distress. *Phillips* v. *Berryman*, 3 Dougl. 286; 1 Selw. N. P. 679.

Winding-up of Company-Distress Restrained. -Sec COMPANY.

#### 14 FRAUDILENT REMOVAL

What is -11 Geo. 2, c. 19.] -The 11 Geo. 2, c. 19, applies to all cases where a landlord is, by the conduct of his tenant in removing goods from premises for which rent is due, turned over to the barren right of bringing an action for his rent. Where a tenant openly, and in the face of day, and with notice to his landlord, removed his goods without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods :- Held. that although the removal might not be clandestine, yet, if it was fraudulent (which was a question for the jury), the landlord was justified under the statute. Opperman v. Smith, 4 D. & R. 33; 2 L. J. (o.s.) K. B. 108; 27 R. B. 507.

elude a distress. Parry v. Duncan, 7 Bing. 243; 5 M. & P. 19; M. & M. 533; 9 L. J. (0,8.) C. P. 83.

It is not necessary to shew in proof of con-cealment of cattle, that they were withdrawn from sight; if they have been removed to a neighbour's field, so as to cause difficulty to the landlord in finding them, it is sufficient, Stanley v. Wharton, 9 Price, 301; 23 R. R. 683.

Semble, that it is a question for the jury whether a removal was fraudulent within the statute, although it is admitted, at the trial by the tenant, that the removal was to avoid a distress. John v. Jeukins, 1 C. & M. 227; 3 Tyr. 170; 2 L. J., Ex. 83.

It is for a landlord who has distrained on

goods removed from the premises, to shew that they were removed with an intention to defraud him of his remedy by distress. Inhop v. Morchurch, 2 F. & F. 501.

A creditor, with the assent of his debtor, may take possession of the goods of the latter, and remove them from the premises for the purpose of satisfying a bona fide debt, without incurring the penalty against persons assisting a tenant in removing his goods from the premises, although the creditor takes possession, knowing the debtor to be in distressed circumstances, and under an apprehension that the landlord will distrain, Buch v. Meats, 5 M. & S. 200: 17 R. R. 310.

Rent must be due. ]-A., in May, 1859, entered into an agreement, not under seal, with M., by which M. agreed forthwith to grant A. a valid lease, under seal, of a house and premises for three years from 25th May, 1859, at the yearly rent of 84L, payable quarterly. The agreement specified the lessor's and lesses's covenants to be contained in the lease, and it concluded as follows :- "It is hereby mutually agreed that these presents shall operate as an agreement only, and that until a lease shall be executed the rents, covenants and agreements agreed to be therein reserved and contained shall be paid and observed and the several rights and remedies shall be enforced in the same manner as if the same had been actually executed." No lease was drawn up, but A. entered into possession, and remained till a quarter's rent became due, when he fraudulently removed his goods from the premises to prevent their being distrained : -Held, that the agreement, coupled with A.'s entry into possession, made A, tenant at will to M, at a fixed reserved rent, for which M, had a right to distrain; and that, therefore, M. was right to distrain, that there electric, it was entitled under 11 Geo. 2, c. 19, s. 1, to follow and scize A.'s goods. Anderson v. Midland Ry., 3 El. & El. 614; 30 L. J., Q. B. 94; 7 Jur. (N.S.) 411; 3 L. T. 809.

Goods can only be followed by the landlord where the removal takes place after the rent becomes due. Watson v. Main, 3 Esp. 15; 6 R. R. 806. S. P., Furneaux v. Fotherby, 4 Camp. 136.
The right of the landlord to follow the tenant's

goods in the case of a frandulent and a clandestine removal, does not attach, unless the rent has actually become due before the removal of has actuary become the before the removation the goods. Rand v. Faughan, 1 Scott, 670; 1 Bing. (N.C.) 767; 1 Hodges, 173; 4 L. J., C. P. 239. S. P., Watts v. Thomas, 1 Jur. 719.

A party was tenant of a house from Michael-

The mere removal of goods by the tenant from premises denised, when rent is in arrent, is not the morning of Christmas-day he fraudulently of itself fraudulent as against the landlord: to justify the landlord in pursuing them, he must the following day the landlord followed the

rent being due and payable on the quarter-day, the landlord was justified in following and distraining the goods within thirty days after their removal. Dibble v. Bandere, 2 El. & Bl. 564; 22 L. J. Q. B. 396; 17 Jur, 1054; 1 W. R. 435. Semble, that nuder 11 Geo. 2, c. 19, s. 1, a landlord has no right to distrain goods removed

from the premises for rent due subsequent to the removal. John v. Jenkins, 2 L. J., Ex. 83; 1 C. & M. 27; 3 Tyr. 170.

A distress cannot be made upon goods fraudulently removed to avoid distress, unless rent was due at the time of the removal. Northfield v. Nightingale, 1 L. J., K. B. 219.

Landlord must retain Reversion.] - A., entitled to a lease for lives renewable for ever assigned the whole of his estate and interest in the lands to B., reserving a rent, and a power of distress and re-entry, but no reversion. The rent being in arrear, A. distrained, and B. replevied; A. avowed under 25 Geo. 2, c. 13 (Irish), plevied; A. avowed under 25 Geo. 2, c. 15 (1781), corresponding to 11 Geo. 2, c. 19, giving land-lords the remedy by distress:—Held, that the statutes apply only to those cases where there is a reversion, or an interest vested in the lessor at the expiration of the lease; and here there was no reversion. Pluck v. Digges, 2 Dow & Cl. 180, A landlord has no right to follow the goods of

a tenant who has removed them after the tenancy has expired by reason of the landlord having conveyed away the reversion. Hardy, 7 Car. & P. 501. Ashmore

Action for breaking and entering the plaintiff's house and taking his goods. Plea, that S. held premises as tenant to the defendant, under a demise, made by the defendant to S. for the term of three years, upon which demise a yearly rent was reserved and made payable by S, to the defendant by quarterly payments; that such rent being in arrear, S. fraudulently conveyed away from the premises goods of S. to prevent the defendant from distraining the same for the rent, and for that purpose, and with the privity of the plaintiff, conveyed the same into his dwelling-house; for which reasons, and because the rent remained in arrear, and because there was no sufficient distress upon the premises, and because the goods still remained in his dwellinghouse, the defendant entered the dwelling-house and seized the goods (justifying under s. 1 of 11 Geo. 2, c. 19):—Held that it was not neces-sary that the plea should state the title of defendant to the premises, and that it sufficiently appeared that there was a reversion in the defendant. Angell v. Harrison, 17 L. J., Q. B. 25; 12 Jur. 114.

Landlord can follow Goods of Tenant only.] The statute applies to the goods of the tenant only, and not to those of a stranger; therefore. a plea justifying the following of goods off the premises, and distraining them for rent in arrear, premises, and distributing defined from the fractions must show that they were the tenant's goods. Theoreton v. Adams, 5 M. & S. 38; 17 R. R. 257. S. P. Fletcher v. Marillier, 1 P. & D. 354; 9 A. & E. 457; 2 W. W. & H. 14; 8 L. J. Q. B. 176.

A landlord has no right to follow and take under a distress for rent the goods of a lodger which have been taken off the premises, but only those of his own immediate tenant. Postman

v. Harrell, 6 Car. & P. 225.

19, giving a landlord power to sue for the the son removed the goods from the farm to his

goods and distrained them :- Held, that the fraudulent removal of the goods of a tenant in order to avoid a distress, does not apply where the goods have become, by the execution of a bill of sale by the tenant, the property of the Credit Corporation, 24 Q. B. D. 135; 62 L. T. 162; 38 W. B. 118; 54 J. P. 644—C. A.

> Seizure of Goods after Expiration of Tenancy. -A landlord is not justified, under 11 Geo.

c. 19, s. 1, in following and seizing, after the expiration of the tenancy, and after the tenant has given up possession, goods which have been fraudulently removed from the demised premises for the purpose of defeating the landlord's right to distrain for the rent, for that statute applies only to a case where the handlord has a right to distrain either at common law or under 8 Anne. c. 14. ss. 6 and 7, and it is a condition of the statute of Anne, in order to make it applicable, statute of Affile, in order to make it applicable, that the tenant must be in actual possession. Gray v. Stait, 52 L. J., Q. B. 412; 11 Q. B. D. 668; 49 L. T. 288; 31 W. R. 662; 48 J. P. 86—

Proceedings by Action.]—The 4th section of the statute, which gives a summary remedy before two magistrates, provided the value of the goods shall not exceed 50l., does not take away the jurisdiction of the superior courts.
v. Holden, M. & M. 175; 31 R. R. 727.

Though the goods are worth less than 50%, the landlord is not confined to his remedy by appli-

cation to two magistrates, Ih,

And the fact that the landlord in the first instance made his complaint before the magistrates, will not preclude him from afterwards maintaining an action. Horsefall v. Davy, 1 Stark, 169; Holt. 147: 17 R. R. 624.

It is not necessary, to support such an action, that it should be proved that a distress was in progress, or about to be in execution, or even contemplated. It is enough if the rent is shewn to be in arrear, and that the goods have been removed afterwards. Stanley v. Wharton, 10 Price, 138; 9 Price, 301; 23 R. R. 683. And see Wandyate v. Knatchbull, 2 Term Rep. 154; 1 R. R. 449.

A colourable possession by a servant of the tenant will not deprive the landlord of his remedy on the statute. Pilton, Ew parte, 1 B. & Ald. 369; 19 R. R. 342.

In an action against a tenant for fraudulently removing his goods from off premises to avoid a distress for rent, it is not necessary to shew an actual participation in the act, if the removal was with his privity. Lister v. Brown, 3 D. & R. 501; 1 Car. & P. 121; 26 R. R. 614.

In an action against a party for aiding and assisting a tenant in the fraudulent removal of his goods, with intent to prevent the landlord distraining them, it is incumbent on the landlord. not only to prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant. Brooke v. Noakes, 8 B. & C. 587; 2 M. & Ry. 570; 6 L. J., K. B. 376.

A tenant being in insolvent circumstances, sold his stock and effects by auction, at which

sale his son was the principal purchaser. The son permitted the things he had bought to remain on the farm nearly two years, during which time the receipts for rent were still given Bill of Sale. ]—The statute of 11 Geo. 2, in the name of the father. To avoid a distress

own house. them :-Held, in an action for trespass by the and knowingly." son, that it lay on the son to shew his property in the goods, and in such circumstances, possession alone was not sufficient to maintain an action of trespass. Whitehead v. Fisher, L. J. (o.s.) K. B. 45.

necessary that a party seizing goods frandhently removed should first eal to his assistance an ordinary peace officer; it is sufficient if he is assisted by a person appointed a special constable for the occasion. Carteringle v. Smith, 1 M. & Rob. 284.

A plea justifying the breaking open a lock to distrain cattle which have been fraudulently removed to clude a distress for rent, must aver that a constable was present when the lock was broken. Rich v. Woolley, 7 Bing. 651; 5 M. & P.

- Pleadings in Actions.]-In an action for taking goods under a distress for rent if they have been clandestinely removed, and are afterwards seized, the defence must be pleaded wants seized, the derence must be measure specially, as the 11 Geo. 2, c. 19, s. 21, does not apply to such a case. Postman v. Harrell, 6 Car. & P. 225. S. P., Furneaux v. Fotherby, 4 Camp. 136; Vaughan v. Davis, 1 Esp. 257.

As to the proper mode of pleading the defence of fraudulent removal, where the goods had been removed to and placed in the plaintiff's house, see Fletcher v. Marillier, 1 P. & D. 354; 9 Ad. & E. 457; 2 W. W. & H. 14; 8 L. J., Q. B. 176.

The plea of not guilty is a good plea to an action by a landlord, for assisting a tenant in the fraudulent removal of his goods. Jones v. Williams, 1 H. & H. 348; 11 A. & E. 643.

In an action for taking goods, the defence, that the goods had been seized after having been fraudulently removed to prevent a distress for rent, cannot be gone into unless specially pleaded. Spencer v. Harrison, 2 Car. & K. 429.

But where, in an action against a landlord

and his broker for taking goods, there was no evidence against the landlord, and this defence was opened, but could not be gone into, as not guilty by statute was the only plea, the judge would not certify under 8 & 9 Will. 4, c. 11, s. 1, that there was reasonable cause for making the landlord a defendant to deprive him of his

costs. Ib.

It is unnecessary to shew that the goods have not been made the subject of a bona fide sale to persons not privy to the fraudulent removal, as provided by the 2nd section; that fact must be replied. Williams v. Roberts, 7 Ex. 618; 22

L. J., Ex. 61.

It is also unnecessary to state in a plea that the party upon whose land the goods are seized is privy to the fraud; and a previous request is unnecessary, in order to give the landlord the right to break into the premises for the purpose of scizing the goods. Ib.

Before Justices. ]—Justices, either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their own counties. Rex v. Morgan, Cald. 157.

The goods need not be specified in the order

The landlord followed and took | be charged to have been committed "wilfully Reg. v. Radnorshire J.J., 9 D. P. C. 90.

An adjudication of justices under 11 Geo. 2, c. 19, s. 4, is an order and not a conviction, and cannot, therefore, like a conviction, be returned to the sessions in an amended form. Rew v. Cheshire JJ., 5 B. & Ad. 439; 2 N. & M. 827; 2

L. J., M. C. 95.

After notice of appeal against an informal order of two justices for payment of double the value of goods fraudulently removed to prevent a distress, a formal order is drawn up and fleed, of which notice is given to the appellant. The court of quarter sessions is bound to try the appeal as an appeal against the original order. Ib.

An order of justices adjudging a party to pay

An order of pasaces anthugung a party to pay double the value of goods fraudulently and clandestinely removed to prevent a distress, must shew on the face of it that the party removing the goods was tenant; and that the complainant is the landlord, or the agent, bailiff, or servant of the landlord, and that the Batty removing is tenant. Rev v. Davis, 5 B. & Ad. 651; 2 N. & M. 349; 3 L. J., M. C. 29. A warrant of commitment for a fraudulent

removal of goods by a tenant did not state that there had been a complaint in writing to the justices, or that the examination of witnesses was upon oath; but it referred to the order of the justices (for payment of double the value of the goods removed) in which those matters were the goods removed in which these the justices were not liable in trespass. Coster v. Wilson, 3 M. & W. 411; 1 H. & H. 141; 7 L. J., M. C. 83.

A commitment for fraudulent removal of goods omitted to state a complaint in writing, by the omitted to state a companie in writing, a landlord, his bailiff, agent, or servant. The order of adjudication stated the defendant to have been duly charged in writing before the magistrate. The court held the commitment to | The Court heat the Committee the bad. | Fuller, Es parts, 1 New Scs. Cas, 284; 13 L. J., M. C. 141. | S. C., nom. Reg. v. Fuller, 2 D. & L. 98; 8 Jur. 604.

If an order of justices, by which a party is adjudged to pay double the value of the goods removed, for the purpose of preventing the landlord from distraining for arrears of does not state that the offender was summoned, that the complainant was adjudged to be true on evidence given upon oath, and that there was proof before the justices, that the party wiffully and knowingly assisted in the removal of the goods, it is bad, although it specifies the full proof of the offence on which the justices convicted and adjudicated. Morgan, Ex parte, 4 Jur. 916,

Prevention of Distress by altering Character of Land. - Where plaintiff, by his bill, suggested that he had a rent issuing out of certain lands, but that defendant, to hinder his distress, had converted the premises into tillage, the court directed an issue to try if there was any fraud used to prevent the distress, and if found, then plaintiff to be relieved. Davy v. Davy, 1 Ch. Ca.

#### 15. INJUNCTION RESTRAINING DISTRESS.

On what terms.]-An injunction, to restrain of the justices; it is sufficient if they find the value. Rex v. Rabbitts, 6 D. & R. 343; 3 L. J. (0.8.) K. B. 230; 28 R. R. 542. In an order by magistrates, under 11 Geo. 2, under the Supreme Court of Judicature Act, c. 19, s. 4, it is necessary that the offence should 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 8.—The

terms and conditions which the court thought | tenant farm-stock, &c., on the farm seized by just and imposed on tenants, who sought to restrain their landlord from distraining for certain rent until the determination of an action brought by them against him to try his right to the rent, were that an injunction should be granted for a fortnight, and continued only if the rent was in the meantime paid into court. Shaw v. Jersey (Earl), 4 C. P. D. 359; 28 W. R. 142—C. A. Affirming 48 L. J., C. P. 308.

When refused. -The common injunction to stay proceedings at law does not extend to distress for rent. Hughes v. Ring, 1 Jac. & Walk, 392.

In a suit relating to two annuities secured on real estate, and to which the grantor was not a party, a receiver was appointed of the incomes of the outstanding trust property, in the pleadings mentioned. The receiver entered and continued in possession of the real estate for six years. The court refused to restrain the grantor, by injunction, from distraining on the tenants. Crow v. Wood, 13 Beav. 271.

Where one distrained, and on replevin made three conusances as bailiff to different persons, an affidavit stating the claim to be under one of the persons, and that he had absconded in-

solvent, will not entitle plaintiff to an injunc-tion. Nichols v. Philips, 3 Anstr. 636.

Lessee proceeded against by ejectment, and who has received notice from the claimant disputing his landlord's title not to pay him any more rent, and has been threatened with distress by landlord for rent, cannot restrain either party by injunction.

Homan v. Moore, 4 Price, 5; 18 R. R. 684.

The plaintiff demised a number of small leasehold houses to the defendant, who having committed a forfeiture the plaintiff re-entered and determined the lease. The defendant thereupon distrained on the tenants, and prevented the plaintiff taking possession and repairing, and the plaintiff apprehended a forfeiture. The defendant had also, being insolvent, received the rents; and in consequence of his conduct the property had become greatly depreciated, and some of the houses had been abandoned by the tenants. The bill prayed an account of the rents, an injunction to restrain the defendant from receiving the rents and distraining, and that the right might be determined under the court. A general demurrer was allowed. Aldis v. Fraser, 15 Beav. 215.

Excessive Distress. |- Semble, that a court of equity will not interfere with the legal right of distraint by the owner of the reversion for the rent due to him on the contract of tenancy, even where the distraint is for more money than is due as rent. Carter v. Salmon, 43 L. T. 490.

Against Stranger. ]-A court of equity has no jurisdiction, at the suit of an owner of property, to restrain a mere stranger from vexatiously distraining on or otherwise molesting the tenants. Best v. Drake, 11 Hare, 369.

At what Stage. ]-Plaintiff, after bill, answer and replication, distrains, for which an injunction is granted. Kidnere v. Harrison, Cary, 48.

Special injunction to restrain distress will be ranted before answer, if defendant is in contempt for not answering, Heming v. Emuss, 1 Price, 386.

Contract to distrain below a certain Sum. ]-

landlord under a distress and bill of sale, the landlord not stating whether the sum (below which, by the terms of the contract, he was not to enforce his remedies) was due. Nuthrawa v. Thornton, 10 Ves. 159.

## 16. SECOND DISTRESS.

For same Rent.]—When a distrainor has been prevented from realising the fruits of a distress by the tortions conduct of the distraince, he may distrain again. Lee v. Cooke, 3 H. & N. 203; 27 L. J., Ex. 337; 4 Jur. (N.S.) 168; 6 W. R. 284— Ex. Ch.

So if a plaintiff in replevin is nonsuited, the defendant may again distrain the same goods for rent subsequently accrued, previously to his executing his retorno habendo, without waiving his action against the sureties to the bond. Hefford v. Alger, 1 Taunt. 218.

An action will lie against a landlord who, having distrained goods sufficient to pay his rent, abandous the distress, and afterwards makes a second distress for the same rent. Smith v. Goodwin. 2 N. & M. 114; 4 B. & Ad. 413; 2 L. J., K. B. 192.

But a second distress upon goods seized and held under a former distress for the same arrears of rent is not the subject of an action of trespass. Lear v. Caldecott, 3 G, & D. 491; 4 Q. B. 123; 12 L. J., Q. B. 169; 7 Jur. 277.

After a distress of goods of sufficient value to satisfy arrears of rent has been made, and abandoned by the landlord, without any cause or excuse, a second distress for the same arrears of rent is illegal; and trover will lie for a conversion of the goods seized and sold under such last-mentioned distress. Dawson v. Cropp, 1 C. B. 961; 3 D. & L. 225; 14 L. J., C. P. 281; 9 Jur. 944.

Half a year's rent being in arrear from a tenant who had previously committed an act of bankruptcy, the handlord put in a distress, and was about to proceed with the sale of the goods seized, when, in consequence of a notice from a creditor of the tenant, stating that he was taking proceedings in bankruptcy against the tenant, and that he thereby warned the landlord not to sell, and threatened to hold him accountable if he did, the landlord withdrew the distress without obtaining payment of his rent. At that time no assignee had been appointed; but the tenant was afterwards declared bankrupt, and the creditor who gave the notice was made assignee. The landlord subsequently distrained a second time for the same rent, but the goods were sold under the direction of the assignee, and the proceeds of the sale were paid over to him :-Held, that as the landlord had abandoned the first distress without any sufficient excuse for so doing, the second distress was illegal, and that he could not maintain an action against the assignee to recover the proceeds of the goods. Bugge v. Mawby, 8 Ex. 641; 22 L. J., Ex. 236; 1 W. R. 357.

A landlord distrained for rent in arrear before the bankruptcy of his tenant, and when the goods were appraised left them on the premises for the use of the bankrupt's wife, the bankrupt himself being in prison. After the bankruptcy, the landlord distrained again for the very same arrears of rent :- Held, that the second distress was void; and that the goods passed to the assignees, as being in the order and disposition of the bankrupt at the time of his bankruptcy. n order was made specifically to restore to a Bradley, Exparte, Deane, Inre, 1 Deac. & C. 223. For subsequent Rent.]—A landlord may, at inventory:—Held, that A was liable, jointly with his peril, make a distress for rent in arrear; B. in trespass. Gauntletv. King, 3 C. B. (N.S.) 59. although his right is in question in a suit depending between him and his tenant in respect of a previous seizure for rent previously due.

And, semble, he may, upon a second distress for the rent subsequently due, seize the same goods which were seized on the former distress, and which were replevied; and the legality of which former distress is still in question. Wilton v. Whiffen, 8 L. J., K. B. 303.

# 17. OTHER MATTERS RELATING TO.

Property in Goods Distrained. ]-Goods of the plaintiff's mother were assigned to the defendant braided in the control of the dependent of the defendant by bill of sale, but remaining in her possession, were distrained for rent due from her, and duly appraised, and the landlord, instead of selling them, took them at the condemned price in satisfaction of the rent and charges, and then gave them to the plaintiff, who removed. The defendant having followed and seized them:— Held, that there was no sale by the landlord under 2 Will & M. sess. 1, c. 5, s. 2, and therefore the property in the goods remained in the plaintiff, notwithstanding 11 Geo. 2, c. 19, s. 19. King v. England, 4 B. & S. 782; 33 L. J., Q. B. 145; 10 Jur. (N.S.) 634; 9 L. T. 645; 12 W. R. 308.

Effect of Distress on Title or Tenancy.] distress for rent affirms the continuance of the tenancy up to the day when the rent distrained for became due. Cotesworth v. Spakes, 10 C. B. (N.S.) 103; 30 L. J., C. P. 220; 7 Jur. (N.S.) 803; 4 L. T. 212; 9 W. R. 436.

Payment of rent under a distress is not a conclusive admission of title in the distrainer, but may be rebutted by shewing that he never had any title. Cow v. Knight, 18 C. B. 645; 25 L. J., C. P. 314.

Liability of Landlord for Acts of Broker.]—A landlord is not liable for the tortious act of a broker in seizing what his warrant does not authorise him to seize, unless he ratifies the broker's act, with knowledge of what he has done; but he is responsible for any irregularity by the broker in dealing with the distress he was authorised to make, as for selling the goods without notice of the distress and without appraisement. Haseler v. Lemoyne, 5 C. B. (N.S.) 580; 28 L. J., C. P. 103; 4 Jur. (N.S.) 1279; 7 W. R. 14.

A., who received the rents and generally managed the property of B., in B.'s name, but without authority from her, signed a warrant to distrain the goods of C., a tenant, for rent in arrear, and after the goods had been distrained, informed B. thereof who thereover said that informed B. thereof, who therenpon said that she should leave the matter in his hands:—Held, sufficient evidence that the distress was authorised or ratified and adopted by B. Ib.

The presence of a landlord with a broker on the premises of the tenant immediately after they have been forced open by the broker, and the fixtures torn down, and who professed to have distrained for rent pending the tenancy, is sufficient evidence of the landlord's liability for the wrongful act of breaking open outer doors and taking fixtures as a distress for rent due.

Moore v. Drinkwater, 1 F. & F. 134.

books and papers (which were assumed not to be under the covenant upon the demised premises,

In an action for an irregular distress, the only evidence at all affecting K., the landlord, was, that all the defendants appeared by the same

attorney, and that the defendants' attorney had given the plaintiff notice to produce "the notice of distress for rent due to Mr. K."; and that the managing clerk of the defendants' attorney, when he served it, had offered 10% to settle the action :- Held, that this was not evidence to go to the jury as against K. Crabb v. Killich, 6 Car. & P. 216.

Payment by Auctioneer to avoid Distress.]. An auctioneer sold certain goods, for the owner, on premises occupied by the owner and another person, and in respect of which the latter owed the landlord rent. By the conditions of sale each lot was to be taken to be delivered at the fall of the hammer, after which time it was to remain at the exclusive risk of the purchaser. After the sale, and before the goods were removed, the landlord threatened to distrain on the goods, whereupon the auctioneer paid the rent, and deducted it from the amount which the goods had realised, and paid over the balance to the owner:—Held, that the auctioneer was not justified, as against him, in paying the rent, as on the sale of each lot the property passed to the purchaser, who would have had to bear the loss if the landlord had distrained. Sweeting v. Turner, 41 L. J., Q. B. 58; L. R. 7 Q. B. 310; 25 L. T. 796; 20 W. R. 185.

When Distress given by Covenants.]-Upon a demise of mines a power of distress for the rent reserved was granted to the lessor over "any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the deed demised shall for the coat or enim by the deert defined single by the lessees, their executors, administrators and assigns," The assignees of the lease, with notice, under a trust deed made by the lessees for the benefit of creditors, sucd the defendants for a distress made under the above-mentioned power, after the assignment, at pits not included in the demise, but referred to in it, and then worked by the lessees :- Held, that whether the power was or was not a valid power of distress against strangers, the assignees taking with notice were bound by it. Daniel v. Stepney, L. R. 9 Ex. 185; 22 W. R. 662—Ex. Ch.

For Recovery of Debt—Bill of Sale—Non-Registration. ]-An agreement for the letting of an hotel by defendant to plaintiff provided that the tenant should not, during the tenancy, buy or sell upon the demised premises any fermented or spirituous liquors other than such as should be supplied by the landlord. It also contained a covenant that the landlord should have the same rights and remedies as landlords ordinarily possess in case of rent in arrear, against the goods of the tenant, for the recovery of any amount due for any fermented, spirituous, or other liquors, sold by him to the tenant, not exceeding 2001. over and above any rent due, and should be at liberty to seize and distrain any goods of the A authorised B., a broker, to distrain for rent same as landlords are empowered to do for arrears due to him from C. B. having entered for the of rent. The agreement had not been registered tenant in respect of any such debt, and to sell the purpose of executing the warrant, took away as a bill of sale. The defendant having entered distrainable), and omitted to insert them in the and having distrained in respect of a debt then

sale under s. 4 of the Bills of Sale Act, 1878, and was, therefore, void for want of registration, and that, consequently, the distress was illegal. Pulbrook v. Ashby (56 L. J., Q. B. 376) approved. Steens v. Marston, 60 L. J., Q. B. 192; 64 L. T. 274; 30 W. R. 129; 55 J. P. 404. But see Roundwood Colliery Co., In re, Lee v. Roundwood Colliery Co., 66 L. J., Ch. 186; [1897] 1 Ch. 373; 75 L. T. 641; 45 W. R. 324.

When a Waiver of Breaches.]—A distress for rent, levied after the commencement of an action of ejectment by a landlord against his tenant for breaches of covenants in the lease. does not operate as a waiver of breaches committed before the date of such rent being due. Grimwood v. Moss, 41 L. J., C. P. 239; L. R. 7 C. P. 360; 27 L. T. 268; 20 W. R. 972.

Pound-Breach-Rescue of Goods and Chattels.] Found-Breach—Resoure of goods and transfers,—It is no answer to an action on the 2 Will.
& M. sess. 1, c. 5, for a pound-breach that the rent and demand wore tendered after the distress and impounding. Firth v. Purris, 5
Term Rep. 422; 2 R. R. 637.
Where a balliff in possession of goods under a

landlord's distress receives a fi. fa. from the sheriff and sells the goods under it, the sheriff is liable in an action for pound-breach and rescue, at the suit of the landlord. Reddell v. Stowey,

2 M. & Rob. 358.

B. being the owner of a piano, lent it to A., whose landlord seized it under a distress for rent. The laudlord remained in possession of the piano for a fortnight, when a sheriff's officer seized it under an execution against A., and removed it to the premises of an auctioneer, who afterwards sold it :- Held, that B. might maintain trover against him, and that trover would not lie at the suit of the landlord against him, but that his remedy was against the sheriff's officer for poundbreach. Turner v. Ford, 15 M. & W. 212: 15 L. J., Ex. 215.

The plaintiff levied a distress for rent in arrear, and impounded the goods on the premises. While his bailiff was removing them, a sheriff's officer came into the house, and said that he had a fi. fa. against the plaintiff, and that he would not allow the goods to be removed. The plaintiff's tenant thereupon ejected the plaintiff's bailiff, and brought back the goods which had been removed :-Held, that these facts did not shew a

pound-breach or a rescue by the sheriff's officer.

Story v. Finnis, 2 L. M. & P. 198.

Semble, that in an action on the case for the

rescue of goods taken under distress for rent in arrear, it is not necessary for the plaintiff to set out the deed creating the demise from himself to the tenant. Dordoy v. Scott, 4 L. J. (o.s.) K. B. 60. The plaintiffs, brewers, were the lessors of a public-house to D., under an agreement which

gave them all the rights and remedies of land-lords for rent against the effects of the tenant for the recovery of any book debts for liquors sold by them to him. There being moneys due in respect of such debts, the plaintiffs sent in their bailiff with a written authority to distrain for the amount, who shewed his authority to the defendant, an auctioneer then on the premises. took an inventory and made a valuation. The of the defendant, an attorney, employed the tenant D, and the defendant thereupon proplantiff to levy a distress for rent upon the pre-

due to him for liquors supplied to the plaintiff:— | down the goods by auction, the tenant handing Held, that the covenant amounted to a bill of them to the purchasers:—Held, that though the plaintiffs had not such possession as to enable them to sue for conversion, they could maintain an action for a resenc against the defendant, for knowingly assisting in transferring the dominion and property in the goods seized to the respective purchasers. Irrdale v. Kendall, 40 L. T. 362.

> Landlord seeking Assistance of Equity.] Where a landlord had a remedy by distress, either upon nonpayment of rent or a penalty, equity will not interfere to assist him unless some fraud be proved. Doneraile v. Chartres, 1 Ridgw, P. C. 135.

## B. DAMAGE FEASANT. 1. Animals.—See Animals.

### 2. OTHER THINGS.

Engine—Railways Clauses Act, 1845.]—The Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), ss. 115, 116, provides that no one shall use an engine on the rail of a company which has not been approved of by the company, and that a certificate of the approval may be obtained by certain steps; and that if an engine be used on the railway without a certificate, the party using shall forfeit to the company a sum not exceeding 201., and the company may remove the engine : -Held, that the company has a common-law right of distress damage feasant on an engine encumbering the railway if there is no certificate of approval. Ambergate Ry, v. Midland Ry, 2 El, & Bl. 793; 2 C. L. R. 261; 23 L. J., Q. B. 17; 18 Jur. 243.

#### 3. FOR INJURY TO CHATTELS ON THE LAND.

Distress damage feasant may be taken for injury done to chattels upon the land, as well as to the land itself. An action of trespass is not maintainable so long as the distress is detained. Roscoe v. Boden, or Buden v. Rosnoe, 63 L. J., Q. B. 767; [1894] 1 Q. B. 608; 10 R. 173; 70 L. T. 450; 42 W. R. 445; 58 J. P. 368.

## C. INDEMNITY ON DISTRESS.

Extent of-Costs of Defending Action.]-A landlord signed a warrant of distress in the fol-lowing form: "I hereby authorise R. I., or his agent, as my agent, to seize and distrain the goods on the premises in the possession of M. G., for 91., being the amount of rent due to me; and for your so doing this shall be your sufficient warrant, authority, and indemnification against all costs and charges in respect to any law expenses, action, or actions that may arise, as well as any other and all charges or expenses which you or your agent may be at, or brought against you or your agent on this account." A servant of R. I. having distrained, an action was brought against him by the tenant, for the conversion of against min by the critary for the conversion of the conversion of the certain goods, some of which were alleged not to have been in the inventory, in which action the plaintiff was monauted :—Held, that, assuming that the servant had done nothing wrong, the indemnity extended to the costs of defending the action brought against him. Ibbett v. De la Salle, 6 H. & N. 233; 30 L. J., Ex. 44.

ceeded to sell the goods in disregard of such mises of an auctioneer, urging him to make the distress—the defendant putting up and knocking levy forthwith, assigning, as a reason, that there

room; and by the warrant, he directed him to ment stamp. Cox v. Bailey, 6 Scott (N.R.) 798; distrain "the several goods and chattels on the 6 Man. & G. 193. room; and by one warrant, no directed num to distrain "the several goods and chattels on the premises." Acting upon these instructions, the plaintiff caused all the goods upon the premises to be seized. Some of the goods so seized turning out to be protected from distress, the owners brought actions, and eventually the goods were restored to them, and the plaintiff incurred costs:—Held, that, under the circumstances, an costs:—Held, that, under the circumstances, an indomnification of the plaintiff against the consequences of pursuing the defendant's instructions was implied by law. \*Toplits v. Graue, 7 Scott, 629; 5 Bing. (N.C.) 636; 2 Arn. 110; 9 L. J., C. P. 180.

Held, also, that the plaintiff's conduct in the

premises did not exhibit such a degree of negligence and want of skill, as to afford an answer to an action for his work and labour. Ib.

Person Distraining in Default. ]-A. gave authority to B. to distrain on the goods of C., and gave him an indemnity against all costs and charges that he might be at "on that account."
B. made the distress, and his men being told by the son of C. that a certain cask contained spent liquor of no value, they took the cask to pieces, and let the liquor run off; it was, in fact, cochineal dye belonging to D. For the wasting of it, D. recovered damages against B. in trover: Held, that B. could not recover the amount of those damages from A. in an action on the in-demnity, and that such an indemnity would only apply to cases where a distress was illegal, because the landlord had no right to put in such distress. Draper v. Thompson, 4 Car. & P. 84.

Covenants in Lease-Indemnity against.]-Under an agreement to assign a lease, the defendant agreed to pay the rent and taxes to become duc in respect of the premises after a certain day, and to indemnify the plaintiff against the rent and covenants contained in the lease, and from all loss which he might incur by the non-payment of such rent, or non-observance of the covenants. No legal assignment was made, but the defendant was let into possession, and some of the plaintiff's goods, which lad been left upon the premises, were distrained for the rent and taxes. In an action upon the agreement for not indemnifying, the declaration alleged that goods or chattels of the plaintiff were in and upon the premises with the leave and licence of the defendant, and were liable to be seized and taken; and afterwards the goods were lawfully seized and taken as a distress for arrears of rent due under the lease in respect of the premises, and sold. The defendant pleaded that no goods or chattels of the plaintiff were at any time in and upon the premises with the leave and licence of the defendant, nor was any part of the goods lawfully seized or taken as and for a distress, or sold or disposed of as alleged:—Held, that the statement relating to the leave and licence was immaterial; and that the substance of the plea was, that the plaintiff's goods had not been seized; and that as the facts involved in the issue raised thereon had been found for the plaintiff, the verdict upon such issue should have been entered for him. Groom v. Bluck, 2 Man. & G. 567; 2 Scott (N.R.) 89; 10 L. J., C. P. 105.

Stamping.]—An undertaking whereby a party describing a distress to be taken for rent claimed

was a large quantity of furniture in the auction- who makes the distress does not require an agree-

#### D. COSTS OF DISTRESS.

The vestry of a metropolitan parish, having incurred expenses for paving, gave the occupier of a house notice to pay his rent to them and not to his landlord. The tenant gave notice thereof to his landlord, who nevertheless distrained. The tenant thereupon paid his rent (which was less than the paving expenses apportioned to the house) to the vestry, and the landlord then merely levied the expenses of the distress, and withdrew :- Held, that his right of distress was only taken away on actual payment by the tenant to the vestry, that the distress was, there-fore, justifiable in the first instance, and that the expenses thereof might be levied. Ryan v. Thompson, 37 L. J., C. P. 134; L. R. 3 C. P. 144;. 17 L. T. 506; 16 W. R. 314.

Amount of, under 57 Geo. 3, c. 93.]-There is: no statutory limit to the amount of the costs and charges for levying and impounding a distressfor rent above 201., where it is impounded on the prentises by virtue of 11 Geo. 2, c. 19, s. 10, Child v. Chamberlain, 3 N. & M. 520; 5 B. & Ad. 1049 : 6 Car. & P. 213.

The 57 Geo. 3, c. 93, does not apply to a case of a distress taken for more than 201., made of goods which are appraised at and sold for less.

than that amount. Ib.

The 6th section of the above statute does not apply to the landlord, unless he interferes personally in the distress. Hart v. Leach, 1 M. & W. 560; 2 Galc, 172; 1 Tyr. & G. 1010; 5 L. J., Ex. 244.

The costs of the distress in the above statute are not confined to the actual distress, but include the subsequent costs of appraisement and sale-per Parke, B. Ib.

A bailiff who seizes goods under a distress. warrant, if his authority to sell on behalf of the landlord is afterwards withdrawn, has no right to go on and sell for his expenses. Harding v. Hall, 14 L. T. 410: 14 W. R. 646.

Hatt, 14 L. T. 410; 14 W. E. 040.
Upon a distress for a church rate, the bailiff made certain charges mentioned in the schedule. to 57 Geo. 3, c. 93, which charges, however, though incurred, were not applicable to such a seizure :-Held, that as he had not claimed any charges not in the schedule, he was not liable to the penalty. Nott v. Bound, L. B. 1 Q. B. 405; 14 L. T. 330.

In replevin, in respect of a distress for arrears of a rent-charge, both the plaintiff and the defen-dant had taken down the record for trial, and the defendant obtained a verdict :- Held, that nnder 17 Car. 2, c. 7, which gives full costs to successful defendants in replevin, the defendant was entitled to ordinary costs only, and that he was entitled to the costs of taking down the was entitled to the costs of making the distress. Jamicoon v. Trevelyan, 10 Ex. 748; 3 C. L. R. 702; 24 L. J., Ex. 74; 1 Jur. (N.S.) 834; 3 W. R. 172.

A charge of 2s. 6d. a day for a man in possession under 57 Geo. 3, c. 93, is excessive, for retaining possession of growing crops distrained upon for a tithe rent-charge less than 201, in amount, on a piece of unenclosed meadow land. Plumpton Tithe Rent-charge, In re, Arnison, Em describing a distress to be taken for rest claimed parts, 37 L. J., Ex. 57; L. R. 3 Ex. 56; 17 L. T. to be due to him, engages to indemnify the bailiff 480; 16 W. R. 368.

## E. REMEDY FOR WRONGFUL, IRRE-GULAR, OR EXCESSIVE DISTRESS.

#### 1. WHEN AND HOW MAINTAINABLE

After Tender of Rent Due. ] - Case lies, as well as trespass, for an excessive distress after tender of the rent due. Holland v. Bird, 10 Bing. 15; 3 M. & Scott, 363; 2 L. J., C. P. 201.

A tenant, tendering his rent after distress taken, but before it is impounded or removed, may maintain trespass for a subsequent removal of the distress. Virtue v. Beasley, 1 M. & Rob.

An action is maintainable upon the equity of the 2 Will. & M. sess. 1, c. 5, s. 2, for selling goods seized under a distress for rent, where a tender of the rent and expenses has been made before the sale and within five days of the seizure, although after impounding. Johnson v. Upham, 2 El. & El. 250; 28 L. J., Q. B. 252; 5 Jur. (N.S.) 681.

An action on the case lies for an excessive distress, when the tenant has tendered the rent to his landlord prior to the distress being levied. Branscomb v. Bridges, 1 B. & C. 145; 2 D. & R. 256; 1 L. J. (0.8.) K. B. 64; 25 R. R. 335.

General Principles-Irregular Distress.] Trespass will not lie for merely an irregular distress. Messing v. Kemble, 2 Camp. 115.

The true construction of 11 Geo. 2, c. 19, s. 19, is, that an action of trespass or case must be brought with reference to the nature of the irregularity. 16.

. But trespass will lie for continuing on the premises and disturbing the plaintiff's possession after the time allowed by law. Winterbourne v. Morgan, 2 Camp. 117; 11 East, 395; 10 R. R. 532. S. P., Ethorton v. Popplewell, 1 East, 139; 6 R. R. 235.

And trespass, and not ease, is the proper remedy for taking goods under an irregular distress since 11 Geo. 2, c. 19, s. 19, Wallace v. King, 1 H. Bl. 13.

Wrongful. -Semble, tresposs lies for a wrongful continuance in possession after a distress made—per Lord Denman, C.J. Ladd v. Thomas, 4 P. & D. 9; 12 A. & E. 117; 9 L. J., Q. B. 345.

Where a landlord, after a lawful distress and impounding, accepts the rent in arrear and costs of distress, he is not liable as a trespasser for retaining possession of the goods distrained, and selling them. West v. Nibbs, 4 C. B. 172; 17 C. P. 150.

. Where goods are distrained which are not liable, an action of trover may be brought by the owner without a demand and refusal, Ward v. Ventum, Peake's Add. Cas. 126.

If a party pays money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrongdoer. wich v. Blanchard, 6 Term Rep. 298; 3 R. R. 175.

A party making a wrongful distress for two causes, as to one of which he is cutitled to notice of action, is nevertheless liable in trespass as to the other. Lamont v. Southall, 7 D. P. C. 569.

Goods of R. were seized by the plaintiff under a distress for rent of a house alleged to have been demised by him to R., and were delivered by the plaintiff to the defendant to sell as his auctioneer. When the sale was about to begin, R. served a notice on the defendant that the distress was void. and requiring him not to sell, or, if he sold, to trained upon the premises goods of the plaintiff,

retain the proceeds for him. The defendant sold the goods, but refused to pay over the proceeds to the plaintiff, and defended an action by the plaintiff, relying on the right and by the authority of R. The distress was void and tortious, as the relation between the plaintiff and R. was not that of laudlord and tenant; but although the plaintiff was a wrongdoer there was no fraud on his part, and he thought he had a right to distrain :—Held. that the defendant might set up the jus tertii of R. as an answer to the action. Biddle v. Bond, 6 B. & S. 225; 34 L. J., Q. B. 137; 11 Jur. (N.S.) 425; 12 L. T. 178; 13 W. R. 561.

An owner of sheep seized and sold under a distress for rent, which was unlawful, because there were other goods on the premises belonging to him which might have been distrained for the same rent, is entitled to recover from the distrainor, not merely nominal damages, but the full value of the sheep so seized. Keen v. Priest. 4 H. & N. 236; 28 L. J., Ex. 157; 7 W. R. 376.

What Interest sufficient to maintain Action against Landlord.]—A house was occupied by a man, his wife, and her trustee. Goods therein had been assigned to the trustee on trust for the wife. Rent being in arrear to the amount of 91. only, the landlord, by his builiff, distrained for 181, and costs, seizing 1001, worth of goods. The rent actually due was tendered to the bailiff with expenses, but refused, and the bailiff remained in possession until an undertaking was given on behalf of the tenant for payment of the whole demand, and a part amounting to 21, 7s. was paid, wherenpon the distress was withdrawn, The tenant having brought an action for an excessive distress, and for money had and received, was nonsuited when the deed of assignment was produced at the trial :- Held, that, although he was neither the legal nor the equitable owner of the goods distrained, yet he had, from his mere enjoyment of the use of them, a special property which entitled him to maintain the action. Evil v. Whitakev, 41 L. J., Q. B. 78; L. R. 7 Q. B. 120; 25 L. T. 880; 20 W. R. 317.

Excessive.]—Distraining for a greater amount of rent than is due is not, per se, actionable.

Tancred v. Leyland, 16 Q. B. 669; 20 L. J., Q. B. 316; 15 Jur. 894-Ex. Ch.

The making a distress for rent, some rent being due, accompanied by an untrue claim or pretence that more was due than really was due, is not actionable. Ib.

An action on the case does not lie against a landlord for distraining for more than the actual arrears of rent, unless the distress taken be of larger value than will satisfy the actual arrears. Wilkinson v. Terry, 1 M. & Rob. 377.

An action on the case will lie against a landlord for distraining for more than the arrears of rent due, although upon the sale the goods taken are not sufficient to satisfy the actual arrears. Taylor v. Henriker, 12 Ad. & E. 488; 4 P. & D. 243; 9 L. J., Q. B. 383.

In case for excessive distress, though the warrant of distress be for a greater sum than is really due, the plaintiff is not entitled to a verdiet unless the goods seized are excessive in regard to the sum really due. Crowder v. Self, 2 M. & Rob.

A declaration alleged that the plaintiff held certain premises as tenant thereof to the defendant, and that the defendant wrongfully disas a distress for alleged arrears of rent, to wit, away and sold. At the sale they realised 5*l*, 11*s*, the sum of 6*l*, 3*s*, by the defendant pretended In an action at the suit of the lodger for wrong-to be due and in arrear, and the defendant fully breaking and entering the premises, and wrongfully remained in possession of the goods under colour of the distress, until the plaintiff was compelled to pay, and did pay, to the defendant the pretended arrears of rent and the costs of the distress, in order to regain possession of the goods, whereas, in truth, a small part only, to wit, 11, 16s, 9d., of the pretended arrears was due :- Held, that the count disclosed no cause of action, for, as the distress was lawful, the defendant was entitled to a tender of the amount really due, and upon his refusal to accept that sum, the plaintiff's course was to replevy the goods. Glyn v. Thomas, 11 Ex. 870; 25 L. J., Ex. 125; 2 Jur. (N.S.) 378; 4 W. R. 363— Ex. Ch.

A count that the plaintiff held a workshop as tenant to the defendant at a certain rent, and that he wrongfully seized divers goods and chattels of the plaintiff, of great value, to wit, of the value of 301., as a distress for arrears of rent, to wit, 137, 10s., claimed by the defendant to be in arrear, and he afterwards wrongfully sold the goods and chattels for the alleged arrears of rent, and costs : whereas in fact a small part only, to wit, 91., of the pretended arrears of rent so distrained for was in arrear. The defendant pleaded not guilty, and at the trial a verdict was found for the plaintiff with 101. 10s. damages :-Held, that the count disclosed no cause of action. French v. Phillips, 1 H. & N. 564; 26 L. J., Ex. 82; 2 Jur. (N.S.) 1169; 5 W. R. 114— Ex. Ch.

In an action against a landlord for excessive distress it appeared that two several distresses for rent, and an intervening execution for a debt, were levied; a sale was afterwards made, when the defendant, having retained what was due for rent, paid the remainder to the execution ereditor :- Held, that he was justified in doing so, and therefore that the sum so paid over could not be recovered back in this action. Held, also, that defendant and his broker were in the same situation as the sheriff's officer, and that production of writ and warrant, without proof of judg-ment, was sufficient. Taylor v. Harrison, 1 ment, was sufficient. Taylor L. J., K. B. 155; 3 B. & Ad. 320.

Excessive or Illegal Distress-Proof of Special Damage - Withdrawal - Lodgers' Goods. -On the 1st September, 1882, W. distrained for 8l. rent due to him from T., who held three rooms under him at the weekly rent of 10s. T. had underlet one of the rooms at the weekly rent of 3s. 6d, (none of which was in arrear) to the plaintiff, who claimed the goods seized as being her sole property, and on the 5th gave W. the proper notice with a written declaration and inventory in the form required by s. 1 of the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79). W., in consequence of this claim and of his immediate tenant T. paving him 11. on account of the rent, and engaging to pay the remaining 7l. by weekly instalments of 10s., withdrew the distress. On the 21st of September two more weeks' rent having become due from T., and he having failed to pay any of the instal-ments as agreed, W. again distrained on the same goods for 81, being 71, of the rent for which the first distress was put in and 1l. for the two weeks' subsequently accruing rent. No fresh declaration and inventory having been served upon him of an excessive distress, made in consequence

converting and selling her goods :- Held, first, that as between the defendant and his immediate tenant, the distress on the 21st of September was not wrongful or illegal, but at the most excessive. and therefore not the subject of an action in the absence of an allegation and proof of special damage; secondly, that the declaration and inventory served on the 5th of September were not applicable to the distress levied on the 21st, and consequently that the plaintiff could not avail herself of the benefit of the Lodgers' Goods Protection Act, 1871. Thwaites v. Wilding, 53 L. J., Q. B. 1; 12 Q. B. D. 4; 49 L. T. 396; 32 W. R. 80; 48 J. P. 100-C. A.

Injunction against enforcing Judgment. 7-A landlord, against whom his tenant has obtained judgment in an action for excessive distress, is not entitled to an injunction to restrain proceedings upon the judgment on the ground that rent and dilapidation money have subsequently become due from the tenant. Maw v. Ulyatt, 31 L. J., Ch. 33; 7 Jur. (N.S.) 1300; 5 L. T. 251; 10 W. R. 4.

Sale under Illegal Condition. 1-A lease of a farm contained a covenant by the tenant not to remove hay, or unthreshed corn, from the demised premises, but to use them for the improvement of the land. The landlord having distrained hav and unthreshed corn for rent in arrear, sold the distress under a condition that the purchaser should consume the matters sold on the premises, and consequently the best price was not obtained in accordance with 2 Will, & M. sess, 1, c, 5 :-Held, that the landlord could not legally sell under such a condition. Hawkins v. Walrond, 45 L. J., C. P. 772; 1 C. P. D. 280; 35 L. T. 210; 24 W. R. 824.

The 56 Geo. 3, c. 53, s. 11, does not apply to a sale by a landlord of a distress. Ib.

A landlord who has distrained his tenant's hav made on the premises, and has sold it subject to a condition that it shall be consumed by the purchaser on the premises, by reason whereof it produces less than the usual price, is liable to the tenant in an action for not selling for the best price, notwithstanding that the latter was under covenant to consume such hay on the premises. Ridgway v. Stafford (Lord), 6 Ex. 404; 20 L. J., Ex. 226.

A tithe-owner seized under a distress for 391. a rick valued 621., there being smaller ricks on the premises. The tenant being bound to consume the straw on the premises, the tithe-owner sold the rick for 42l, subject to the purchaser's leaving the straw:—Held, that this was not an excessive distress; that the tithe-owner was not bound to sell the straw; that the whole rick might be taken; and that a party seizing under a distress is bound only not to take what is manifestly excessive. *Hoden* v. *Eyton*, 6 C. B. 427; 18 L. J., C. P. 1; 12 Jur. 921.

After Re-entry.]-A broker having distrained the goods of a tenant for rent in arrear, he signed an agreement drawn up by the broker, that if he, the tenant, did not pay the rent on or before a given day, the broker might re-enter and distrain again :- Held, that this did not estop the tenant from afterwards complaining by the plaintiff, W. caused the goods to be carried of the rent not being paid at the stipulated Bing. 15; 2 L. J., C. P. 201.

Man in Possession-Tenant having sufficient Control of Goods to carry on Business. ]-Au action will lie for an excessive distress, and leaving a man in possession, although the goods of the tenant are not so completely removed from his control as to prevent him from carrying on his business. Baylis v. Usher, 4 M. & P. 790; 7 Bing. 153; 9 L. J. (o.s.) C. P. 43.

Damage must be Shewn. ]-The 11 Geo. 2, c. 19, s. 19, only entitles the tenant to recover in an action for any irregularity in dealing with an action for any irregularity in dealing with a distress, where actual damage is proved. Rogers v. Parker, 18 C. B. 112; 25 L. J., C. P. 220; 2 Jur. (N.S.) 496; 4 W. K. 545.

- Even when Sale does not realise Amount of Rent. -An action may lie for an excessive distress, although the sale (less the expense) does not realise the rent due. Smith v. Ashforth. 29 L. J., Ex. 259.

having distrained growing wheat as a distress for rent, and having caused the same to be carried away, instead of impounding, appraising and selling the same, suffered other persons to carry the same away and convert the same to their use, whereby the plaintiff was injured, and was deprived of the surplus. There was a count in trover. The evidence was, that the defendant seized the plaintiff's growing wheat as a distress for rent, and sold it (for its full value) on the premises in a growing state, that the purchaser cut the wheat and carried it away, and that the surplus of the proceeds of the sale, after satisfying the rent, was paid over to the plaintiff. The jury found that the plaintiff sustained no damage by the transaction :- Held, that upon these facts and upon this finding, the plaintiff was not entitled to recover even nominal damages upon either count. Rogers v. Parker, 18 C. B. 112: 25 L. J., C. P. 220; 2 Jur. (N.S.) 496; 4 W. R. 545.

An action will lie for an excessive distress in taking growing crops. Piggott v. Birtles, 1 M. & W. 441; 2 Gale, 18; 1 Tyr. & G. 729; 5

L. J., Ex. 193.

A landlord is liable to some damages in an action for an excessive distress, where the excess consists wholly in seizing growing crops, the pro-bable produce of which is capable of being estimated at the time of the seizure; but the measure of damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or which he is put to in procuring sureties to a larger amount than he would otherwise have been in repleying the crops.

Order to restore Stock Improperly Taken. uraer to restore stock improperly Taken.]—An order was made specifically to restore to a tenant farm stock, &c., on the farm seized by landlord under a distress and bill of sale, the landlord not stating whether the sum (below which, by the terms of the contract, he was not to enforce his remedies) was due. Nutbrown v. \*Monthly 10 Ver. 150. Thornton, 10 Ves. 159.

time. Holland v. Bird, 3 M. & Scott, 363; 10 | money into court. The plaintiff replied damages ultra, and that issue was found for the defendant : —Held, that defendant was not entitled to double costs under 11 Geo. 2, c. 10, s. 21. Hundcock v. Foulkes, 9 M. & W. 431; 1 D. P. C. 658; 11 L. J., Ex. 381.

## 2. Pleadings in Actions.

Claim. ]-The court will not allow a common count in trespass de bonis asportatis, together count in trespass to done asportant, together with a count to recover the double value of the goods, framed under 2 Will & M. soss. 1, c. 5, s. 5. Haare v. Lee, 5 C. B. 754; 5 D. & L. 765; 17 L. J., C. P. 196; 12 Jun. 355.

Under a count in the common form on the 52 Hen. 3, c. 4, for an excessive distress, the allegation, that the defendant took and distrained the plaintiff's goods, does not include the sale of them, and, therefore, under such a count. damages cannot be recovered for the sale as well as the seizure. Thompson v. Wood, 3 G. & D. 518; 4 Q. B. 493; 12 L. J., Q. B. 175; 7 Jur. 303

In an action for an irregular distress it is Growing Crops. — The plaintiff declared for necessary to state correctly to whom the rent an irregular distress, alleging that the defendant distrained for is due. Ireland v. Johnson, I Bing. (N.C.) 162; 4 M. & Scott, 706; 3 L. J., C. P. 303.

> - Amendment of ]-In an action for an excessive distress, not averring that the sum distrained for was not due, with a count for selling before the expiration of five days, the plaintiff at the trial applied to amend by adding a count for distraining and selling goods to satisfy more rent than was due. The judge refused to allow the amendment, on the ground that it was not a matter in dispute at the time of the commencement of the action :—Held, that the amendment was properly disallowed. Lucas v. Turkton, 3 H. & N. 116; 27 L. J., Ex. 246.

> Defence—Not Guilty.]—The plea of not guilty by statute pleaded under 11 Geo. 2, c. 19, s. 21, in an action for an excessive distress, puts in issue not only the matter of justification, but the tenancy and ownership of the goods. Williams v. Jones, 11 A. & E. 643.

> In an action for wrongful and excessive distress, the defendant pleaded not guilty by statute :- Held, that this plea not only put in issue the wrongful act complained of, but also the tenancy itself, and the distress, and all mat-ters of justification. Nash v. Lucas, 16 L. T. 610.

> Where the plaintiff assigned her interest in the premises before the date of the distress, but still remained upon the premises (the person to whom her interest was assigned not having entered) : Held, that she was there merely as the agent of such other person, and that she therefore could not maintain an action for distress. Ib.

> — Denying Tenancy.]—In an action against a landlord for distraining where no rent was due. or for more rent than was due, a plea denying the tenancy is a good plea. Yates v. Trarle, 6 Q. B. 282; 13 L. J., Q. B. 289; 8 Jur. 774.

#### 3. EVIDENCE.

Amount of Rent Due.]—It is not incumbent on a plaintiff, in an action for an excessive distress, to prove the precise amount of rent due, as stated in the declaration; the substantial Double Costs.]—In an action for an illegal allegation being that more was distrained for distress, the defendant pleaded payment of than was actually due. Sells v. Haure, 8 Moore, 451; 1 Bing. 401; 1 Car. & P. 28; 2 L. J. (o.s.) only nominal damages. Clarke v. Holford, 2 C. P. 56.

Malice. ]-In an action for excessive distress, express malice is not necessary to be proved to support the declaration. Field v. Mitchell, 6 Esp. 71. S. F., Sturch v. Clarke, 1 N. & M. 671; 4 B. & Ad. 113; 2 L. J., K. B. 9.

Improper Sale.]—Upon a count for not selling goods distrained at the best prices, the plaintiff may go into evidence to shew that the goods were allowed to stand in the rain, and that they were improperly lotted. Poynter v. Buchley, 5 Car. & P. 512.

Where a landlord distrains for rent, and the tenant, before the sale of the goods, brings an action for breaking and entering the premises, and for seizing and taking the goods of the plaintiff, and for excessive distress, with a count in trover, evidence of the sale (which took place after the action was commenced) is not admissible to shew the intention of the defendant to seize the fixtures, which were among the articles which the landlord purported to have sold. Beck v. Denbigh, 29 L. J., C. P. 273; 6 Jur. (N.S.) 998; 2 L. T. 154; 8 W. R. 392.

Not putting in Agreement for Tenancy. ]-If a tenant who sues his landlord for a wrongful distress does not put in the agreement of the tenancy, the jury, as against him, may infer its terms from his own admission or his own evidence. Cowne v. Cordery, 10 W. R. 347.

Appraisement.]—The appraisement made by two sworn appraisers under 2 Will. & M. sess. 1, c. 5, is only prima facie evidence of the value of the goods. Cook v. Corbett, 24 W. R. 181.

Price realised on Sale by Auction. ]-The price realised at a sale by auction of goods seized under a distress is prima facie evidence of their value. Rapley v. Taylor, 1 Cab. & E. 150.

#### 4. DAMAGES

When Distress is Irregular or Excessive. In an action for an excessive distress a plaintiff is entitled to a verdict with nominal damages, although he proves no actual damage. Chandler v. Doulton, 3 H. & C. 553; 34 L. J., Ex. 89; 11 Jur. (N.S.) 286; 11 L. T. 639.

In an action for a vexatious and excessive distress, the plaintiff having received the taxed costs of his replevin on the distress is not entitled to recover, as damages, the extra costs occasioned to him by the replevin. Grace v. Morgan, 2 Bing. (N.C.) 534; 2 Scott, 790; 5 L. J., C. P. 180.

In an action for an excessive distress, the question is, what the goods seized would have sold for at a broker's sale. If it is excessive, the plaintiff is entitled to recover the fair value of them. Wells v. Moody, 7 Car. & P. 59.

In an action for selling goods distrained before the expiration of five days, the plaintiff is not entitled to a verdict unless he proves actual damage. Lucas v. Tarleton, 3 H. & N. 116; 27 L. J., Ex. 246.

Where a landlord distrained for 110L instead of 271. 10s. :- Held, that if the jury was of opinion that the goods distrained were no more damage sustained by the taking of those partithan sufficient, if fairly sold, to realise the cular goods, and not the whole amount paid by 271. 10a, the plaintiff would be entitled under him. Harvey v. Phecok, 11 M. & W. 740; 12 count for taking an excessive distress, to recover L. J., Ex. 434.

Car. & K. 540.

Held, secondly, that in assessing the damages under that count, the jury was at liberty to inquire whether the best means had been used to ascertain the value of the goods seized and sold, although it appeared that they had been duly appraised, and that they were sold at the appraised value. Ib.

Held, thirdly, that under a count in trover to recover damages for wrongfully removing fixtures under a distress, the plaintiff was entitled to recover the value of the fixtures as chattels merely. Ib.

In an action for selling goods distrained for reut without complying with the provisions of the 2 Will. & M. sess. 1, c. 5, the damages are the value of the goods distrained, less the amount of rent due, Whitworth v. Maden, 2 Car. & K. 517. S. P., Knight v. Egerton, 7 Ex. 407. In an action upon the 2 Will. & M. sess. 1,

c. 5, s. 4, for double value for distraining, no rent being due, the jury ought to be directed, if they find for the plaintiff, to give damages to double the amount of the value of the goods. Masters v. Farris, 1 C. B. 715.

In an action for an excessive distress for taking goods, it appeared that of the goods taken part belonged to the plaintiff and part to a third party :- Held, that the declaration might be amended, by stating the legal distress to have taken place with respect to the goods of the plaintiff and of the third party, and that the plaintiff would be entitled to recover some amount of damages, and that the other party whose goods were taken would also be entitled to maintain an action and recover damages. Buil v. Mellor, 19 L. J., Ex. 279.

Where a laudlord of a warehouse, let with heavy weaving machines, distrained property to an excessive amount, and locked up the warean excessive amount, and recent up as more hones, so as to keep the tenant excluded, and the proceeds of the sale, less the expenses, did not equal the amount of the rent due; but there was evidence that the value was ten times the amount, and the tenant sued both in trespass and for an excessive distress; a verdict for the plaintiff on both counts, and upon each of them, for substantial damages, was upheld. Smith v. Ashforth, 29 L. J., Ex. 259.

Set-off against Rent.]—A landlord, by his bailiff, distrained upon his tenant for an arrear of rent; the tenant brought trespass against the landlord and his bailiff, for an irregularity in the distress, and recovered damages; the bailiff being indemnified by the landlord in respect thereof:-Held, on demurrer, that the landlord and his bailiff could sustain a bill to have the damages and costs recovered by the tenant set off pro tanto against the arrears of rent due to the landlord; and to restrain execution in the meantime. Hamp v. Jones, 9 L. J., Ch. 258.

When Wrongful or originally Illegal. |-- If a landlord distrains for rent goods which are not distrainable in law (as looms in work, there being sufficient without them to satisfy the rent), and the tenant pays the rent and the costs of distress, upon which the distress is withdrawn, thetenant is entitled to recover only the actual

for rent in such a manner as to render himself a lanswer. Albridge v. Howard, 5 Scott (N.R.) 623; trespasser ab initio, the measure of damages is 4 Man. & G. 921. the full value of the goods seized. Attack v. Bramwell, 3 B. & S. 520; 32 L. J., Q. B. 146; 9 Jur. (N.S.) 892; 7 L. T. 740; 11 W. R. 309.

In an action by a tenant against his landlord for breaking open the door and tearing down fixtures, under colour of a distress during the tenancy, the proper measure of damages as to the ceeds of a forced sale by a broker, nor is it necessarily the value paid by the tenant; but it is, or may be, the value of the fixtures to an incoming tenant, and the amount such incoming tenant would be likely to pay the outgoing tenant for them. Moore v. Drinkwater, 1 F. & F. 134. Rent being due to the defendant from the

plaintiff, who was about to remove her goods, the defendant entered the house after sunset, and for some hours prevented her from so doing, and locked some of the doors:—Held, that the plaintiff was entitled to a verdiet, but only for the actual damage. Lamb v. Wall, 1 F. & F.

### F. EFFECT AS A DISCHARGE.

Distress must have satisfied Rent Due. ]-To an avowry by executors, for rent due in the life-time of their testator, a plea that the testator took as a distress for the same rent, goods of sufficient value to satisfy such rent and the costs of taking the distress, is insufficient, as it should have shewn that such distress produced a satisfaction of the rent. Lingham v. Warren, 4 Moore, 409; 2 Br. & B. 36.

To a cognizance for rent in arrear, a plea in bar that the defendant, on a former occasion, made a distress for the same rent, and took goods liable to distress, sufficient to discharge the rent in arrear, and the costs of the distress, and might thereby have paid the arrears, but neg-lected so to do, and wrongfully made a second distress for the same rent, is ill on special demurrer, assigning for cause that the plea did not shew that the rent was satisfied by the former distress. Hudd v. Raxonor, 5 Moore, 542; 2 Br. & B. 662; 23 R. R. 526.

Second Distress - First Abandoned. ] - Sec supra, col. 1032.

When agreed that Goods Seized should be kept in Satisfaction.]—Action for use and occu-pation. Plea, that the plaintiff wrongfully seized and detained goods of the defendant, of sufficient value to pay the rent and costs, that it was agreed that plaintiff should retain them in satisfaction of the rent, and that he did retain them. A replication traversing the seizure of the goods of sufficient value to pay the rent and costs of distress, is bad, as traversing mere in-ducement to the allegation of acceptance in satisfaction:—Plea held good, as disclosing a good accord and satisfaction. Jones v. Sauckins, 5 D. & L. 353; 5 C. B. 142; 17 L. J., C. P. 92.

To Action alleging Nonpayment of Rent. nonpayment of rent, a plea as to so much as relates to 150l., parcel of the arrears, that, after the same became due, and before action, the plaintiff distrained certain goods on the premises, subject to the rent, and sold them for a sum greater than the amount of the arrears, and

Where a landlord distrains goods of his tenant | thereby satisfied and discharged the arrears, is no

Payment and Satisfaction of Rent. ]-When a superior landlord distrains on a sub-lessee for rent due to him from the mesne lessee, and the sub-lessee owes rent to his immediate lessor, the amount realised by the distress is a satisfaction, pro tanto, of the rent due by the sub-lessee to his landlord; and this is so not only when the sub-lessee pays out the distress, but also when goods belonging to him are sold under the distress. O'Donoghue v. Coalbrook and Broad-oak Co., 26 L. T. 806-Ex. Ch.

The goods of a sub-lessee, who owed rent to his immediate lesser, having been sold under a distress put in by a superior landlord for rent due to him; in an action by the sub-lessee against his immediate lessor to recover damages for a breach of his covenant to pay the rent to the superior landlord :-Held, that the sum for which the goods were sold should be deducted from the amount of damages recoverable, as that sum operated as a satisfaction, pro tanto, of the rent due by the sub-lessee to his immediate lessor. Ib.

Suspension of Remedy by Action. ]-A distress for rent suspends the right of the landlord to recover the rent by action, so long as the goods distrained continue in his hands as a pledge unsold. Lehain v. Philipatt, 44 L. J., Ex. 225; L. R. 10 Ex. 242; 33 L. T. 95; 23 W. R. 876. See King v. England, 4 B. & S. 782; 33 L. T. 95, 12 L. T. 645; 12 L. T. 645; 12 W. R. 308.

## DISTRIBUTION OF ESTATE.

See EXECUTOR AND ADMINISTRATOR.

## DISTRIBUTION. STATUTES OF.

See EXECUTOR AND ADMINISTRATOR.

## DISTRICT REGISTRY.

See PRACTICE.

#### DISTRINGAS.

See EXECUTION.

#### DIVIDENDS.

See COMPANY.

### DIVORCE.

See HUSBAND AND WIFE.

# DOCK AND DOCK COMPANY.

See SHIPPING.

## DOCTOR.

See MEDICINE.

## DOCUMENTS.

See DEED AND BOND.

Discovery and Inspection of.]-See DISCOVERY,

Order to Deliver up. ]-See SOLICITOR.

## DOG.

Carriage of Dogs.]—See Carriers.
Licence for.]—See REVENUE (EXCISE).
Injuries caused by.]—See Animals.

## DOMICIL.

See INTERNATIONAL LAW.

## DONATIO MORTIS CAUSÂ.

See WILL.

#### DOWER.

See HUSBAND AND WIFE.

## DRAINAGE.

See LOCAL GOVERNMENT-METRO-POLIS-SEWERS.

## DRAWINGS.

See COPYRIGHT.

## DRUNKENNESS.

Effect on Contracts. ]-See Contract.

Convictions, &c.]—See JUSTICE OF THE PEACE.

Undue Influence. - See FRAUD.

## DUES.

See SHIPPING-TOLLS.

## DURESS.

- 1. General Principles, 1050.
- 2. What Amounts to, 1051,

See Fraud and Misrepresentation,

To the Person. ]-See TRESPASS.

#### 1. GENERAL PRINCIPLES.

In General.]—The court will not give any assistance to a party seeking to enforce a hard bargain. Kimberley v. Jennings, 6 Sim. 340; 5 L. J., Ch. 115.

Setting Aside.]—Where a purchaser takes advantage of the distress or ignorance of the vendor, or of any particular authority over him, a court of equity may set aside the purchase, even after the purchaser's death. Gould v. Oheden, 4 Bro. P. C. 198.

At time of making Contract.]—To form case for relief on the ground of oppression on the one side, and distress on the other, the disadvantage of the bargain must be within view of the parties, and not the result of future contingencies. Ramsbottom v. Parker, 6 Madl. 5.

Waiver—Performance.]—A man who being in distress, procures other persons to consent to an agreement which he would not himself have consented to if he had not been in distress, and obtains the performance of that agreement, and benefits by it, and acquiesces in the performance, without any notice of complaint, is not entitled to set aside the transaction on the mere ground of the powerful and distress. Knight v. Majoribanis, 2 Mac. & G. 10; 2 Hall & Tw. 308.

Arbitration.]—If a voidable contract is voluntarily acted upon by a party to it, with a knowledge of all the facts, he cannot avoid it when the result has turned out to his disadvantage. Ormeev. Beadel, 2 De G. F. & J. 383; 30 L. J., Ch. 1; 6 Jur. (N.S.) 1003; 3 L. T. 344; 9 W. R. 25.

A: ontracted to build a house within a given time, under a condition that if the builder did not progress as the architect might consider necessary, the architect might purchase such materials and employ such workmanship as he might consider necessary, and deduct the costs of the same from any moneys due to the contractor. After a portion of the work had been done the architect refused to certify for further payments. A's workmen not being paid, they became elamorous, and accompanied A: to the architect's office, and A. signed an agreement, giving up the contract, and stipulating that the works should be paid for according to the valuation of an arbitrator. The arbitrator proceeded with the valuation, and was attended by A: —Held, that A. had confirmed the agreement by acting upon it. The

Where an agreement to settle disputes by

arbitration is obtained by duress, the duress may is not true that a man in prison cannot sell his be waived by attending the arbitration. Ib.

Bill of Exchange-Onus of Proof. ] - In an action by the indorsee of a bill of exchange against the drawer, if it appears that he drew the bill without consideration and under duress. it is incumbent on the plaintiff to prove that he gave value for it, although it was indorsed to him before it became due. Duncan v. Scott, 1 Camp.

#### 2. WHAT AMOUNTS TO.

Threat of Criminal Proceedings. - The defendants gave promissory notes to the plaintiff, the trustee in bankruptcy of C., the plaintiff stating that criminal charges under the Debtors Act 1869, could, and were about to be brought against C., who was the son of one defendant and nephew of the other :- Held, that judgment should be entered for the defendants on the ground that they had been induced to enter into ground that one had been induced to state and the contract by duress, and threats of criminal proceedings. Seeur v. Cohen, 45 L. T. 589. And see Williams v. Buyley, 35 L. J., Ch. 717; L. R. 1 H, L. 200; 12 Jur. (N.S.) 875; 14 L. T. 802.

Compromise of Proceedings. -- When an offence is of such a nature that the person injured may obtain either a civil or a criminal remedy, there is nothing unlawful in a compromise of criminal proceedings taken against the offender. Fisher v. Apollinaris Cv., 44 L. J., Ch. 500; L. R. 10 Ch. 297; 32 L. T. 628; 23 W. R. 460.

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A mortgage deed executed by a married woman was set aside on the ground that it was executed by her to secure payment of moneys which her husband had misappropriated and in fear of a criminal prosecution against him. McClatchie v. Haslam, 63 L. T. 376.

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Coercion.]-The moment that a person who influences another does so by the threat of taking away from that other something that he possesses, or of preventing him from obtaining something he could otherwise have obtained, then the act of the person exercising the influence becomes coercion, and ceases to be persuasion or considera-tion. Ellis v. Barker, 41 L. J., Ch. 64; L. R. 7 Ch. 104; 25 L. T. 680; 20 W. R. 160.

was entered into while seller was in prison. It defeated. Beasley v. Magrath, 2 Sch. & Lef. 31.

property, but the transaction is to be carefully examined by the court. Brinkley v. Hahn, 1 Dr.

Though a man is arrested by due process, yet, if obliged to execute a conveyance while under arrest, this court will relieve. Nicholls v. Nicholls, 1 Atk, 409,

If a person in custody confess a judgment whilst his counsel is attending, it will not be set aside for duress. Roy v. Beaufort (Duke), 2 Atk.

Compromise with a prisoner held bad. Wil-kinson v. Stafford, 1 Ves. J. 43. But see Hinton v. Hinton, 2 Ves. Sen. 635.

Securities obtained under a threat and apprehension of arrest set aside. Scott v. Scott, 11 Ir. Eq. R. 74.

Distressed Circumstances. ]-A share in a leasehold interest was sold to the plaintiff. Subsequently the owners of the other share obtained a renewed lease of the whole, which they mortgaged to M., and brought an ejectment against the plaintiff. The plaintiff filed a bill against the mortgagors and their mortgagee, and obtained a decree in 1826, for an account and a reconveyance against them. The defendant, the attorney who prepared the mortgage and conducted the electment, afterwards purchased the mortgagors' interest, and paid off his mortgage. The plaintiff, who was in distressed circumstances, signed an agreement, stating that he had surrendered his holding to the defendant, and consenting to a reference to arbitration respecting a new division of the lands, and to take them at an increased rent; but no actual surrender, nor lease, was proved :-Held, that the plaintiff was entitled to the benefit of the decree of 1826 against the defendant, who was decreed to pay the costs. Patten v. Wallace, 1 L. & T. 470. S. C., sub nom. Wallace v. Patten, 12 Cl. & F. 491.

H. was entitled to the rent of lands producing 350l. a year. S. having withheld the rents of these lands from H., whereby she was reduced to great necessity, she was prevailed upon to release the same to S., in consideration of 1007. paid down (though the arrears amounted to 1,2001), and an annuity of 2001 per annum. But this release was set aside as fraudulent. Amory v. Luttrell, 4 Bro. P. C. 159,

— Reduction of Portion.]—Notwithstanding two private acts of parliament, reducing younger children's portions in proportion to the other interests in the estate, the court would not enforce an agreement entered into by one of the younger children, in execution of the private acts, consenting to accept a stated sum in satisfaction; such agreement being inserted by the plaintiff's solicitor in a receipt from her, on paying her a small sum of money, and she being in great distress and embarrassment at the time. Kerneys v. Hansard, G. Cooper, 125,

- Bond. ]-B., while in distressed circumstances, upon the suggestion of M., executes a bond to him for a sun due by a deceased brother, to whom she was next of kin, but who left no personal chattels. The bond set aside; but if it had been executed by her after getting possession Imprisonment.]—Specific performance of an of an estate to which she became entitled on agreement for sale decreed, though the contract the death of her brother, it could not have been

Sale of Equity of Redemption.]-A mortgagor in embarrassed circumstances, in May, conveyed his equity of redemption, under pressure, to the mortgagee, for considerably less than its value, and in June he was, on his own petition, adjudicated bankrupt. On a bill by the assignee the deed was set aside. Ford v. Olden, 36 L. J., Ch. 651; L. R. 3 Eq. 461; 15 L. T. 558.

Promise to Bequeath Debt by Will.]-A., being in embarrassed circumstances, made an arrangement for an advance from an insurance office, that his mother should take up certain judgment debts and have a second mortgage (after that of the insurance office) on the family property. The money was raised, but he refused B. PRIVATE WAYS. to execute the mortgage to his mother, except upon a promise from her to leave the mortgage debt to him by will. The mother died without carrying out the promise:—Held, that since he could have been compelled to excente the deed without the promise, the promise was not binding on the mother's estate. Luxmore v. Clifton, 16 W. R. 265.

Duress of Goods.]—Bond given for silks taken up in order to sell and to raise money ordered to be delivered up upon payment of the sum really raised. Burker v. Vansommer, 1 Bro. C. C. 148, If a man pays money or gives securities to

redeem his goods from the custody of the law, that is not a case of duress, nor can he recover back his money, or defend himself from proceedings taken to enforce the securities. Liverpool Marine Credit Co. v. Hunter, 18 L. T. 749: 16 W. R. 1090.

An agreement made under duress of goods is not void. Skeate v. Beale, 3 P. & D. 587; 11 A. & E. 983; 9 L. J., Q. B. 283; 4 Jur. 766. And see Wahefield v. Newbon, 6 Q. B. 276;

13 L. J., C. B. 258: Kearns v. Durell, 6 C. B. 596; 18 L. J., C. P. 28: 13 Jur. 153.

Threat to Confine as a Lunatic. -- A threat by husband to confine his wife in a lunatic asylum does not constitute duress. Biffin v. Bignell, 7 H. & N. 877; 31 L. J., Ex. 189; 8 Jur. (N.S.) 647; 6 L. T. 248; 10 W. R. 322.

Religious Fears.]—An assignment of their share in their father's property was obtained from two nuns, who made declarations shewing that the deeds were executed by them against their will and under the influence and spiritual terror of their vows. The assignees filed a bill for the shares but declining an issue whether the deeds were freely executed, their bill was dismissed with costs. M Carthy v. M Carthy, 1 H. L. Cas. 703; 9 Ir. Fq. R. 629; 12 Jur. 757. And see cases under Fraud and Misrepresen-TATION.

E. E. H. B.

#### DWELLINGS.

Artizans' Dwellings. ]-See ARTIZANS' DWEL-

In Metropolis. ]-See METROPOLIS.

In Other Places. ]-See LOCAL GOVERNMENT.

## DYING DECLARATIONS.

See CRIMINAL LAW.

#### EASEMENTS AND PRE-SCRIPTION.

[BY J. RITCHIE.]

- A. EASEMENTS GENERALLY.
  - 1. General Rules, 1054.
  - 2. Under Prescription Act, 1058.
  - 3. Implied by Law, 1065.
  - 4. Created by Express Agreement, 1070.
  - Abandonment, Suspension, or Extinguishment of, 1075.
  - 6. Pleadings and Evidence, 1078.

- 1. By Grant and Reservation.
  - a. Particular Description, 1082. General Words, 1089.
  - c. Sale without Notice, 1094.
- By Necessity, 1095. 3. By User and Prescription.
  - Acquisition, 1100.
  - Evidence of User, 1103.

  - c. Continuous User, 1105.
- Extent of Right, 1106.
- 5. Cesser of User or Abandonment, 1109.
- Unity of Possession, 1111.
- 7. Obstruction of, 1114.
- 8. Effect of Statutes upon, 1119.
- 9. Permission to Use, 1121.
- 10. Proceedings relating to.
  - a. Jurisdiction, 1121.
    - b. Parties, 1122.
  - Evidence, 1122. d. Pleadings, 1123.

## C. LIGHT AND AIR.

- 1. Right to.
  - a. Generally, 1129.
  - b. By Statute, 1130.

  - c. By Grant, 1138.
    d. Licence and Acquiescence, 1145. Abandonment and Alteration, 1147.
  - f. Extinguishment, 1151.

#### 2. Obstruction.

- a. General Principles, 1152.
- b. Right to Obstruct, 1154.
- c. Injunction.
  - Who Entitled, 1157.
  - ii. When Granted, 1159. iii. Nature of Interference or Ob-
  - struction, 1166. iv. Defences, 1172.

  - v. Form of Injunction, 1172.
  - vi. Inspection of Premises, 1173.
- vii. Application, 1174. d. Action, 1174.
- e. Damages, 1175.
- D. RIGHT OF SUPPORT.
- - From Adjoining Land, 1178. 2. From Adjoining Buildings, 1185.
- E. DRAINS AND WATERCOURSES-See WATER.
- F. OTHER EASEMENTS, 1188.

## A. EASEMENTS GENERALLY.

## 1. GENERAL RULES.

Prescription.]—No one can claim a prescription in his own land. Cooper v. Barber, 3 Taunt. 99 ; 12 R. R. 604.

arbitration is obtained by duress, the duress may is not true that a man in prison cannot sell his be waived by attending the arbitration. Ib.

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Though a man is arrested by due process yet, if obliged to execute a conveyance while under arrest, this court will relieve. Nicholls v. Nicholls, 1 Atk. 409.

If a person in custody confess a judgment whilst his counsel is attending, it will not be set aside for duress. Roy v. Beaufort (Duke), 2 Atk.

Compromise with a prisoner held bad. kinson v. Stafford, 1 Ves. J. 43. But see Hinton v. Hinton, 2 Ves. Sen. 635.

Securities obtained under a threat and apprehension of arrest set aside. Scott v. Scott, 11 Ir. Eq. R. 74.

Distressed Circumstances. ]-A share in a leasehold interest was sold to the plaintiff. sequently the owners of the other share obtained a renewed lease of the whole, which they mortgaged to M., and brought an ejectment against the plaintiff. The plaintiff filed a bill against the mortgagors and their mortgagee, and obtained a decree in 1826, for an account and a reconveyance against them. The defendant, the attorney who prepared the mortgage and conducted the ejectment, afterwards purchased the mortgagors' interest, and paid off his mortgage. The plaintiff, who was in distressed circumstances, signed an agreement, stating that he had surrendered his holding to the defendant, and consenting to a reference to arbitration respecting a new division of the lands, and to take them at an increased rent; but no actual surrender, nor lease, was proved :-Held, that the plaintiff was entitled to the benefit of the decree of 1826 against the defendant, who was decreed to pay the costs. Patter v. Wallace, 1 L. & T. 470. S. C., sub nom. Wallace v. Patten, 12 Cl. & F. 491.

H. was entitled to the rent of lands producing 350%, a year. S. having withheld the rents of these lands from H., whereby she was reduced to great necessity, she was prevailed upon to release the same to S., in consideration of 100%. paid down (though the arrears amounted to 1,2001.), and an annuity of 2001. per amuni. But this release was set aside as fraudulent. Amory v. Luttrell, 4 Bro. P. C. 159.

- Reduction of Portion, -Notwithstanding two private acts of parliament, reducing younger children's portions in proportion to the other interests in the estate, the court would not enforce an agreement entered into by one of the younger children, in execution of the private acts, consenting to accept a stated sum in satisfaction; such agreement being inserted by the plaintiff's solicitor in a receipt from her, on paying her a small sum of money, and she being in great distress and embarrassment at the time. Kerneys v. Hansard, G. Cooper, 125.

Bond. ]-B., while in distressed circumstances, upon the suggestion of M., executes a bond to him for a sum due by a deceased brother, to whom she was next of kin, but who left no personal chattels. The bond set aside; but if it had been executed by her after getting possession Imprisonment.]—Specific performance of an agreement for sale decreed, though the contract the death of her brother, it could not have been was entered into while seller was in prison. It defeated. Beasley v. Magrach, 2 Sch. & Lef. 31. Sale of Equity of Redemption.]—A mortgagor in embarrassed circumstances, in May, conveyed his equity of redemption, under pressure, to the mortgagee, for considerably less than its value, and in June he was, on his own petition, adjudicated bankrupt. On a bill by the assignee the deed was set aside. Ford v. Olden, 36 L. J., Ch. 651; L. R. 3 Eq. 461; 15 L. T. 558.

Promise to Bequeath Debt by Will. ]-A. being in embarrassed circumstanecs, made an arrangement for an advance from an insurance office, that his mother should take up certain judgment debts and have a second mortgage (after that of the insurance office) on the family property. The money was raised, but he refused property. The money was raised, but he recused to execute the mortgage to his mother, except upon a promise from her to leave the mortgage debt to him by will. The mother died without carrying out the promise :- Held, that since he could have been compelled to execute the deed without the promise, the promise was not binding on the mother's estate. Luxmore v. Clifton, 16 W. R. 265.

Duress of Goods. ]-Bond given for silks taken up in order to sell and to raise money ordered to be delivered up upon payment of the sum really raised. Barker v. Vansommer, 1 Bro. C. C. 148.

If a man pays money or gives securities to redeem his goods from the custody of the law, that is not a case of duress, nor can he recover back his money, or defend himself from proceedings taken to enforce the securities. Liverpool Marine Credit Co. v. Hunter, 18 L. T. 749; 16 W. R. 1090.

An agreement made under duress of goods is not void. Sheate v. Beale, 3 P. & D. 587; 11 A. & E. 983; 9 L. J., Q. B. 233; 4 Jur. 766.
And see Wakefield v. Newbon, 6 Q. B. 276;

13 L. J., Q. B. 258: Kearns v. Durell, 6 C. B. 596; 18 L. J., C. P. 28; 13 Jnr. 153.

Threat to Confine as a Lunatic. —A threat by husband to confine his wife in a lunatic asylum does not constitute duress. Biffin v. Biynetl, 7 H. & N. 877; 31 L. J., Ex. 189; 8 Jur. (N.S.) 647; 6 L. T. 248; 10 W. R. 322.

Religious Fears.]—An assignment of their share in their father's property was obtained from two nuns, who made declarations shewing that the deeds were executed by them against their will and under the influence and spiritual terror of their vows. The assignees filed a bill for the shares but declining an issue whether the deeds were freely executed, their bill was dismissed with costs. M'Carthy v. M'Carthy, 1 H. L. Cas. 703; 9 Ir. Eq. R. 620; 12 Jur. 757. And see cases under FRAUD AND MISREPRESEN-TATION.

E. E. H. B.

#### DWELLINGS.

Artizans' Dwellings. ] - See ARTIZANS' DWEL-LINGS

In Metropolis. ]-See METROPOLIS.

In Other Places. ]-See LOCAL GOVERNMENT,

## DYING DECLARATIONS.

See CRIMINAL LAW.

#### EASEMENTS AND PRE-SCRIPTION.

[BY J. RITCHIE,]

- A. EASEMENTS GENERALLY.
  - 1. General Rules, 1054. 2. Under Prescription Act, 1058.
  - 3. Implied by Law, 1065.

  - 4. Created by Express Agreement, 1070.
  - 5. Abandonment, Suspension, or Extinguishment of, 1075.
  - 6. Pleadings and Evidence, 1078.

#### B. PRIVATE WAYS.

- 1. By Grant and Reservation.
  - a. Particular Description, 1082. b. General Words, 1089.
  - c. Sale without Notice, 1094.
- 2. By Necessity, 1095.
- 3. By User and Prescription.
- a. Acquisition, 1100.
  - b. Evidence of User, 1103.
  - c. Continuous Uscr. 1105.
- Extent of Right, 1106.
- 5. Cesser of User or Abandonment, 1109,
- 6. Unity of Possession, 1111.
- 7. Obstruction of, 1114.
- 8. Effect of Statutes upon, 1119.
- 9. Permission to Use, 1121.
- 10. Proceedings relating to.
  - Jurisdiction, 1121.
  - b. Parties, 1122.
  - c. Evidence, 1122.
  - d. Pleadings, 1123.

#### C. LIGHT AND AIR. 1. Right to.

- - a. Generally, 1129.
  - b. By Statute, 1130.
     c. By Grant, 1138.
  - d. Licence and Acquiescence, 1145.
  - e. Abandonment and Alteration, 1147. f. Extinguishment, 1151.
- 2. Obstruction.
  - a. General Principles, 1152,
    - b. Right to Obstruct, 1154.
    - c. Injunction.
      - Who Entitled, 1157.
      - ii. When Granted, 1159. iii. Nature of Interference or Ob-
      - struction, 1166.
      - iv. Defences, 1172.
      - v. Form of Injunction, 1172,
      - vi. Inspection of Premises, 1173.
      - vii. Application, 1174.
    - d. Action, 1174. e. Damages, 1175,
- D. RIGHT OF SUPPORT.
- 1. From Adjoining Land, 1178.
  - 2. From Adjoining Buildings, 1185.
- E. DRAINS AND WATERCOURSES-See WATER,
- F. OTHER EASEMENTS, 1188.
  - A. EASEMENTS GENERALLY,
    - 1. GENERAL RULES.

Prescription. ]-No one can claim a prescription in his own land. Cooper v. Barber, 3 Taunt, 99 : 12 R. R. 604.

the thing upon which it is claimed is within the time of memory. Rew v. Johns, Lofft. 76.

Unlawful Acts will not Support. 1scription based upon a series of unlawful acts. cannot be supported whether the acts were unlawful at common law or by statute. Traill v. McAllister, 25 L. R., 1r. 524.

The general rule that a man cannot prescribe against a statute means that prescription cannot be proved by acts prohibited by a statute. The prescription which is sought to be established must be one which could have a legal origin, and the right must be such as that it could have been lawfully granted by the owner of the servient to the owner of the dominant tenement; and if such grant would have been unlawful, either at common law or as prohibited by statute, it cannot be presumed, and the claim of right cannot be supported by a continuance of acts, thus unlawful, for any length of time. Ib.

- Ancient Grant. |--- An ancient grant, without date, does not necessarily destroy a prescriptive right; for it may be either prior to time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury. Addington v. Clode, 2 W. Bl. 989.

- Effect of unauthorised Grant, ] - Sec Simpson v. Godmanchester Corporation, 66 L. J., Ch. 770; [1897] A. C. 696; 77 L. T. 409—H. L.

- Effect of Statute. ]-The Prescription Act has not taken away any of the modes of acouiring easements which existed before the statute was passed; and where the evidence is clear of a right to the light from time immemorial that right is not taken away by the statute. Aynaley v. Glaver, 44 L. J., Ch. 523; L. R. 10 Ch. 283; 32 L. T. 345; 23 W. R. 457.

- Impossible Rights. The right to any easement whether affirmative or negative cannot be acquired by prescription when neither it was physically capable of being prevented nor actionable at the snit of the servient owner, Sturges v. Brildman, 48 L. J., Ch. 785; 11 Ch. D. 852; 41 L. T. 219; 28 W. R. 200—C. A.

The right therefore to make a noise so as to annoy a neighbour cannot be supported by user, unless during the period of user the noise has amounted to an actionable nuisance. Ib.

An owner of a windmill cannot claim, either by prescription, or by presumption of a grant arising from twenty years' acquiescence, to be entitled to the free and uninterrupted passage of the currents of wind and air to his mill. Webb v. Bird, 13 C. B. (N.S.) 841; 31 L. J., C. P. 335; 8 Jur. (N.S.) 621—Ex. Ch. Affirming, 4 L. T. 445; 9 W. R. 899.

Such a claim is not within 2 & 3 Will, 4, c. 71. s. 2, which is confined to rights of way or other easements to be exercised upon or over the surface of the adjoining land, Ib.

- Rights in Gross.]-Rights in gross are not within 2 & 3 Will. 4, c. 71. Shuttleworth v. Le Fleming, 19 C. B. (N.S.) 687; 34 L. J., C. P. 309; 11 Jur. (N.S.) 840; 14 W. R. 13.

A prescription cannot be where the creation of | because the sheep, &c., the defendant, as servant of those persons distrained. The plaintiff replied that he and his tenants, and immediately before him certain other persons from and under whom the plaintiff immediately claimed and the tenants of the said other persons, and immediately before them B, from and under whom the said other persons immediately claimed, and the tenants of the said B., for 30 years next before suit enjoyed as of right and without interruption common of pasture over the said land in gross for 100 sheep; that the plaintiff put on six sheep, which defendant distrained :- Held, on demorrer that the replication was bad. Latcham, 4 W. R. 97. Sannders v

> - Profits à prendre.] - The defendants proved that cot-fishing had been carried on in a navigable tidal river with the knowledge of the plaintiff or his agents, and without interruption by them, as far back as living memory extended: Held, that if the plaintiff's right to a several fishery were once proved the exercise of cot-fishing could not take it away or confer any right on the imblic; for the public cannot in law prescribe for a profit à prendre in alieno solo, nor acquire any right adversely to the owner under any statute of limitation; and an incorporeal hereditament such as a several heterporeas hereditainent stati as a several fishery, which can only pass by deed, cannot be "abandoned." Noill v. Devonshère (Duke), S. App. Cas. 135; 31 W. R. 622 — H. L. (Ir.)

A prescriptive right to a several ovster fishery in a navigable tidal river was proved to have been exercised from time immemorial by a borough corporation and its lessees; without any qualification except that the free inhabitants of ancient tenements in the borough had from time immemorial without interruption, and claiming as a right, exercised the privilege of dredging for oysters in the locus in quo from the 2nd of February to Easter eye in each year, and of catching and earrying away the same without stint for sale and otherwise. This usage of the inhabitants tended to the destruction of the fishery, and if continued would destroy it:— Held (Lord Blackburn dissenting), that the claim of the inhabitants was not to a profit à prendre in alieno solo; that a lawful origin for the usage ought to be presumed if reasonably possible; and that the presumption which ought to be drawn, as reasonable in law and probable in fact, was that the original grant to the corporation was subject to a trust or condition in favour of the free inhabitants of ancient tenements in the borough in accordance with the usage. Goodman v. Saltash Corpora-tion, 52 L. J., Q. B. 193; 7 App. Cas. 633; 48 L. T. 239; 31 W. R. 293; 47 J. P. 276—H. L.

(E.)
The inhabitants of a town cannot, by that name and description, prescribe for an easement in alieno solo; and, therefore, under a grant the inhabitants of a town cannot take, by that name or description, an easement to place their stalls on market-days upon the land of another, withont making any mayment for the use of the soil. Lockwood v. Wood, 6 Q. B. 31; 13 L. J., Q. B. 365; 8 Jur. 543-Ex. Ch.

A right in an occupier of an ancient messuage to water his eattle at a pond, and to take the water thereof for domestic purposes for the more Trespass for Distraining Sheep.]-Plea alleg- convenient use of his messuage, is an easement, ing a right of common in certain persons, and and not a profit a prendre in the soil of another.

So a right claimed by the inhabitants of a township to enter upon land of a private person and take water from a well therein for domestic and date water from a went different for domestic purposes is an easement and not a profit à prendre. Rice v. Ward, 4 El. & Bl. 702; 3 C. L. R. 744; 24 L. J., Q. B. 153; 1 Jun. (N.S.) 704; 3 W. R.

A right claimed by the inhabitants of a parish to cut and carry away underwood for fuel from a common belonging to the lord of the manor is a right to a profit a prendre in the soil of another. Rivers (Lord) v. Adams, 48 L. J., Ex. 47; 3 Ex. D. 361; 39 L. T. 39; 27 W. R. 381.

The public cannot by prescription or otherwise obtain a legal right to fish in a non-tidal river, even though it be navigable. Smith v. Andrews, [1891] 2 Ch. 678; 65 L. T. 175.

And see Tilbury v. Silra, post, col. 1063.

\_\_\_\_ Several Fishery.]—There may be a pre-scriptive right in a subject to a several fishery in an arm of the sea. Oxford Corporation v. Richardson, 4 Term Rep. 439; 3 R. R. 579.

A prescriptive right to a several fishery in a navigable river may pass as appurtenant to a manor. Rogers v. Allen, 1 Camp. 309; 10 R. R.

To an action for fishing in the plaintiff's fishery the defendant pleaded that the locus in quo was an arm of the sea; the plaintiff replied a prescription for the sole and several right of fishing, and traversed that every subject had a right of free fishery in the locus in quo. This was a bad traverse, and defendant might pass it and traverse the prescriptive right. Richardson v. Orford, 2 H. & Bl. 182; 1 Aust. 281; 4 Term Rep. 437; 3 R. R. 579.

\_\_\_\_ Excessive Servitudes.]—There can be no prescriptive right, in the nature of a servitude or an easement, so large as to preclude the ordinary uses of property by the owner of the land affected, Dyce v. Hay, 1 Macq. H. L. 305.

Semble, that where a claim, in the nature of a servitude or an easement, is incapable of judicial control and restriction, it cannot be sustained by

prescription, Ib.

It does not follow that rights sustainable by grant are necessarily sustainable by prescription.

The right to the whole of a given substratum of coal lying under a close, is a right to land and cannot be claimed by prescription. A right to take coal is different. Wilkinson v. Proud, 11 M. & W. 33; 12 L. J., Ex. 227; 7 Jur. 284.

Action for breaking and entering the closes of the plaintiff, and taking sand therefrom. Pleas, setting up a right by prescription for thirty and sixty years, for the surveyors of the parish for the time being, to take the sand, stones and gravel, from the waste land within the parish, for the purpose of repairing the highways, are bad. Padwick v. Knight, 7 Ex. 854; 22 L. J.,

Similar pleas, setting up an immemorial right of all persons residing in the parish, whose office or duty it was to repair the highways, are also

Ownership of Land or Easement.]-By a local act power was given to road trustees, in whom the soil of the road was vested, to consent in applies to cases under ss. 2 and 4, as well as to writing to excavation or undermining of the road : cases under ss. 3 and 4. Beytagh v. Cassidy, this was repealed as from 1 November, 1871. By 16 W. R. 403.

Manning v. Wasdale, 1 N. & P. 172; 5 A. & E. deel dated 12 July, 1871, the then road trustees, 758; 2 H. & W. 431; 6 L. J., K. B. 59. for valuable consideration, granted to defendants for valuable consideration, granted to defendants predecessor in title a licence to construct a tunnel under the road. The tunnel was completed about July, 1872, and had ever since remained in the uninterrupted and exclusive possession of the defendants or their predecessor in title. No substantial alteration had been made in it for more than twelve years before the issue of the writ in Angust, 1891. Plaintiff, who was owner of the land on both sides of the road, where the tunuel passed under, claimed to be cutitled to the soil under the road at that place, and claimed an injunction restraining trespass by the defendants on his land :- Held, that the use of the tunnel by the defendants was not a mere easement, but as against the plaintiff amounted to exclusive possession and occupation, which having continued for more than twelve years, the action was barred by the Statute of Limitations. Beran v. Landon Portland Cement Co., 3 R. 47; 67 L. T. 615.

Semble, the interest of an owner of tin-bounds in Cornwall is not a mere easement or incorporeal hereditament, but may be the subject of an action of ejectment, even where he is not in actual possession at the time of the wrongful entry of the defendant. Vise v. Thomas, 4 Y. & Coll. 538.

When in a feu charter the superior reserves of coal and limestone with the right to work them, giving satisfaction for damage, the right reserved is a right of property, or an absolute ownership, and not a mere servitude or easement; the surface and the minerals becoming separate tenements severed in title, and in such a case the superior, as absolute proprietor of the reserved coal and limestone, may make a tunnel through them for the conveyance of other minerals belonging to him in the lands adjacent. Hamilton (Duke) v. Graham, L. R. 2 H. L. (Sc.) 166.

Where Benefit not confined to Owner of Dominant Tenement. ]—It is not a valid objection to a claim of a lawful casement that it may possibly benefit persons other than the owner of the dominant tenement. Simpson v. Godman-chester Corporation, 66 L. J., Ch. 770; [1897] A. C. 696; 77 L. T. 409.—H. L. (E.)

Rights unconnected with Land.]-It is not competent to a vendor to create rights unconneeted with the use and enjoyment of land, and to annex them to it; neither can the owner of land render it subject to a new species of burthen, so as to bind it in the hands of the assignee. Ackroyd v. Smith, 10 C. B. 164.

There cannot be a right appurtenant to the land of A. to take a profit on the land of B., which right is wholly unconnected with the land of B., which right is wholly unconnected with the land of A. Bailey v. Stephens, 12 C. B. (N.S.) 91; 31 L. J., C. P. 226; 8 Jur. (N.S.) 1063; 6 L. T. 356; 10 W. R. 868.

By Custom, ]-See Custom.

## 2. Under Prescription Act.

When Absolute and Indefeasible.] - Under 2 & 3 Will. 4, c. 27, it is sufficient to prove forty years' enjoyment of the easement claimed next preceding any suit or action in which the right has been called in question. And this doctrine in a compromise, or refusal by the plaintiff to proceed with it, does not hinder it from being such an action as the statute mentions. Ib.

Nor does the fact that the plaintiff in the former action was only tenant of the dominant tenement, whereas the plaintiff in the present action is the reversioner sning as such. Ih.

Computation of period of Twenty Years. |a declaration for obstructing ancient lights, the defendant pleaded the custom of London to build on ancient foundations to any height; that the defendant was possessed of an ancient messuage adjoining the plaintiffs' premises, and towards which the windows in the declaration mentioned looked; and that pursuant to the custom he built thereon, and thereby unavoid-ably a little obscured the plaintiffs' windows. The plaintiffs replied that the access of light and air had been enjoyed as of right and without interruption by the respective occupiers of the plaintiffs' messuage for and during the full period of twenty years before the said obstruction, and of twenty years next before the commencement of a suit, wherein the plaintiffs' claim in this action, and to the said access and use of light and air was and is brought into question :- Held, that the twenty years' enjoyment of the access and use of light to a dwellinghonse, &c., under ss. 3 and 4 of the Prescription Act (2 & 3 Will. 4, c. 71), is to be taken to be the period next before some action or suit wherein the claim shall have been brought in question, and, consequently, that the replication was good. Covper v. Hubbuck, 12 C. B. (N.S.) 456.

2 & 3 Will, 4, c. 71, does not give a title to a right of way over lands held under a lease for lives granted by a bishop, by reason of an adverse user for twenty years during the lease, either as against the bishop, the lessee, or those claiming under the lessee.  $Bright \vee Walker$ , 1 C. M. & R. 211; 4 Tyr. 502; 3 L. J., Ex. 250.

A declaration for the disturbance of such right of way, alleging that the plaintiff was possessed of a certain wharf, close and premises, and by reason thereof ought to have had, and still of right ought to have a certain way from the said wharf, close, and premises, into, &c., as to the said wharf and premises belonging and appertaining:—Held, good. Ib.
And see Pulk v. Shinner, infra.

Computation of Period of Thirty Years. ]-See Clayton v. Corby, 5 Q. B. 518; 11 L. J., Q. B. 289, post, col. 1080.

Computation of Period of Forty Years-" Person entitled to any Reversion." ]-The words in s. 8 of the Prescription Act, "any person entitled to any reversion expectant on the determination" of a life estate, are not limited to an owner of the whole reversion, but include a tenant at will to such an owner. Therefore, if within three years after the determination of a life estate in land, an action is brought by a tenant at will to the reversioner against the claimant of an easement by prescription over the land, the term of the tenancy for life is to be excluded in the computation of the period of forty years mentioned in the act. Laird v. Briggs, 50 L. J., Ch. 260; 16 Ch. D. 440; 43 L. T. 632; 29 W. R. 197.

The Court of Appeal declined to give any

ornion on this point, at the same time intimating

The fact that the previous action terminated | construction placed on s. 8. Ih., 19 Ch. D. 22; 45 L. T. 238-C. A.

> Sect. 8-Changing word "Convenient" to "Easement." |- See per Jessel, M.R.

> - Effect of a Lease.]-Under 2 & 3 Will. 4, c. 71, ss. 7, 8, the time during which the servient tenement has been under lease for a term exceeding three years, is to be excluded from the computation of a forty years' enjoyment, but not from the computation of an enjoyment for twenty years. Palk v. Shinner, 18 Q. B. 568; 22 L. J., Q. B. 27; 17 Jur. 372.

> Enjoyment of Rights.]—The words "enjoyed by any person claiming right," applied to cuse-ments, in 2 & 3 Will. 4, c. 71, s. 2, and "enjoyment thereof as of right" in s. 5, mean an enjoyment had, not secretly, or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without dauger of being treated as a trespasser, as a matter of right, whether the right so passer, as a natter of right, whether the right so claimed is strictly legal, as by prescription and adverse user, or by deed, or has been merely lawful, so far as to excuse a trespass. Tieble v. Branos, 4 A. & E. 360; 1 H. & W. 769; 6 N. & M. 230; 5 L. J., K. B. 119.
>
> The 2 & 3 Will. 4, c. 71, s. 3, converts into a

right such an enjoyment only of access of light over contiguous land as has been had for twenty years in the character of an easement, distinct from the enjoyment of the land itself; and the statute places this species of negative easement on the same footing, in this respect, as those positive easements provided for by the other sections; therefore, if the dominant and servient tenements are, during the prescribed period, in the occupation of the same person, no right is acquired. *Harbidge* v. *Warwick*, 3 Ex. 552; 18 L. J., Ex. 245.

Belonging to Land or Owner. ]-Semble, that where an easement has been enjoyed from time immemorial by persons exercising rights in the dominant tenement, although such rights are not derived from the owner, and are to some extent adverse to him, yet, in the absence of express proof as to the origin of the easement, the presumption is, that it belongs to the land and not sampten is, that it belongs to the familiar into the persons exercising such rights. Frimey v. Stocker, 35 L. J., Ch. 467; L. R. I. Ch. 396; 12 Jun. (N.S.) 419; 14 L. T. 427; 14 W. R. 743.

The plaintiff was possessed of a mill on the

river Calder, and the defendant of a mill on the river Hebble, which flowed into the Calder at a point above the plaintiff's mill. A declaration complaining that the defendant threw, placed and deposited, into and upon the bed of the Hebble, and on the banks and side thereof, at and near to the defendant's mill, cinders and ashes, which fell and were washed down, and carried into the Hebble, and so were floated and passed with the water into the Calder, and unto and into the plaintiff's mill-pond, and unto and into the plaintiff's part of the bed and channel of the Calder, filling them up, and obstructing the working of his mill. Plea, as to the throwing, placing and depositing the cinders and ashes, that the defendant had been the occupier of the mill on the river Hebble for more than twenty years before the doing the acts complained of, that they must not be taken to agree with the and that during all that time large quantities of

cinders and ashes were necessarily produced at windows by actual enjoyment for twenty years the mill, being the refuse of the ash-pit of the engine, and the sweepings of the mill; and that being such occupier he enjoyed as of right, and without interruption, the privilege and easement of throwing, placing and depositing upon the bed and channel of the Hebble, and the banks and side, and near to his mill, all such quantities of cinders and ashes as were produced in the mill. The plea alleged that the cinders and ashes were produced in the defendant's mill, and justified the grievance in the lawful exercise of the privilege and easement :—Held, after verdict, that supposing the defendant to claim the banks and hed of the Hebble, on and in which the cinders and ashes had been deposited, as in his own occupation, or that the banks and bed were in the occupation of some third person against whom a valid right by way of easement had been gained, in either view the plea failed to show any right of easement as against the plaintiff. gatroyd v. Robinson, 7 El. & Bl. 391; 26 L. J., Q. B. 233; 3 Jur. (N.s.) 615; 5 W. R. 375.

Held, also, that even if it was taken that an casement in the bed and banks of the Hebble had been alleged and proved, and as a natural consequence that the deposit on the bed of the Calder was necessarily established, still, as it was consistent with the plea, that no perceptible deposit had been occasioned on the plaintiff's part of the bed of the Calder for twenty years, the plea was insufficient to show a claim to an easement of depositing cinders and ashes on the plaintiff's part of the bed of the Calder. Ib.

Rights in a Parish Church. ]-Upon a bill in equity to establish a right to a chancel as part of a parish church against the lord of a manor, who claimed it as appendant to the manor or manor-house, it appearing that the chancel was an ancient charged when a manor or with the period with the chancel was an ancient charged, overal with the years' user without intermities to the chancel and the charged with the period with the pe church, and that it was a private chapel erected by lord of the manor: - Held, that the immemorial use and occupation, coupled with reparation, entitled the lord of the manor by prescription to the perpetual and exclusive use of the chancel; and that this right might exist, notwithstanding that the freehold might not be in the person prescribing, and although the estate or house to which the chancel was appendant might not be situate in the parish. Churton v. Frewen, 35 L. J., Ch. 692; L. R. 2 Eq. 634; 12 Jur. (N.s.) 879; 14 L. T. 846.

"Consent or Agreement."]-K., the owner in fee of a freehold house, in 1814 put out four new windows, and signed and gave to S., the owner in fee of an adjacent freehold house overlooked by those windows, a document declaring that they were put out and remained upon the leave of S., and that he, K., would, on the request of S., or his heirs or assigns, at any time thereafter block up the same, and in the meantime would pay S., his heirs and assigns, sixpence a year for the indulgence. This document was not signed by S. The rent was paid down to 1859. In 1877 S.'s successor in title called upon K.'s successor in title, who had bought the property in 1865 with notice of the document, but had never paid any rent under it, to block up the four windows, and proceeded to obstruct the access of light to them. K.'s successor in title thereupon brought his action against him for an

without intermission:—Held, first, that the enjoyment of light by K. and his successors had been by virtue of the document of 1814, and that such document, although signed by K. only, was a consent or agreement expressly made or given for the purpose of such enjoyment within the meaning of the 3rd section of the Prescription Act, so as to prevent K. and his successors from acquiring any right to the access and use of light under that section ; and secondly, that the agreement, having been acted on by payment of rent thereunder to within twenty years from the commencement of the action, was enforceable in equity, irrespective of the statute. Bewley v. Athinson, 49 L. J., Ch. 153; 18 Ch. D. 283; L. T. 603; 28 W. R. 638—C. A.

Interruptions-Payment of Rent. ]-Payment of rent for the use of lights is not an interruption of the njoyment, so as to defeat a prescriptive title, under 2 & 3 Will. 4, c. 71, s. 3. Plasterers' Co. v. Perish Clerks' Co., 20 L. J., Ex. 362; 15 Jur. 965-Ex. Ch.

There must be a discontinuance of the enjoyment to constitute such an interruption. Ib. The interruption which defeats a prescriptive right under 2 & 3 Will. 4, c. 71, s. 1, is an ad-

verse obstruction, not a mere discontinuance of user by the claimant himself. Carr v. Foster, 3 Q. B. 581; 2 G. & D. 753; 11 L. J., Q. B. 284. In a case under s. 1, if proof is given of a right enjoyed at the time of action brought, and thirty years before, but disused during any part of the intermediate time, it is always a question for the jury, whether, at that time, the right had ceased, or was still substantially enjoyed. Ib.

years' user without interruption is set up, extending over a space larger than but including the locus in quo, and an interruption acquiesced in for a year is shown to have existed as to the locus in quo, but as to no other part of the space over which the right is elaimed, the right under 2 & 3 Will, 4, c. 71, is disproved as between the parties to the action, and affords no justification of the trespass complained of. Davies v. Williams, 16 Q. B. 546; 20 L. J., Q. B. 330; 15 Jur. 752.

An interruption of a right acquired by user, All interruption of a right acquired by within 2 & 3 Will. 4, c. 71, s. 4, may be caused by the act of a stranger, and not the owner of the servient tenement. Ib.

Where an easement has been enjoyed for nineteen years and a fraction, and is then interrupted by the owner of the soil, the easement may still be acquired under 2 & 3 Will. 4, c. 71, s. 3, at the end of the twentieth year; for the interruption, to defeat twenty years' user, must have been acquiesced in or submitted to for a whole year. Flight v. Thomas, 3 P. & D. 442; 11 A. & E. 688; 10 L. J., Ex. 529. Affirmed in Dom. Proc.,

West, 671; 8 Cl. & F. 231; 5 Jur. 811. Where an easement is claimed under s. 2 of the 2 & 3 Will. 4, e. 71, the question of acquiescence or non-acquiescence in an interruption of the enjoyment thereof, under s. 4, is a question for the jury, to be determined by the acts and conduct of the claimant of the easement, within a year from the commencement of the interruption, and it is not necessary that the claimant should higuertion, claiming to have acquired an indefensible right to the access of light to the four Bennison v. Cartwright, 5 B. & S. I. ; 33 L. J., bring an action or commence a suit to prove the

Q. B. 137; 10 Jur. (N.S.) 847; 10 L. T. 266; 12 have the sole and several pastures in 217 acres W. R. 425. W. R. 425

Although under 2 & 3 Will, 4, c, 71, s, 4, uo interruption will prevent a right from being acquired by twenty years' user, unless it has been acquiesced in for a whole year, yet an interruption for a shorter period may have the effect of showing that the enjoyment never was as of right, and thereby of preventing a right being acquired under s. 1. Eaton v. Swansea Waterworks Co., 17 Q. B. 267; 20 L. J., Q. B. 482; 15 Jur. 675.

The practice in a manor was for the lords to grant copyholds for three lives, and to renew at a fine upon the dropping of any of the lives; but there was no custom binding them to renew. The convhold grants did not mention a right of fishing; but from time immemorial the copy-holders had enjoyed a right of angling in a stream which formed the boundary of the manor, and of passing along the bank over the lands of other tenants of the manor for that purpose. Subject to this, the right of fishing was in the In 1845 the lords enfranchised a copyhold belonging to S., which adjoined the river, and leased in the most ample terms all rights of fishing and all other rights they had over the enfranchised tenement. After this various other copyholds were enfranchised, and for nearly forty years the copyholders and the enfrancised convholders exercised the same right as before of angling and going over the land of S., for that purpose. T. was the owner of several tenements formerly copyhold of the manor which had been enfranchised since 1845. In 1885 S, set up a gate and prevented T, from passing over his land to fish. T, acquiesced in the interruption until 1889, when he commenced an action, on behalf of himself and all other the owners and occupiers of copyholds or enfranchised copyholds, to establish the right of angling and of passing over the land of S, for that purpose:—Held, that the interruption of T.'s alleged right, acquiesced in by him, for four years before action brought, was a bar to that right under s. 4 of 2 & 3 Will. 4, c. 71; and that such right, being in the nature of a profit à prendre, could not be claimed by prescription on behalf of a large and indefinite class such as "owners and occupiers," Tilbury v. Silva, 45 Ch. D. 98; 62 L. T. 254, Affirmed on other grounds, 45 Ch. D. 98; 63 L. T. 141-C. A.

Application for Leave. ]-Action for breaking and entering a close, called the Railroad. A plea alleged that the occupiers of adjoining closes had, for twenty years, as of right, and without interruption, used and been accustomed to use the privilege and easement of passing and repassing, and laying down railroads across the plaintiff's railroad :- Held, that the defendant was bound to show an uninterrupted enjoyment, as of right, during that period ; and that the plaintiffs might prove, under that issue, applications by the defendant during the twenty years for leave to cross their milroad, and that it was not necessary for them to reply to such licence specially. Monnouth Cunal Co. v. Harford, 1 C. M. & B. 614; 5 Tyr. 68; 4 L. J., Ex. 43.

- Encroachments. - To an action for taking the plaintiff's cattle in an open field, called P. and G. field, and impounding them, the defen-

and their cattle, from the 4th of September to the 5th of April: that T. B., in 1755, by indenture, granted the pasturage to S. B., his heirs and assigns, for ever; that J. B. (who claimed by descent from S. B.), in 1836, demised the pasturage to the defendant, who seized the plaintiff's entile because they were depasturing on the 217 acres. The second plea alleged a right of sole pasturage, in gross, for thirty years before the commencement of the suit in J. B. and his ancestors, and a demise from him to the defendant. It appeared that within the last twenty years encroach-ments have been made by buildings and inclosures on the 217 acres, and that above thirty acres had thus been appropriated, but no encroachments had been made on the part of the 217 acres on which the alleged trespass was committed :- Held, that these interruptions, being so recent did not disprove the right of T. B. to the pasturage in 1755, as alleged in the first plea: and that, not having been made on that part of the land where the plaintiff's cattle were depasturing, they were not conclusive evidence of an interruption of the enjoyment of that part by J. B. as alleged in the second plea. Welcome V. Upton, 6 M. & W. 536; 8 L. J., Ex. 267.

- Life Tenancy.]-If to a declaration in trespass the defendant pleads an enjoyment as of right for thirty years next before the commencement of the action, and the plaintiff simply traverses such enjoyment, he cannot support the traverse by proof, that though there was such enjoyment, yet for a period of time without including which there would not be a thirty years' enjoyment there was a tenant for life of the locus in quo. Pye v. Munford, 11 Q. B. 666; 5 D. & L. 414; 17 L. J., Q. B. 138; 12 Jur. 578.

Disproof by Origin of Right.]-The 2 & 3 Will. 4, c. 71, s. 1, does not prevent a claim to a right of common, &c., from being defeated after thirty years' enjoyment, by showing that such right was first enjoyed at a time when it could not have originated legally. Mill v. New Forest Commissioner, 18 C. B. 60; 25 L. J., C. P. 212; 2 Jnr. (N. s.) 520; 4 W. R. 508,

A plea, that the defendant and all his ancestors, whose heir he is, from time whereof the memory of man is not to the contrary, have had and been used and accustomed to have the sole and several herbage and pasturage of and in a certain open field, is disproved by showing a grant to the defendant's ancestor eighty-one years before, for a valuable consideration; and such a plea is not aided by 2 & 3 Will. 4, c. 71, s. 1. Welcome v. Upton, 5 M. & W. 398; 7 D. P. C. 475; 9 L. J., Ex. 154.

Presumption of Legal Origin, 1 - Where a privilege has been exercised as of right for a long series of years, the court will make every presumption in favour of its legal origin, but the circumstances of the enjoyment must be carefully looked to; and as in the present case there were copyholders whose right of way and of fishing was not disputed, the court considered the case not to stand on the same footing as if the person exercising the privilege formed only one class. Tilbury v. Silva, supra.

The Court will seek to find a legal origin for a user which has continued for a long period of dant pleaded, first, that T. B. and his ancestors | years without interruption, and will, if necessary, had been immemorially used and accustomed to presume a lost grant. Even where the origin, can be traced to a deed granting the user in a way which would be bad as being the grant of an ensement in gross, yet such origin will not defeat the acquisition of the right by prescription by minterrupted user, nor in consequence of such a deed will the user be considered as enjoyed by "some consent or agreement expressly given or made for the purpose by a deed or writing" within s. 2 of the Prescription Act, 1832. Simpson v. Gadmanekester Corporation, 13 R. 861; 64 L. J. Ch. 837. Affirmed 73 L. T. 423; 44 W. R. 149; 13 R. 869, n.—C. A. &ee S. C. in H. L., 66 L. J., Ch. 770; [1897] A. C. 696; 77 L. T. 469.

#### 3. IMPLIED BY LAW.

Easements of Necessity—Severance of Tenements.]—Upon a severance of tenements, as of necessity or in their nature continuous, will pass by implication of law without any works of grant. Watts v. Kelson, 40 L. J., Ch. 126: L. R. 6 Ch. 166: 24 L. T. 209: 19 W. R. 833.

The owner of two adjoining properties, Black-acre and Whiteaere, conveyed Blackacre by deed, "together with all waters, watercourses, &c., used and enjoyed therewith." There was a small natural watercourse, which passed through Whiteaere to Blackaere. At the date of the conveyance an artificial pipe existed in this watercourse, which passed the water through Whiteacre down to some eattle-sheds in Black-After the severance the grantee pulled down the cattle-sheds and erected cottages in their place :- Held, that the right to the waterflow through the artificial pipe was an easement as of necessity, and in its nature continuous, and as such passed by implication of law to the grantee; that, if it was not necessary, the general words in the conveyance were sufficient to pass it, and that the change in the mode of user by the grantee had not taken away his right to have the water-flow in the accustomed manner through the premises. Ib.

—— Support of Surface.]—In every grant or lease by the owner of the surface and subjacent strata of land, either of the surface or of the subjacent strata, there is an implied provision that the surface-owner shall have a right not to be damaged by the removal of such support from the subjacent strata as is necessary to support the surface in the condition in which it is at the time of the grant or lease, with the buildings thereon, if any. Richards v. Jenkins, 18 L. T. 437; 17 W. R. 30.

— When discontinuous.]—An easement such as the right to use a pump is a discontinuous easement, and needs definite words to create it, and differs from a continuous easement, such as a right to drains, which passes with the premises to which it appertains. Polden v. Bustard, 7 B. & S. 130; 35 L. J., Q. B. 92; L. R. 1 Q. B. 156; 13 L. T. 441; 14 W. R. 198—Ex. Ch.

— Implied reservation.]—Where an essement is in the nature of an easement of necessity, there is no need of an express reservation of such easement in the conveyance of the property to be affected by the easement; and such reservation is a matter of legal presumption to einplied from the nature of the transaction between the grantor and grantee. Shubrook v. Tufnetl., 46 I. 7. 886; 43 J. F. 684.

An easement, by implied grant, of communication with a dwelling-house, through land not conveyed therewith, cannot be claimed in virtue of anything short of an absolute necessity for the user. Dadd v. Burchall, 1 H. & C. 113; 31 L. J., Ex. 364; 8 Jur. (N.S.) 1180.

- Contiguous Tenements. ]-Although the occupiers of contignous tenements, held under one title, may sometimes set up implied grants from the original owner of easements not expressly mentioned, this only applies to such easements as are apparent and continuous, that is to say, clearly indicated by the condition of the premises at the time of the division of title; and if the premises are then unfinished, and the buildings are in a skeleton state, so that though there are openings left in the walls, it is uncertain for what purpose they are intended, whether as doors or windows; and if as doors, then in what direction and to what extent the ways thereto are designed to be used, there will be no such implied grants, the easements not being apparent and continuous; and a plan attached to the grants, if it leaves the matter equally uncertain, will not aid the implication, Glave v. Harding, 27 L. J., Ex. 287.

Easements continuous — Apparent and necessary.]—To imply a grant or a reservation of an easement as arising upon the disposition of one of two adjoining tenements by the owner of both, where the easement had no legal existence anterior to the unity of possession, and is not one of necessity, is a theory in part not required by, and in other parts inconsistent with, the principles of English hav that regulate the effect and operation of grants of real property. Sufficial v. Brown, 4 De G. J. & S. 185; 83 L. J., Ch. 248; 3 N. R. 340; 10 Jur. (N. 8.) 11; 9 L. F. (627; 12 W. R. 356. Explained in Wheeldon v. Burrows, infra.

If the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant; and the operation of a plain grant not pretended to be otherwise than in conformity with the contract between the parties ought not to be limited and cut down by the fletion of an implied reservation. 1b.

A dock and an adjoining strip of land and a coal wharf were held in fee by the same person, and whenever a ship of any size was taken into the dock to be repaired her standing bowsprit projected over and across the adjoining strip of land. All the properties were put up for sale by anction under particulars of sale which stated that the dock was capable of holding two vessels of large size, and that at low water several vessels or a steamer of the largest class would safely lie on the ways for repairs; and wherein the strip of land was described as a freehold coal wharf, capable of being rendered worth a very large rental by a comparatively small outlay; but nothing was stated to show that the dock or its. owners either had or were intended to have any right or privilege over the adjoining premises. The strip of land or coal wharf was sold and conveyed to the purchaser in fee absolutely and in the most unqualified manner, and under such purchaser the defendant claimed. Afterwards the dock was sold and conveyed to the purchaser thereof, under whom the plaintiff claimed :-Held, on a bill for an injunction to restrain the defendant from preventing or interfering with the plaintiff's full use and enjoyment of the dock as the same had theretofore been used by allowing the bowsprit of any vessel in the dock to overlie or overhaug the strip of had and coad wharf; first, that there was no legal ground for holding that the owner of the dock retained or had, in respect of that tenoment, any right or easement over the adjoining tenement of the strip of land and wharf after the sale and alicnation of the latter. Ib. Held, secondly, that the purchaser or grantee

Held, secondly, that the purchaser of grantee of the wharf was not to be considered as having been bound to know, at the time of his purchase, that the use of the dock would require that the bowspirts of large vessels received in it should project over the land he bought, or as having hought with notice of this necessary use of the dock, and the absolute sale and conveyance to him was not to be out down and reduced accordance.

ingly. Ib.

Held, thirdly, that the casement claimed by the plaintiff was neither continuous, apparent,

nor necessary. Ib.

By the grait of part of a tenement there will pass to the grantee all those continuous and apparent casements over the other part of the tenement which are necessary to the enjoyment of the part granted and have been hitherto used therewill: but, as a general rule, there is no corresponding implication in favour of the grantor, though there are certain exceptions to this, as in the case of ways of necessity. Wheeldow v. Hurvens, 48 L. J., Oh. 853; 12 Ch. D. 31; 41 L. T. 327; 28 W. R. 1996—C. A.

Where two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used and was necessary for the confortable enjoyment of that part of the property which was granted must be considered to follow from the grant. Beart v. Chehrane, 4 Macq. H. L. 117; 7 Jur. (N.S.) 92; 5 L. T. 1; 10 W. R. S.

A, owner of two adjoining properties, commands, owner of two adjoining properties, commands a cesspool in a corner of the garden, and a drain to carry the water into it from the tanyard, which gradually sloped down towards the garden. Afterwants he sold the two properties to different persons. The conveyances made no allusion to the existence of the drain and cesspool:—Held, that the casement passed, by an implied grant, with the tanyard. Ib.

— Grantor cannot derogate from his Grant.]
—The grantor cannot derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements, enjoyed by an adjoining tenement which remains the property of the grantor. Suffield v. Brown, 4 De G. J. & S. 185; 33 L. J., Gl. 249; 3 N. R. 340; 10 Jun. (N.S.) 111; 9 L. T. 627; 12 W. R. 356.

The rule that an owner of two tenements who grants one of them cannot decogate from his own grant by anything he does on the tenement which he retains cannot be extended so as to compel such owner, when he has granted one tenement but has retained under covenant certain rights over it, to enforce those rights in order to preserve to a subsequent grantee of the other tenement, the enjoyment of easements which he would have been entitled to enjoy if the owner of the two tenements had retained the absolute ownership of the tenement first granted.

Master v. Hansard, 46 L. J., Ch. 505; 4 Ch. D. 718; 36 L. T. 535; 25 W. R. 570—C. A.

The owner of two adjoining premises demised one of them for unety-une years by a lease which contained a restrictive covenant on the part of the lessee not to do anything upon the premises which might be an aunoyance to the neighbourhood or diminish the value of the adjacent property, and not to build upon the premises without the approval of the lessor. Afterwards he demised the adjacent premises for ninety-four years by a lease which contained a restrictive covenant in the same terms as that in the first lease. The first lease was assigned to an hotel company, and they proposed, with the approval of the lessor, to build so as to interfere with the access of light to the adjacent premises, the lease of which had been assigned to the plaintiff. In an action to restrain the lessor from approving such building, and the company from building, and for damages :-Held, first, that the principle that the lessor could not derogate from his grant did not compel him to prevent the company from building; and secondly, that the restrictive covenant in the first lease had not emired for the benefit of the plaintiff. Ib.

A deed of 1671, which severed the surface from the minerals, contained a reservation of the mines to the grantor, with free and full power and liberty to work, sink, dig for, or win the same, and to drive drifts, make watercourses, or do any other act necessary or convenient for the working, winning or getting the same, with a covenant by the grantor to pay to the grantee treble the damages, loss or prejudice which the grantee should sustain by reason of such diggling, working, &c. —Held, that the reservation was subject to the implied right of the grantee of the surface to support from the uninerals, and did not empower the granter to remove the whole of the minerals without leaving a support for the surface, Smart v. Marton, 5 El, & Bl, 30; 24 L. J., Q. B. 200 : 1 Jur. (N.S.) 825.

A grant by lease of premises last held under the grantor as bleach works, implies a licence to use the same as such. *Hidl* v. *Innd*, 1 H. & C. 676; 9 Jur. (N.S.) 205; 11 W. R. 271.

Grantor, affected with Notice of Plans -Implied Reservation-Merger of Lease-Surrender.]-By seven simultaneous leases seven plots of lands marked respectively A, B, C, D, E, F, and G, and forming together one square block, were demised by the owner to J. with a ground plan on each lease, and with covenants for the erection and maintenance of buildings upon each plot according to certain plans. The leases were granted with a view to the erection upon the whole block of one large edifice, of which the several parts and the internal arrangements were to be connected together for a common use and occupation; so, however, as to be separable (if desired) into seven separate buildings. J. being in the occupation of the whole, while the buildings were being erected, mortgaged C. F. and G, by a sub-lease which recited the building scheme and the original leases of C, F and G, and contained stipulations for the completion of the buildings on C, F and G. After the buildings had been substantially completed, J. mortgaged E by a deed which recited the lease of E and assigned the buildings thereon, subject to the covenants in the lease, to one who had notice of the general plan of the buildings. J. then mortgaged B. On J's bankruptey the sic utere too ut alienum non lædas, the action several mortgagees obtained forcelosure decrees was maintainable. Alston v. Grant 3 El. & Bl. in respect of B, C and E respectively :- Held (Lord Blackburn dissenting), that though there was no express reservation of the right to light. yet, looking at the plans, the covenants in the original leases, and the mortgage deeds, the mortgagees of C and E respectively were by mortgagees of Came E respectively were by reasonable implication precluded from interfering with the light to the windows in B which looked out upon C and E respectively, and might be restrained accordingly in an action by the mortgagee of B :- Held, also, that the mortgagee of B. could maintain such an action, although he had surrendered the lease of B and taken a fresh lease from the original lessor; for, without deciding what effect the merger of the original lease might have, whenever the lease of B came to an end either by surrender, forfeiture. or otherwise, the original lessor would have the same rights to light as the mortgagee would have had if the original lease had subsisted, Russell v. Watts, 55 L. J., Ch. 158; 10 App. Cas. 590; 53 L. T. 876; 34 W. R. 277; 50 J. P. 68— H. L. (E.)

\_\_\_\_ Sale of Plots of Land.]—Semble, by the Earl of Selborne, that if on a sale and conveyance of land adjoining a house to be built by the vendor, it is mutually agreed that one of the outer walls of that house may stand wholly or partly within the verge of the land sold, and shall have in it particular windows opening upon and overlooking the land sold, and if the house is erected accordingly, the purchaser cannot afterwards build upon the land sold, so as to prevent or obstruct the access of light to those windows. Th.

Admissions in Derogation. ]-The plaintiff claimed a right of common by prescription, in respect of a que estate in land, and also by thirty and sixty years' enjoyment by the occu-pier of the land. The defendant offered evidence that A., now deceased, while tenant of the land for years, had declared that he had no such right in respect of the land :- Held, that the declaration was not admissible, inasmuch as it was in derogation of the title of the reversioner. Papendick v. Bridgwater, 5 El. & Bl. 166; 24 L. J., Q. B. 289; 1 Jur. (N.S.) 657; 3 W. R. 490.

\_\_\_\_ Implied Duties.]—The defendant had, more than twenty years before action, constructed a sewer or a watercourse through property of his own then occupied by him. In 1845, the defendant let a house, shop and cellar to the plaintiff, which the defendant, down to that time, also occupied with the property. In 1851, the sewer or watercourse burst, and thereby the plaintiff's cellar and goods were damaged, and the plaintiff thereupon brought an action against the defendant for negligently and improperly making and constructing the sewer, and keeping and continuing the same negligently and improperly made and constructed, and so causing the damage. The jury found that the sewer was not originally constructed with proper care, and it was proved that it had been continued in the same state: Held, that upon the letting of the premises to the plaintiff, a duty arose on the part of the defendant to take care that that which was rightful did not become wrongful to the plaintiff, because that would be in derogation of the defendant's own demise to the plaintiff; and course, and that the defendant was liable to an that upon this ground, as also upon the principle action for altering the channel and diverting the

was maintainable. *Alston* v. *Grant*, B El. & Bl. 128; 2 C. L. R. 933; 23 L. J., Q. B. 163; 18 Jur. 332; 2 W. R. 161.

Both Tenements held under same Landlord-Presumption of Grant. |-Where parcels of land are held under a common landlord by tenancies, each of which has existed for unwards of twenty years, the jury, in an action for obstructing the easement, may infer, from twenty years' uninterrupted enjoyment, as of right of an easement claimed by the owner of one of the tenements over the lands of the other tenements, a grant of such casement by deed from one tenant to the other. Where the tenancies have not been created by writing, and the user is proved to have existed as far back as the memory of the witness can reach, the jury may infer that the alleged dominant tenement when originally. demised by the landlord, was demised with the easement appurtenant. When open upon the pleadings the question should be so left to the jury, that if some of the jurors infer a deed and the others infer the creation of a tenancy, with the easement annexed as appurtenant, the verdict should be for the owner of the alleged dominant tenement, though all the jurors do not agree upon the same alternative. Timmons v. Hewitt, 22 L. R., Ir. 627.

Right of Interference-Implication must be Direct.]—At common law, where A. has two interests in the same hereditament, as houses or minerals, or a watercourse or also a mill, or two storeys in a house, and demises one part, e.g. the lower portion of a honse, reserving to himself the upper part, the grantee either for years or in fee will not, except by express stipulation or very direct implication, be permitted to use the portion held by him so as to interfere with the enjoyment by the grantor of the portion of which he has retained possession. Dugdale v. Robertson, 3 Jnr. (N.S.) 687.

#### 4. CREATED BY EXPRESS AGREEMENT.

Construction. ] - By an agreement between G. & C. it was agreed, "that the dock between their wharves, on the eastern side of the line of separation, shall for ever remain open as it now stands; that is to say, that neither of them shall fill it up with wharves or other incumbrances. whereby the convenience of the same may be damaged to either party":-Held, that the effect of this agreement was to create an easement that the dock should remain open as it then stood for the convenience of either party to use it as a dock; and that if it was intended that one party should have a more limited right therein than the other, such limited easement should have been created by express words. Morton v. Snow, 29 L. T. 591—P. C.

By a deed between A. and B. it was stipulated that B. should have the use of a stream of water, for irrigation, for ten days in every month, and that at all other times the stream should be under the control of A. and his assigns, and should flow in an uninterrupted course, through a channel, into the land of A. : and afterwards A. and B. assigned respectively their land to the plaintiff and the defendant:—Held, that the deed operated as a grant of the easement of the waterstream, though he did not thereby deprive the sive right to put or use boats on the canal, and plaintiff of the use of any water. Abriham v. let the same for hire for the purposes of pleasure Murley, 1 El. & Bl. 665; 22 L. J., Q. B. 183; 17 only," a third party infringed that right by Jun. 672.

Appurtenances. ]-A. was owner of the estate adjoining the sea-shore, and let N., part of the estate, to a tenant, with express liberty to take seaweed from the shore to manure his lands. N, was a farm lying inland, no part of it being nearer than about two miles from the shore. N., while so occupied, was sold to F., and the lands were described in the conveyance "as the same are presently possessed by the tenant." No express mention was made of any easement to take seaweed, and there were only the general words, "together with all the appurtenances." F. having claimed an easement to go and collect the seaweed adjoining A's estate to manure his lands :-Held, there being no express words of conveyance of such an easement, and the period of prescription not having clapsed, the easement flid not pass under the words "together with the appurtenances." Baird v. Fortune, 7 Jur. (N.S.) 926; 5 L. T. 2; 10

- Reservations. ] - A conveyance of land from the defendant to the plaintiff contained the following clause: "save and except, and always reserved unto the plaintiff, his heirs and assigns, the power to enter upon the land, and to dig and make a covered sewer or watercourse through the land, in order to convey the waste water from the premises of the plaintiff into the river W., on making reasonable compensation to the defendant for any damage or injury which might be occasioned thereby, either to the surface of the ground or the buildings under which the same might be The plaintiff having constructed covered drain or sewer, in pursuance of the power, the defendant made an opening in it, and drained his premises through it :- Held, that the reservation gave the plaintiff a right to the exclusive use of the sewer. Lee v. Sterenson, El., Bl. & El. 512; 27 L. J., Q. B. 263; 4 Jur. (N.S.) 950.

A plaintiff, in an action for diverting the water of springs used in bleaching works, claimed under a lease of certain closes, with all streams that might be found in certain of the closes, there being in the lease an exception of mines and quarries, with power to the lessor and his assigns to enter on the premises, and search for minerals, and divert or alter the course of any brook or spring. The defendant justified under a subsequent demise of mines under the demised premises :- Held, that the rights of the parties were regulated by the prior lease; and that upon its construction, springs, the water of which was collected in reservoirs, and used in the works at the time of the demise, passed to the lessee, as well as streams (there being only one above-ground stream at the time of the demise); and that under the exception, as it did not comprise in its terms springs or streams, the lessor, or his subsequent lessee, could not interfere, by mining, with the springs found under the demised premises. Whitehead v. Parks, 2 H. & N. 870; 27 L. J., Ex. 169.

Rights against Third Parties.]—A canal not justify cuttering the land again, and widening company having, in consideration of an annual the goit from nine to eighteen feet, for that the reart, demised land adjoining the canal for a power to make a goit was exhausted, and the term of years, "together with the sole and exclusive widening was not a repairing or amending within

sive right to put or use boals on the canal, and let the same for hire for the purposes of pleasure only," a third party infringed that right by letting out a boat for hire on the canal. In an action against him by the lessee for such infringement:—Held, that the grant of the right, although valid as between the company and their lessee, passed on such estate or properly to him as would enable him to maintain an action against a third party for its infringement. Hill v. Tupper, 2 H. & O. 121; 32 L. J., Ex. 217; 9 Juv. (N.S.) 725; S. L. T. 792; 11 W. R. 786.

The grant of the right in question operated simply as a licence or a covenant on the part of the lessors; and in suing a stranger for its infringement the lessee must use the name of his lessors. Ib.

Increase of Privilege. |- Lands, partly adjoining a river, were demised for 999 years, by indenture, in which the lessor granted to the lessee liberty to cut a goit or sluice out of the river at a proper and convenient distance above a weir, in the most convenient line, through closes (named) of the lessor, into a close intended for a mill-dam, part of the demised lands, and from time to time, and at any times to turn the water of the river through the goit, and liberty, from time to time and at all times during the term, to view, examine, carry, and lay down materials, and repair and amend the goit or sluice, when so made as aforesaid, or any of them, when and as often as need or occasion should be, making reasonable satisfaction to the lessor, his heirs and assigns, for all damage done or occasioned to the grass or herbage of the lessor, his heirs and assigns, and the lessee covenanted that he, his executors, administrators, orassigns, would make reasonable satisfaction to the lessor, his heirs and assigns, for all damages to be occasioned to the lands of the lessor by the lessee, his executors, administrators, or assigns, in exercise of any of the liberties, privileges, and powers by the in-denture granted, except for the term of two years next cusning the commencement of the rent, during which time no trespass or damage should be charged or paid for. In an action against the lessee for widening a goit on the lessor's soil to the extent of nine additional feet, he pleaded that the goit was made in due exercise of the liberty contained in the deed, but that the same not having been made of a sufficient width, and completed to a small and an insufficient width only, viz., nine feet, so that, without widening it, as after mentioned, he could not enjoy the tenements as he was entitled by the indenture so to do, he, in further due exercise of the liberty contained in the indenture, cut down the sides of the goit, and widened it. Replication, that before the expiration of two years, and before the commission of the trespasses, the lessee, in due exercise of the liberty in the indenture contained, made and completed a goit, being the goit in the plea mentioned, of the width therein mentioned, and the same remained and was used by the lessee continually, from the time the same was so made and completed until the lessee, under colour of the indenture, committed the trespass complained of :-Held, that the privilege given to the lessee by the deed was to make a goit once only, and that, after having completed a goit, he could not justify entering the land again, and widening the goit from nine to eighteen feet, for that the

the meaning of the indenture. Bostock v. Sidebottom, 18 Q. B. 813—Ex. Ch.

A shop was demised by A. to M. "as the same was late in the occupation of C." During the occupation of C., A., who occupied the adjoining house, had the right of using the flat roof of the shop for a garden, or any other purpose not in-jurious to the shop:—Held, that the assignces of A. had no right, without the consent of M., to erect a photographic studio uyon the roof of the shop. Martyr v. Lawrence, 10 Jur. (N.S.) 858; 10 L. T. 677; 12 W. R. 1048.

Property in Soil.]—Where a local act gave to a navigation company of a river a power to appoint and set out towing-paths alongside the river, but the language left it in equal doubt whether the soil of the towing-paths was to vest in the company, or only the easement of the right of way for rowing; though it was necessary for other purposes of the company that the company should have the fee of certain parts of the land adjoining the river:—Held, that the company is not provided the river in the towing-paths, but only such a use of the soil, or an easement, as was necessary for the purposes of the navigation. Badger v. South Yorkshire Heilmay and Hiver Dun Murigution (a., 1 E. k. El. 347; 28 L. J., Q. B. 118; 5 Jur. (N.S.) 459; 7 W. R. 130—Ex. Ch. —Ex. Ch.

Preventing Sale of Land—Legality,]—An agreement between the vendor and vendee in a conveyance of land, after setting out the parcels, providing "that any distance which may remain westwardly to J.-street slad in ever be hereafter sold, but left for the common benefit of both parties, and their successors," does not create a servitude in contravention of any rule of law, but creates an equity binding ou the successor in estate of the vendor, so that the person who has the estate of the original vendee is entitled to come into a court of equity for its assistance to remove a structure placed on such land. McLewa v. McKay, L. R. 5 P. C. 327; 29 L. T. 352; 21 W. R. 798.

User of Roads. ] -- By a deed of partition of a freehold estate between S. and P., portions of the estates, which were laid out for roads, were conveyed to S. in fee, and he covenanted with P., his heirs and assigns, that P., his heirs and assigns. and all owners and occupiers for the time being of all or any parts of the lands limited to P., and of the house to be built thereon, should at all times for ever thereafter have right of passage over the roads, which was given in the most ample terms, and also the full use and enjoyment of the roads in as full, free, complete, and absolute manner to all intents and purposes whatsoever as if they were public roads. Thirty years afterwards the occupiers of houses on these lands of P. applied to a gas company to supply them with gas, and the company proceeded to lay down pipes for the purpose in the above roads. It was admitted under the company's act this would have been lawful if the roads had been public roads. The devisees of S. filed a bill in equity to restrain the company from interfering with the roads. The Master of the Rolls having dismissed the bill:—Held, that the bill had rightly been dismissed, for that the covenant cutifled the occupiers to the same use of the roads for the purpose of obtaining gas as if they had been public roads. Selby v. Crystal Palace Gus Co., 4 De G. F. & J. 246; 31 L. J., Ch. 595; 10 W. R. 636.

Right of Repair vested in Owner of Dominant Tenement. ]-By an indenture executed by both parties, A. conveyed to B. in fee land, "subject, nevertheless, to the joint ownership and right to the use by A. and the owners and occupiers for the time being of certain adjoining land as then enjoyed by him or them, but no further or otherwise, of the drain running through or laid in the land conveyed and the course and direction of which was delineated on a plan in the margin of the deed, and subject to the right of A, and the occupiers, &c., at all reasonable times to enter upon the land thereby conveyed for the purpose of renairing the drain and laying or replacing pipes therein." A local board of health, under 11 & 12 Vict. c. 63, s. 49, after the conveyance, constructed a new sewer (in lien of the old one, into which the drain discharged the sewerage from A, and B,'s premises), at a lower depth : and A. thereupon lowered the drain between two and three feet and put fresh pipes (but in the course of the old drain), in order to adapt it to the new sewer. B. having brought an action of trespass :-Held, that the effect of the deed executed by both parties was either to create a tenancy in common in the drain between them or only an easement in A., but that, in either view, A. had done no more than he had the right to do. Finlinson v. Porter, 44 L. J., Q. B. 56; L. R. 10 Q. B. 188; 32 L. T. 391; 23 W. R. 315.

User of Easement,]—When an easement be land has been granted, the use of that easement will be restricted to a reasonable use for the purpose of the land in the condition in which it was when the grant was made. Wood v. Saunders, L. R. 10 Ch. 582, Affirming 44 L. J., Ch. 514; 32 L. T. 803; 23 W. R. 514.

A lease contained a demise of a house and grounds, together with the free passage and running of water and soil in and to the existing cesspool, and in and through all the drains then constructed or thereafter to be constructed through the adjoining property of the lessor. The cesspool was on such adjoining property. The lease also contained a stipulation against the culargement of the house or the erection of new buildings, without the consent of the lessor. The lessee subsequently purchased the reversion, the conveyance of which contained a similar grant of the right of drainage, and shortly afterwards considerably cularged the house :- Held, that the right of drainage given by the lease had reference to the house in its then existing state, and could not be extended so as to allow the whole of the drainage from the enlarged house to flow into the cesspool, Ib.

Countermandable or Revocable, ]—If a party seiscal of land grants to another by parol an easement therein, the grant is countermandable at any time, so long as the licence remains exceed tory on the part of the grantee; if it is executed, and the grantee has incurred any expense thereby, it is otherwise. Wilkis v. Harrison, 4 M. & W. 538; 8 L. J., Ex. 44; 2 Jur. 1019. If a party seised of land grants to another by

If a party seised of land grants to another by parol an easement therein, and subsequently disposes of the land itself to a third person, the right to the easement is instantly put an end to, and the grantee, by exercising the same, will render himself liable to an action at the suit of the purchaser. Ib.

In order to make the grantee a wrongdoer in the above ease, he is not entitled to notice from soil, as that is a fact which he is obliged to know at his peril. Ih.

A verbal licence is not sufficient to confer an easement of having a drain in the land of another to convey water, and such licence may be revoked, though it has been acted upon. Cocker v. Cowper, I C. M. & R. 418; 5 Tyr. 103.

#### 5. ABANDONMENT, SUSPENSION, OR EX-TINGUISHMENT OF.

Non-user. ]-Whether mere non-user of a right amounts to an abandonment of the right will depend upon the circumstances which caused the non-user. Ward v. Ward, 7 Ex. 838; 21 L. J., Ex. 334.

Mere non-user for less than twenty years of a privilege or of an easement to discharge foul dye water into a stream is not in itself a proof of abandonment, which is a conclusion to be which the lying by, and permitting others to incur expense in preparing to do that which, if continued uninterruptedly for twenty years, would destroy the easement, is a fact of great importance, Crossley v. Lightowler, L. R. 3 Eq.

- Acquisition of Adverse Rights.] - Actual disuser of an easement for twenty years, during which others have acquired adverse rights, destroys the right to the easement. Where there is a prescriptive right to a riparian casement, the user which originated the right must also be its measure, and the easement cannot be enlarged to the prejudice of any other person. S. C., on appeal, 36 L. J., Ch. 584; L. R. 2 Ch. 478; 15 W. R. 801.

Time of-Evidence. - Where, on the trial of an indictment for driving a carriage along and thereby obstructing a public footway through a narrow lane, the question was, whether the defendant's private right of carriage way, pre-ceding the public user and inconsistent therewith, had been released or abandoned, and the jury was directed that no interruption by the public for a less period than twenty years could destroy the private right, a new trial for mis-direction was granted, after verdict for the defendant. Reg. v. Chorley, 12 Q. B. 515.

In such a case (no actual interruption for twenty years being proved), it is not so much the duration of the cesser to use the private easement, as the nature of the act done by the grantee of such easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, that is material for the consideration of the jury. Ib.

Semble, if an easement is disused for a time sufficient to bar the right of resumption as against parties acting on the assumption of abandonment, unless there are some acts on such assumption, and unless other persons have expended money on the faith of the right having been abandoned, the right continues, and is merely suspended, and may be resumed. Cook v. Bath Corporation, 18 L. T. 123.

Unity of Possession. |-- Unity of possession has the effect of suspending an easement, but does not extinguish a prescription. Canham v. Fish, 1 Price's P. C. 148.

the purchaser of the change of ownership in the | twenty (or forty) years next before the commencement of the snit within 2 & 3 Will, 4, c, 71. means a continuous enjoyment as of right, for twenty (or forty) years next before the com-mencement of the suit, of the easement as an easement, without interruption acquiesced in for a year, and such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession has its inception after the completion of the twenty (or forty) years. Battishill v. Revd, 18 C. B. 696; 25 L. J., C. P. 290.

An easement is suspended as long as the same person having a term of years in the land a qua, and a fee-simple in the land in qua, is in posses sion of both; but it revives on a cessation of the unity of possession, though the change of possession is not accompanied with an alienation of the whole of either of the estates. Thomas v. Thomas, 2 C. M. & R. 34; 1 Gale, 61; 5 Tyr. 804; 4 L. J., Ex. 179.

In 1796, S. was seised in fee of a farm and also of an estate for life in a moor. In 1822, S, and the tenant in remainder joined in a couvevance of the moor to C, in fee, that he might be tenant to the precipe for the purpose of suffering a recovery in order to create a mort-gage term, but no recovery was suffered. In 1827, S. became bankrupt, and by subsequent conveyances his interest in the moor vested in conveyances his interest in the moor vested in the defendant, and his interest in the farm vested in the plaintiff. S. always occupied the farm by his tenants, who had enjoyed without interruption the right of depasturing their cattle on the moor. In 1856, the defendant distrained the plaintiff's cattle, damage feasant, when the plaintiff claimed the right of common by enjoyment as of right, for the respective periods of sixty and thirty years mentioned in the 2 & 3 Will. 4, c, 71:—Held, first, that there was no unity of seisin to extinguish the easement or prevent its existence. Warburton v. Parke, 2 H. & N. 64; 26 L. J., Ex. 298.

Held, secondly, that the title to the tenements. was such that there could not, in point of law, have been an enjoyment of the right of common for the period of sixty years as of right; for S-being owner in fee of the farm, and also tenant for life and occupier of the common, the rights of the tenants of the farm over the common were derived from him, and as he could not have an enjoyment as of a right against himself within the meaning of the statute, so neither could his tenants. Th.

To an action of trespass on land, the defendant pleaded, that for twenty, thirty, forty, and sixty years, he and the occupiers of a mill had (as an easement) gone on the land to repair the banks of a stream which flowed to the mill. It appeared that within forty years B. had been lessee of the mill under one landlord and of the land under another :- Held, that this was such a unity of possession as prevented his having an easement on the land. Clay v. Thachrah or Shackeray, 9 Car. & P. 47; 2 M. & Rob. 244.

Held, also, that this unity of possession need not be specially replied; and that, without a special replication under the 2 & 3 Will. 4, c. 71, s, 5, the lease of the land to B. and letters. written by B. while lessee of the mill, and before he became lessee of the land, were receivable in

evidence. Ib.

Enjoyment as of Right.]-Held, also, The enjoyment of an easement as of right for that B,'s lease of the land having expired more

than thirty years ago, the acts of the occupiers ! time, without any leave asked by them, or any notice from the other side of any adverse claim, must be taken to be done as a right. Ib.

The enjoyment of an easement of right for twenty years next before the commencement of the suit, within 2 & 3 Will. 4, c. 71, means a continuous enjoyment as of right, for the twenty years next before the commencement of the suit, of the easement as an easement, without interruption, acquiesced in for a year. It is therefore defeated by unity of possession during all or part of the twenty years; and such unity of possession need not be specially replied under the 5th section. Olivy v. Gardiner, 4 M. & W. 496; 1 H. & H. 381; 8 L. J., Ex. 102,

- Severance on Sale. - When the owner of two tenements sells and conveys one for an absolute estate therein, he puts an end by contract to any relation which he had himself created between the tenement so sold and the adjoining tenement, and discharges the tenement so sold from any burthen imposed upon it during his joint occupation ; and the condition of such tenement is thenceforth determined by the contract of alienation, and not by the previous user of the vendor during such joint ownership. Suffield v. Brown, 4 De G. J. & S. 185; 3 N. R. 340; 33 L. J., Ch. 249; 10 Jur. (N.S.) 111; 9 L. T. 627; 12 W. R. 856.

Abolition of Servient Tenement.]-An easement to take water to fill a canal ceases when the canal no longer exists. National Guaranteed Manure Co. v. Donald, 4 H. & N. 8; 28 L. J., Ex. 185.

Award by Inclosure Commissioners. ]-To an action for entering a close the defendant justified under a custom for the inhabitants of a parish to take water from a well in the plaintiff's close, and proved a continuous use of the well by the inhabitants. It was also proved that, in 1809, the close was allotted to the plaintiff under an inclosure act, which incorporated the 41 Geo. 3. c. 109, s. 10 of which empowers the commissioners to set out roads, ways, and watering places; and by s. 11, all ways which are not so set out are to be extinguished. Sect. 14 directs that the allotments are to be in lien of all rights of common and all other rights to which the allottees were entitled, and enacts that, after making the award, all rights of common, and all rights whatsoever intended by the local act to be extinguished, are to cease, Neither the local act nor the award contained any reference to the well, or to any way to it, but the latter did set out certain watering places and ways to them : -Held, that the award and act had not the effect of extinguishing the well, either directly or indirectly, by reason of the way to it being but an end to, and that the right claimed was therefore proved. Race v. Ward, 7 El. & Bl. 384; 26 L. J., Q. B. 133; 3 Jnr. (N.S). 512; 5 W. R. 288.

Variation of Rights. |-- When it is sought to establish a right to an easement by user, and it appears that the user has varied, it is for the jury to say whether the user has been commensurate with the right claimed. Thomas v. Thomas, 2 C. M. & R. 34; I Gale, 61; 5 Tyr. 804; 4 L. J., the plaintiff, and digging for and carrying away Ex. 179.

Though a party, having an easement of eavesof the mill in repairing the banks ever since that droppings from a thatch resting on a wall, increases the height of the wall and the projection of the thatch, he may maintain an action against a neighbour who does an act which not only prevents the enjoyment of the extended easement. but which would also interrupt it if existing within its proper limits. Ib.

> Under Artizans' Dwellings Act, 1875.7-See ARTIZANS' DWELLINGS.

#### 6. PLEADINGS AND EVIDENCE.

Entirety of Rights.]—All prescriptions are in their nature entire, and when they are pleaded, the adverse party cannot deny a part only, but must either demur to or traverse the whole,

Morewood v. Wood, 4 Term Rep. 157; 2 R. R. 349. Morewood v. Wood, 4 Term Rep. 157; 2 R. R. 349. A party in pleading may prescribe for less than he is entitled to claim. Teuchesbury Balliffs v. Bricknell, 1 Taunt. 142; 11 R. R. 537.

A prescription to enter and dig for minerals, making compensation, is an entire prescription, and will not support the affirmative of an issue taken upon a plea justifying under a prescription to enter and dig for minerals, omitting the qualification as to making compensation. Paddock v. Furrester, 3 Man. & G. 903; 3 Scott (N.R.) 715; 1 D. (N.S.) 527; 11 L. J., C. P. 107.

But in a plea stating such prescription correctly, it is not necessary to allege that compensation has been made or tendered. Ib.

In an action by a reversioner for widening a channel or watercourse in a close in the occupation of his tenant, the defendant pleaded a prescriptive right, enjoyed for twenty years and upwards, as of right, and without interruption, by the occupiers of a certain close, to a watercourse, and also a right to enter for the purpose of cleansing and souring the same, when necessary, as appurtenant to the said close. The replication traversed the right to the water course, and the right to enter for the purpose of eleansing and scouring :-Held, that the right to the watercourse, and the right to scour and cleanse, constituted one entire right, and consequently that such right was properly put in issue in its entirety. Peter v. Daniel, 5 C. B. 568; 5 D. & L. 501; 17 L. J., C. P. 177; 12 Jur.

Pleading Specially.]—Whoever pleads an easement must plead it specially. Hawkins v. Wallis, 2 Wils. 173.

In an action for obstructing the plaintiff in the enjoyment of an easement, he must show, in his declaration, that the obstruction was in the place wherein the plaintiff is entitled. Thus, when a declaration alleged a right to take water at a cistern, and complained that the defendant wrongfully locked up a door leading to it, and thereby prevented the plaintiff from using the cistern, issue having been taken on the right to take water, judgment was arrested after verdict for the plaintiff, because non constat that he had any right to go through the doorway in question, although a verdict found that he had a right to take water. Tehbutt v. Selby, 6 A. & E. 786; 1 N. & P. 710; W. W. & D. 312; 6 L. J., K. B. 175; 1 Jur. 309.

Right Claimed must not be Unlimited. ] - In trespass for breaking and entering the close of the elay, the defendant justified as owner of a

brick-kiln, and pleaded that he and all the occupiers thereof for thirty years had enjoyed, as of right, and without interruption, a right to dig, take and earry away from the close so much clay as was at any time required by him and thom for making bricks at the brick-kiln, in every year and at all times of the year.—Held, that the claim was bad. Clayton v. Carby, 14 L. J., Q. B. 364.

Amendments. ]-Where a party who is entitled to a limited right excreises it in excess, so as to cause a misance, or create a right of action cutire in its nature (as where a window or a drain is enlarged or applied to other purposes than originally authorised), as the entire muisance may be abated, an action for an obstruction of the original right of easement cannot be maintained, until its exercise has been reduced within its original limits; and if an action is brought for the obstruction, in which the right is alleged according to its enlarged exercise, and the declaration is not supported by the proof, on a traverse of the right as laid, an amendment will not be allowed, as the effect would be to evade, and not to determine the question really in controversy between the parties. Cuwhwell v. Russell, 26 L. J., Ex. 34.

Action for nuisunce. Plea, prescription for an casement. The plea must distinctly show that the right elaimed is an easement, otherwise the plea is bad, and, if not, the defect is not cured by vertice. Flight v. Themas, 2 P. & D. 531; 10 A. & E. 590; 7 D. P. C. 741; S. L. J., Q. B. 337; 3. Jur. 899.

Divisible Issues.]—Under a canal act, millowners within a specified distance of the canal were entitled to use the water for the purpose of condensing the steam used for working their engines. In an action against such a mill-owner. the declaration charged that he abstracted more water than was sufficient to supply the engine with cold water for the purpose of condensing the steam, and that he applied the water to other and different purposes than condensing steam. The plea alleged an user by him, as occupier of the mill, of the water as of right and without interruption for twenty years for other purposes than condensing steam, to wit, for the purpose of supplying the boiler of the engine, and of generating steam for working the engine, and of supplying a certain cistern, to wit, a cistern on the roof of a certain engine-house. The evidence was, that he was the occupier of two mills, adjoining to each other and occupied together. each having a separate steam-engine. The old mill was creeted in 1823, since which time he had used the water from the canal for twenty years for the purposes mentioned in the plea in respect of the old mill. The new mill was built in 1829, and the water had been used for less than twenty years in respect of that mill. There was no cistern on the roof of any enginehouse, but there were various cisterns in and about the engine-house in the old mill through which the water passed. The jury found that the two buildings formed one mill, and that there had been a twenty years use as of right by the defendants:—Held, that the issue was divisible, and that he was entitled to have the verdict entered for him, except as to the supplying a cistern on the roof of the enginehouse, as to which the plaintiff was entitled to entera verdict with nominal damages. Rockdale Canal Co. v. Radeliffe, 18 Q. B. 287; 21 L. J., Q. B. 297; 16 Jur. 1111.

Held, also, that the plea was bad, as the company had no right to grant the water for other purposes than for condensing steum, and that no such right could consequently be inferred from a twenty years' user by the defendant. Ih.

Evidence.)—Where rights are claimed by prescription, the jury ought to be directed, that from modern wasque they are warranted in presuming that the right claimed is immemorial, unless they are satisfied of the contrary by other evidence. Jenkins v. Harrey, 1 C. M. & R. 877; 1 Gule, 23; 5 Tyr. 326; 5 L. J., Ex. 17. And see S. C., 2 C. M. & R. 888.

— Time of User.]—A plea of prescription is supported if the party proves a right more extensive than that pleaded; but the right proved must be of such a nature that it may comprehend the right pleaded. Basey. Appleyeard, 8 N. & P. 257; 8 A. & E. 161; 1 W. W. & H. 208; 7 L. J., Q. B. 145; 2 Jun. 872.

A plea of forty or twenty years' user is not smparted by proof of user from a period of suffixy years before the commonement of the action down to within four years of it; and if the evidence goes no further there is no case for the jury, Parke v, Mitchell, 11 A. & E. 788; 2. P. 6.1 6.5, 9.1. I. O. 8. 194. 4. Jury 117.

3 P. & D. 655; 9 L. J., Q. B. 194; 4 Jur. 915.

In plea of forty years' user, it is sufficient to allege this neer to have been before the commencement of the suit; it is not necessary to allege it to have been before the time, when, &c. Wright v. Williams, 1 M. & W. 77; 1 Tyv. & G. 375; 1 Gale, 410; 5 L. J. Ex. 107.

To such a pilea, a replication of a life estate still existing is no answer, unless it shows that the reversion expectant on such estate is in the plantiff. *Th.* 

plaintiff. Ih.

A plea alleging an easement enjoyed for twenty years must state, in the words of s, 5, that the enjoyment was had as of right. Halford v. Hashiwan, 5 Q. B. 584; D. M. 473.

Under 2 & 3 Will. 4. c 71, where a defendant justifies in trespass under a profit à prendre as enjoyed thirty years. 8 next before the commencement of the sait, "a life estate which has existed during part of that time is to be excluded from the computation. Therefore, where the plaintiff replied to such a plea, that a life estate existed during part of the thirty years, which allegation was traversed by the defendant :—Held, that on this issue the defendant was entitled to succeed, it appearing that the life estate existed during part of the thirty years, but that the defendant enjoyed the right chained for twenty-five years before its commencement, and five years after its termination. Clauton v. Corby, 11 L. J., Q. B. 289 ; 5 Q. B. 415.

Pleas of twenty and forty years' user respectively, under 2 & 3 Will. 4, c, 71, are not supported by proof of user for forty years and apwards, before the commencement of the action, to within fourteen months of it. Some act of user must be shown to have been excised in the year in which the action is brought. Lance v. Curpenter, 6 Ex. 825; 20 L. J., Ex. 374; 15 Jur. 883.

— Extent of Rights.)—To an action for polluting a stream, and impregnating it with noxious substances, whereby the plaintiff was unable to drink the water, defendant pleaded an immemorial right to use the water of the stream

for the purposes of his trade of a tanner and | fellmonger, and returning it polluted to the stream when so used, and also prescriptive right for twenty and forty years respectively. The plaintiff new assigned that he sued not only for the grievances in the pleas admitted and atdant committed the grievances over and above what the defences justified. At the trial, it appeared that the defendant and his father and grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it; but that, within the last twelve years, the tannery business had been enlarged, and the business (and consequently the pollution of the stream) increased fourfold. Without leaving anything to the jury, the judge ruled that the defendant was entitled to a verdict on all the issues except the first and second :-Held, that, whether the pleas were to be understood as claiming an immemorial or a prescriptive right, not limited to the purposes of the tannery, or the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence. Moore v. Webb.

1 C. B. (N.S.) 673.
The plaintiff and the defendant occupied contignous portions of land. For more than forty years, and as far back as living memory went, the occupiers of the plaintiff's land had been in the habit of passing over the defendant's land to a brook which lay on the other side of that land. and of damming up the brook, when necessary, so as to force the water into an old artificial watercourse which ran across the defendant's land to the plaintiff's land. They did this for the purpose of supplying their cattle with water, whenever they wanted the water, except when the owners of the defendant's land used the water, as they did at certain seasons of the year, for irrigation:—Held, that upon this evidence, the jury was warranted in inferring an user, as of right, by the occupiers of the plaintiff's land, of the easement on the defendant's land, and, that for the interruption of such easement, the plaintiff might maintain an action against the defendant. Breston v. Weate, 5 El. & Bl. 986; 25 L. J., Q. B. 115; 2 Jur. (N.S.) 546; 4 W. R. 325.

In an action for cutting lines of the plaintiff, and throwing down the linen thereon hanging, the defendant pleaded that he was possessed of a close, and because the linen was wrongfully in and upon the close he removed it. Replication, that E., being seised in fee of the close and of a messuage with the appurtenances contiguous to it, conveyed to H. the messuage, and all the casements, liberties, privileges, &c., to the message belonging, or therewith then or of late used; that, before and at the time of such conveyance, the tenants and occupiers of the messnage used the easement of fastening ropes to the messnage, and across the close to a wall in the close, in order to hang linen thereon, and of hanging linen thereon to dry, as often as they should have occasion so to do, at their free will and pleasure, and that the plaintiff, being tenant to H. of the messuage, did put up the lineus:—Held, that proof of a privilege for the tenants to lang lines across the yard for the purpose of drying the linen of their own families only, did not support the alleged right.

Drewell v. Towler, 3 B. & Ad. 735; 1 L. J., K. B. 228.

Where a party claims an casement, and proves only a part of his claim, the casement proved constitutes a different casement from the one claimed, and the claimant cannot obtain relief in equity. Felkin v. Herbert, 11 L. T. 173.

— Unity of Possession.]—A plea of enjoyment of a profit à prendre for sixty years is, defeated by showing unity of possession during part of the time, and unity of title is prima facie evidence of unity of possession. This may be shown on a traverse of the plea. Chapton v. Corby, 5, 0, 8, 415; 111, 15, 0, 2, 2, 39.

User short of Thirty Years.]—Although, by 2 & 3 Will. 4, c. 71, s. 6, no presumption in twour of the claim is to be derived from a user short of thirty years, the statute does not take from such shorter user its weight as collateral evidence of a grant. Hunner v. Chanre, 34 L. J., Ch. 413; 11 Jur. (N.S.) 397; 12 L. T. 163; 13 W. B. 556.

#### B. PRIVATE WAYS.

1. By Grant and Reservation.

#### a. Particular Description.

Mining Property—"Free and Convenient Way."]—Under the grant of a free and convenient way for the purpose of earrying coals (among other articles), the grantee has a right to lay a frauncd waggon-way. Senhouse v. Christian, 1 Term Rep. 560; 1 R. R. 300.

Under a grant of a way from A. to B. in, through and along a particular way, the grantee is not justified in making a transverse road across the same. Ib.

"Waggon or Cart Road."]—H., being the owner of certain land and the mines thereunder, by indeature conveyed the surface to C; but he excepted and reserved a "waggon or cart road" of the width of eighteen feet, to be at all times, thereafter kept in repair at his own costs and charges:—Held, that these words would not enable H. to lay down a railroad or trauway for the carriage of coals raised from neighbouring-collieries belonging to him. Bidder v. North Suffortshitre Ry, 48 L, J., Q, B, 248; 4 Q, B, D, 413; 4 D, T. S01; 27 W, R, 549—C. A.

"Full and Sufficient"]—By a lease of mines the lessees were authorised to take and use "full and sufficient rail and other ways, paths and passages to and for the said lessees and their agents, servants and workmen, or others," to carry away "all or any of the coal, cannel, slack, iron and ironstone, the produce of the mines thereby domised, or any other mines":

—Hold, that the lessees, by virtue of this clause, might lay down a railway for the carriage of coals raised by them, and that they were not restricted to using the railway for the carriage of coals raised by or through the pits of the mines demised to them by the above-mentioned leases. Ib.

Foot and Horse Way.]—A reservation in a lease of a right of way on foot, and for horses, oxen, earthe and sheep, does not give any right of way to lead manure. *Breston* v. *Hall*, 1 G. & D. 207; 1 Q. B. 792; 10 L. J., Q. B. 258; 6 Jur. 340.

Extent of Grant.]—When a private way is granted over a piece of land of stipulated dimensions, the grantee is not entitled to the use of every square inch of the surface of the land; all that the grant confers upon him is a reasonable enjoyment of the land as a road. Clifford v. Houre, 43 L. J., C. P. 225; L. R. 9 C. P. 362; 30 L. T. 465; 22 W. R. 828.

By an indenture of the 17th May, 1872, to which the defendant was a party, A. bought a plot of ground for building a house, and power was given to her to erect as part a portico projecting into a private road upon the west side thereof. By an indenture of the 2nd August, 1872, to which also the defendant was a party, another plot of ground was conveyed to the plaintiff with a right of way over the private road before mentioned, which was to be forty reat paints mentioned, when was no be forty feet wide; and the defendant covenanted with the plaintiff that he had not "been party or privy to anything" whereby the premises granted by him were or might be "impeached, affected or incumbered in title, estate or otherwise howsoever." A. erected a house upon the plot of ground bought by her, and built out a portico upon the west side; the columns of the portico stood in the carriage-way of the private road; the bases of the columns were five feet in width and two feet in depth :- Held, that, by the indenture of the 2nd of August, 1872, the plaintiff was entitled only to the reasonable enjoyment of a right of way over the private road, and not to the use of every square inch of the surface of a road forty feet wide; that the portico did not interfere with the reasonable enjoyment of the road by the plaintiff, that the defendant's covenant had not been infringed, and that he was not liable for breach thereof in an action at the sait of the plaintiff. Ib.

Semble, that if the plaintiff's enjoyment of the right of way over the private road had been interfered with by the portico the defendant would have been, within the meaning of his covenant, party and privy to a thing which impeached, affected and incumbered the grant of the right of way to the plaintiff, who might therefore have maintained an action against the

defendant. Ib.

- Over Waste Land. ] A private right of way over waste land, or a line between two points, is not necessarily a right over every part of the land, and the owner of the soil may enclose on each side of it, leaving a convenient way. Hutton v. Hamboro, 2 F. & F. 218,

— Way abutting on Road. ]—A. granted to B. land of unequal width, described as abutting on a road on his own soil. It abutted on the broadest part of the road, but in the narrowest part of it a narrow strip of the grantor's land intervened between the road and the premises granted :-Held, that the granter and those granted:—Held, that the grantor and those claiming under him were concluded from preventing the grantec from coming out into the road over this skip of land, Roberts v. Karr., 1 Tanut. 495; 10 k. R. 592.

A grant of a right of "ingress, egress and tegress" is a grant of a right of way from the

regress," to and from certain private roads which bounded the close and led to the railway station and on to the public highways :- Held, that the grantee was entitled to pass from the close to the private roads, and thence to the public highways, or in the reverse direction, and was not limited to passing from the close to the railway station, or vice versa. Somerset v. Great Western Ry., 46 L. T. 883.

---- Construction of Deed. ]-A conveyance to the plaintiff granted to him a right of way through the guteway of the vendor (which opened into a close afterwards bought by the defendant) to a wicket-gate to be erected by the plaintiff at a given point into a piece of garden ground, part of the premises purchased by the plaintiff. The plaintiff built a cart-shed on this piece of garden ground close to the point where the wicket-gate was to be, and claimed a right of carriage-way to it :- Held, that he was not confined to a right of footway, but was entitled to a right of way for all purposes. Watts v. Kelson, 40 L. J., Ch. 126; L. R. 6 Ch. 166; 24 L. T. 209; 19 W. R. 338.

A conveyance of a piece of freehold ground with a messuage thereon, adjoining a covered gateway, "together with the exclusive use of the said gateway," was held to confer not merely a right of way through the gateway, but the use of it for all purposes. Semble, that it passed the ownership of the gateway. Rrilly v. Booth, 44 Ch. D. 12: 62 L. T. 378; 38 W. R. 484.

The defendant was owner in fee of a dwellinghouse, together with a cottage and stable belonging to it, called Roseville, and was also owner in fee of an adjoining farmstead and farm, having a private road which led from a high road to the farm buildings, and passed close to one side of the stable of Roseville. By indenture of the 1st of May, 1860, the defendant demised Roseville to H. for ten years. H. entered on the premises, and built over the stable a hay loft, with two openings towards the private road, having first obtained permission from the defendant to do so, and also permission from him and the then tenant of the farm to use the farm road for the purpose of bringing hay, straw, &c., to the loft, that being the only access to the openings in the loft. H. and the sub-temants occupying Roseville continued during the term to use the road up to May, 1870; at that time the plaintiff agreed to purchase Roseville of the defendant; and by deed of the 2nd of August, 1870, Roseville was conveyed by the defendant to the plaintiff in fee, "together with all . . .

ways and rights of way, . . . casements, and appurtenances to the said dwelling-house, cottage and hereditaments, or any of them appertaining, or with the same or any of them now or heretofore demised, occupied, or enjoyed, or reputed as part or parcel of them, or any of them, or appur-tenant thereto":—Held, that the right to use the farm road for the aforesaid purposes passed to the plaintiff under the above words. Oxley, 44 L. J., Q. B. 210; L. R. 10 Q. B. 360; 33 L. T. 164.

In a lease the demised premises were described as "all that plot of land bounded on the east learness is a ginut of a right of way from the least of lecus a quo to the locus ad queen, and from the least of lecus a quo to the locus ad queen, and from the least of least ad queen forth to any other spot to which is endorsed on these presents," and the lessee the greates may lawfully go, or back to the lecus a quo. By a deed of conveyance from a lands. The site of the new streets was marked rathey company of a close of land the grantee as each in the plan indorsed:—Held, that this was given a right of free "ingress, egress and

Semble, if the owner of a house and land makes a formed road over the land for the apparent use of the house, and conveys the house separately from the land, with the ordinary general words, a right of way over the road will pass. Watts v. Kelson, supra.

A right of way was granted by deed as follows: "together with the free liberty, use, benefit and privilege for A., his heirs, tenants and assigns, with other the inhabitants of York-house and with other the inhaditants of lora-noise and grounds of the Terrace-walk, of the Water-gate next the river Thames, he, they, and every of next the river Thames, he they are not applying and proving a property of the control of the them from time to time contributing and paying a ratable share and proportion towards repairing the same, with others who shall have the benefit thereof." In an action by the assignce of A. against a stranger, for obstructing the right:
Held, first, that the plaintiff might properly
describe it as a right of way from his house, over a street called Buckingham-street, through and over the Terrace-walk, unto the Water-gate, and over the representation of the water gate, and so back again, the evidence proving his right to use the Terrace-walk at his pleasure. *Duncan* v. *Louch*, 6 Q. B. 904; 14 L. J., Q. B. 185; 9 Jur. 346.

Held, also, that the private right of way so granted was not extinguished by the subsequent dedication of Buckingham-street to the public.

A. sold to B. two dwelling-houses, a coach-A. soft to b. two avening-moses, a coach-house and stables, and a field, together with all ways usually held, occupied or enjoyed there-with, with free liberty of ingress, egress and regress for B., or for cattle and carriages, over the carriage road leading to the dwelling-houses and stables. B. afterwards made a gate from the field which abutted upon the carriage road, into the road at an intermediate part thereof, and drove horses and carriages along the road into the field and back again :—Held, that he was liable in trespass, the right of way being a right of way to the dwelling-houses, coach-houses and stables only. Henning v. Burnet, 8 Ex. 187; 22 L. J., Ex. 79.

Defined Way - Limitation of User -Substantial Interference, ]—The plaintiff in 1888 purchased Nos. 1, 2, and 3, H. cottages, and certain land in the rear thereof, which and certain land in the rear alereot, which property was conveyed to him by deed, together with a right of way on foot along the way or passage coloured blue in the plan on the deed, which passage ran from F.-lane along the southside of No. 8.H. cottages, to the above-mentioned land of the plaintiff. This land was at the date of the conveyance, and had ever since been, used as a nursery garden. The passage was for the as a nursery garden. The passage was for the greater part of its length about three feet wide, but grew to a width of about ten feet where it Dut grow to a want or about ten reet where to reached the plaintiff's land, from which a gate about three feet wide opened on to it. The defendant had erected a building, partly on certain adjoining land of his own, and partly on the wider end of the passage, thereby reducing it to a uniform length of about three feet, reducing the what can of the passage, the coy culturing to a uniform length of about three feet, reducing conveyed in fee farm, to other persons, land in the frontage of the plaintiff's land on the passage the manor of H. (adjoining A.), with a like exby some seven feet, and preventing the erection by the plaintiff on his land of any greenhouse or other building which could open on the passage by any door unless it occupied the exact site of by any table arress to complete the state of the Ex. 279.

Held, also, that, under the reservation in the

the proposed new streets to the land demised. | the occupation of the land as a nursery garden, Espley v. Wilkes, 41 L. J., Ex. 241; L. R. 7 Ex. | but gave a right to the reasonable use of the way. and any part of it, for all purposes; that the plaintiffs mode of access to his land was not limited to the gate, but he was entitled to access at whatever point was most convenient to himself; that the defendant's building was a substantial interference with the plaintiff's right of way, and a mandatory injunction for its removal must be granted. Shetchley v. Berger, 69 L. T.

> - Appropriation for Streets.]-A private estate aet enabling tenants for life to grant building leases, empowered the lessors to lay out and appropriate any part of the land authorised to be leased as and for a way, street, square, passage or sewer, or other conveniences for the general improvement of the estate, and the accommodation of the tenants and occupiers : -Held, that exclusive private rights of way over land, so appropriated for a way, might be granted to particular lessees, as such appropriation did not confer a right of user by all the tenants and occupiers. White v. Leeson, 5 H. & N. 53; 29 L. J., Ex. 105; 5 Jur. (N.s.) 1361; 1 L. T. 189; 8 W. R. 137.

- Evidence of User. ] - An indenture of lease demised to K. property, including a yard, together "with the right of way for K., his executors, administrators and assigns, his and their servants, agents and workmen, horses, carts and carriages, from D-street to the yard and workshops as at present by K. enjoyed, which premises respectively are more particularly delineated and described on the plan drawn on the margin of these presents coloured red and green":-Held, both on the construction of the grant, and on the evidence of user, that the right of way was over the whole of the premises coloured green. Knox v. Scnsom, 25 W. R. 864.

Held, also, that where the turning of a carriage or cart is necessary to the convenient enjoyment of the dominant premises such a right of turning over a piece of land may be a part of the right of way to the dominant premises. Ib. The court will not declare a greater right than

is necessary to satisfy the right of the plaintiff as claimed. Ib.

- Ways at the date of Grant. ]-By a deed, dated in 1830, the grantor conveyed in fee farm land in the manor of A., in the county of Northumberland, "excepting and reserving out of the grant all mines of coals within the fields and territories of A. aforesaid, together with sufficient way-leave and stay-leave to and from the said mines, with liberty of sinking and digging pit and pits"; with a covenant by the grantees, that they, their heirs and assigns "should give such accustomed recompense for digging and breaking the ground within A. aforesaid, in which any pits should thereafter happen to be sunk and wrought, as formerly had been usually given and allowed there in like cases." By another deed of the same date, the same parties ception, reservation and covenant :- Held that that right was not confined to such ways as were in use at the time of the grant. Dand v. Kingscote, 6 M. & W. 174; 2 Rallw. Cas. 27; 9 L. J.,

former deed, the coal owner could not carry over sionally used this new way, but more generally A. coals got in H., although part of the same internal field. IL.

— Lawful Jase.]—Where there is an express pant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would know the time of the grant. By an inclosure award a road was set out as a carriage road and drift way from a highway to certain of the enclosed lands. The defendants, a railway company, acquired some of these lands, and built a cattle-pen therom, adjoining their railway, and used the road for that were to be or had been conveyed on their railway, such user being much greater than the user at the time of the grant, which was exclusively for agricultural purposes: —Hald, that this was a lawful user on their part, and that they were not estricted to the new which existed at the time of the grant, Finch v. G. II. Ray, 5 Ex. D. 284; 14. J. P. 84; 28 W. R. 229; 44. J. P. 8.

— Gustomary User.]—A deed reserved to 04, a right of way over a yard "to the stable and loft over the same, and the space or opening under the loft, and now used as a woodhouse," and also the use of the yard "in common with A. and his tenants for the time being, it being the intent that the whole of the yard should lie open and undivided as the same then was, without any other buildings to be erected thereon, and that the yard should be used in common by the occupiers of A.7s and G.'s messanges, in the same manner as the tenants thereof had been accustomed to use the same." G. converted the loft, and the space thereunder, which had been used as a woodhouse, into a cottage—Held, first, that the deed did not justify G. in using the yard after the cottage was built, for that such a user was not the accustomed user which had been reserved. Allan v. Gomme, 3 P. & D. 581; 11 A. & E. 759; J. L. J. Q. B. 258.

Held, secondly, that the reservation of the way in the space or opening, under the loft, and now used as a woodhouse," was to be taken as identifying the locality, and confining the way to a piece of open ground generally, and not specifically to a woodhouse; but that the conversion of the open space to a cottage, was an alteration in substance, and that G, had no right of way to the cottage. Ib.

No Defined Way—Definition by user—Right of Grantor to alter Direction.]—By lease, dated in 1862, the S. milway demised to the plaintiff, for twenty-one years, the space under and within one of the arches supporting their station, together with a right of way for him, his servants, agents and customers, with or without carts and corriages, from the said arch into V-street. At the time of the lease, and for eight years after, the only way by which the plaintiff could get to V-street was by passing over an open space lying in front of the plaintiff's arch and the adjoining arches, in a northerly direction, in front of two arches occupied by other tenants, and then turning east into V-street. The plaintiff used this way exclusively 11 1880. In that year the company made a way into V-street, a liftle to the south of the plaintiff's cards occa-

continued to use the old one. In 1882 the company put a fence across the open space, barring the old way used by the plaintiff, but they made gates in this fence and gave the plaintiff keys. The plaintiff continued till 1888 to use the old way through the fence by means of these gates. The right of way granted was in no way defined in the lease or the plan thereon, and had never been paved, set out, or otherwise defined on the land. In December, 1888, the company put new lockson the gates, and claimed to prevent the plaintiff passing through, and to confine him to the way made in 1880. The plaintiff brought this action for an injunction restraining the company from closing the gates or preventing him passing through them.—Held, that the right of way granted by the lease being undefined by the deed, the right to define the line it should take was vested in the company as a grantor, but that the company, by their action in putting up the gates and giving the plaintiff keys, had defined the way and could not afterwards after it, and that the injunction must be granted. Deacon v. S. E. Ry., 61 L. T. 377.

Duration of Grant—Leasehold Interest in Dominant Tenement—Subsequently Acquired Fee, ]—If the owner of land (coloured green on plan) covenants and grants with and to the yearly tenant of adjoining land (coloured green on plan) are a right of way from the "pink" land over the "green" land, and the yearly tenant subsequently acquires the fee of the "pink" land, it is a question of construction of the deed of grant and covenant whether the right of way terminates with the yearly tenancy, or continues to subsist in favour of the covenantee, his helis and assigns, owners of the "pink" land, and where the latter is the true construction a lessee of the assignee of the heirs of the covenantee, where the latter is the true fright of way. \*\*Upmer\* v. \*\*Ject\*\*-Ject

Personal Privilege for Life of Grantee.] -A.'s and B.'s lands adjoined each other, A.'s land being on the south and B.'s on the north, and about the middle of the boundary was a gate into B.'s land at the end of a lane or road leading to this gate from the public street, and passing through A.'s land. On the eastern side of B.'s land adjoining the highway, was a house in a ruinous state, which was once, in 1830, a dwellinghouse, and in the centre of B.'s land, equidistant from the gate and the house, and surrounded by From the gate and the noise, and shruamon by a garden, was a separate building, then used as a kitchen for the house. The remainder of B.'s land had been partly and at different times garden, ovohard, grass, &c. The owner of A.'s and B.'s premises, who died in 1830, by his will devised to his nephew, B.'s predecessor, the kitchen and garden. The will then continued as follows:—"I will and direct that my nephew, table Heavisten shall have the wireless or with John Harrison, shall have the privilege or right of a road for loading coals and dung, and other necessary things, through the gate, to the kitchen and garden." This right of a road, which was the lane or road above mentioned, was at that time the only approach to the kitchen and garden. Shortly afterwards the remainder of the premises now occupied by B. came by inheritance into the possession of John Harrison, whereby he had other access to the highway through the ruined | legally appurtenant; or unless it appears from dwelling-house, though the only approach for a horse and cart was through the way in dispute. B., who carried on the business of a coal higgler, used the kitchen as a stable for his horse, and made use of the way with his cart and horse :-Held, that this grant of a right of way was merely a personal privilege for the life of the grantee; for that by the words of the devise merely a life estate in the easement passed, and it was manifestly the intention of the testator that the right should not extend beyond the lifetime of the devisee. Pym v. Harrison, 33 L. T. 796-C. A.

#### b. General Words.

"All Ways appertaining."]—Where an under-lease described a road demised and the ways granted by the words, "all ways thereunto appertaining," it seems that a right of way over the original lessor's soil would not pass by these words. \*\*Harding v. Witson, 2 B. & C. 100; 3 D. & R. 287; 1 L. J. (o.s.) K. B. 238; 26 R. R. 287.

"All Ways used before with."]-In an action for the disturbance of a right of way, leading from a public street through the defendant's premises to a yard at the back of the plaintiff's house, originally forming part of the premises demised by lease to the defendant:—Held, that a grant of "all ways, used or enjoyed before with" the plaintiff's premises, was good, though there, was no express grant of the way in question.

\*\*Kooystra v. Lucas, 1 D. & R. 506; 5 B. & Ald, 830.

"Ways now or heretofore enjoyed"—Way at Date of Grant physically incapable of Use.]—In 1872 the owner of two adjoining pieces of land granted one to the plaintiff and the other to the defendant. The grant to the plaintiff contained the general words, "together with all ways, &c., easements, and appartenances whatsoever to the said tenement and premises hereby granted, or any part thereof, now or heretofore held or enjoyed, or reputed or known as part or parcel thereof, or appurtenant thereto."—Prior to 1852 the occupiers of the two tenements had used in common a formed private road, for the purpose of going to and from their respective tenements to the high road .- There was access to the plaintiff's tenement from the high road without passing over the private road, but the only access to the defendant's tenement was by means of that road. In 1852, by the permission of the owner, the then occupier of the plaintiff's tenement built a wall which entirely separated his tenement from the private road, and from that time down to 1872, and afterwards, with one exception, down to the issue of the writ, the occupiers of the plaintiff's tenement made no use of the private road, but obtained access to the tenement directly from the high road :-Held, that under the circumstances the inference that the word "heretofore" in the grant to the plaintiff was used in its ordinary grammatical meaning was rebutted, and that no right to the use of the private road passed to him. Roe v. Siddons, 22 Q. B. D. 224; 60 L. T. 345; 37 W. R. 228; 53 J. P. 246—C. A.

"All Ways to the Same belonging." ]-Where one seised in fee of premises, and of the soil over which a way, not of necessity, has been used by the occupier of them, grants those premises "with all ways, roads, &c. to the same belonging, or in anywise appertaining," no way will pass, unless

the grant itself that the parties meant to use the word in a sense more extended than the legal one. Barlow v. Rhodes, 3 Tyr. 280; 1 C. & M. 439 ; 2 L. J., Ex. 91.

"Right occupied or enjoyed as Parcel or Member" of Tenement granted. - A railway company purchased, under the powers of their act, a piece of land on which was a stable. By the conveyance to the company the premises were granted together with all "rights, members, or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience, and had used it ever since; the soil of this road was not conveyed to the company and no express mention of it was made in the con-veyance. The plaintiff refused to allow the company to use the road:—Held, that notwithstanding the unity of possession of the stables standing the unity of possession of the stables and the private road at the date of the conveyance to the company, a right of way passed to the company under the general words in the conveyance. Kay v. Oeley (L. R. 10 Q. B. 360), and Watts v. Kelson (L. R. 6 Ch. 165), followed. Bayley v. G. W. Ry., 26 Ch. D. 494; 51 L. T. 33T—C. A.

The fact of the stable having been purchased by a railway company for the purposes of their undertaking did not preclude them from claiming the right of way so long as they used the premises as a stable ; which they might lawfully do till such time as they were required for the special purposes of the railway, or were sold as superfluous land. Whether the railway company would be entitled to claim the right of way after they had ceased to use the premises as a stable, and had converted them to some purpose connected with the railway, quære. 11

Access "to and from every or any Part of the Parcels"-Intervening Lands of Grantor-Use of one Line of Access.]-Where the right of access to a private right of way over land belonging to the grantor has been granted "to and from every or any part of the parcels". convyed to the grantee, the latter and his suceessors may avail themselves of such right at any point, notwithstanding that only one par-ticular line of access has been made and used during a long period. Cooke v. Ingram, 3 R. 607; 68 L. T. 671.

Implication-Streets not yet formed.]-By a deed of conveyance land was conveyed to the respondent's predecessor in title, "the situation, dimensions, and boundaries whereof are particularly described in the map or plan drawn on larry described in the map of pain drawn on these presents . . . together with all streets, ways, rights, easements, and advantages." The plan showed a piece of land at the intersection of "G. Street" and "M. Street," which were delineated communicating on a level. The land was in fact, at the date of the conveyance, waste building land on the outskirts of a town, and neither of the streets had been made or dedicated to the public. The soil of the intended streets was the property of the vendor. Houses were built on the land fronting M. Street, and both streets were made, and used as streets; but the appellant company afterwards made a branch line passing under G. Street, near the property in mineral field. Ib.

\_\_\_\_Lawful User.]—Where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant. By an inclosure award a road was set out as a carriage road and drift way from a highway to certain of the enclosed lands. The defendants, a milway company, acquired some of these lands, and built a cattle-pen thereon, adjoining their railway, and used the road for the passage to and from the highway of cattle that were to be or had been conveyed on their railway. such user being much greater than the user at the time of the grant, which was exclusively for agricultural purposes:—Held, that this was a lawful user on their part, and that they were not manual user on mear part, and that they were not restricted to the user which existed at the time of the grant. Finch v. G. W. Ry., 5 Ex. D. 254; 41 L. T. 731; 28 W. R. 229; 44 J. P. 8.

— Customary User.]—A deed reserved to (t, a right of way over a yard "to the stable and loft over the same, and the space or opening under the loft, and now used as a woodhouse," and also the use of the yard "in common with A. and his tenants for the time being, it being the intent that the whole of the vard should lie open and undivided as the same then was, without any other buildings to be creeted thereon, and that the yard should be used in common by the occupiers of A,'s and G,'s messuages, in the same manner as the tenants thereof had been accus-tomed to use the same." G. converted the loft, and the space thereunder, which had been used as a woodhouse, into a cottage:—Held, first, that the deed did not justify G, in using the yard after the cottage was built, for that such a user was not the accustomed user which had been reserved. Allan v. Gomme, 3 P. & D. 581; 11 A. & E. 759; 9 L. J., Q. B. 258.

Held, secondly, that the reservation of the way " to the space or opening under the loft, and now used as a woodhonse," was to be taken as identifying the locality, and confining the way to a piece of open ground generally, and not specifithe open space to a cottage was an alteration in substance, and that G. bad no right of way to the cottage. Ib.

— No Defined Way—Definition by user— Right of Grantor to alter Direction.]—By lease, angue in vigility to steer introduct, —By lease, dated in 1862, the S. railway demissed to the plaintiff, for twenty-one years, the space under and within one of the arches supporting their station, together with a right of way for him, his servants, agents and enstoners, with or without carits and curriages from the said and inches servants, agents and customers, with or without carts and carringes, from the said arch into V. street. At the time of the lease, and for eight years after, the only way by which the plaintiff could get to V. street was by passing over an open space lying in front of the plaintiff's arch and the adjoining arches, in a northerly direction, in front of two arches occubriefly direction, in front two arounds occu-pied by other tenants, and then turning east into V-street. The plaintiff used this way exclusively tint 1890. In that year the company made a way into V-street, a little to the south of the plain-tiff's arch; after this the plaintiff's carts occa-

former deed, the coal owner could not carry over | sionally used this new way, but more generally A. coals got in H., although part of the same continued to use the old one. In 1882 the company put a fence across the open space, barring the old way used by the plaintiff, but they made gates in this fence and gave the plaintiff keys. The plaintiff continued till 1888 to use the old way through the fence by means of these gates. The right of way granted was in no way defined in the lease or the plan thereon, and had never been payed, set out, or otherwise defined on the land. In December, 1888, the company put new locks on the gates, and claimed to prevent the plaintiff passing through, and to confine him to the way made in 1880. The plaintiff brought this action for an injunction restraining the company from closing the gates or preventing him passing through them:—Held, that the right of way granted by the lease being undefined by the deed, the right to define the line it should take was vested in the company as a grantor, but that the company, by their action in putting up the gates and giving the plaintiff keys, had defined the way and could not afterwards alter it, and that the injunction must be granted. Deacon v. S. E. Ry., 61 L. T. 377.

> Duration of Grant—Leasehold Interest in Dominant Tenement—Subsequently Acquired Fee.]—If the owner of land (coloured green on plan) covenants and grants with and to the yearly tenant of adjoining land (coloured plak) that the latter and his heirs and assigns may have a right of way from the "pink" land over the "green" land, and the yearly tenant sub-sequently acquires the fee of the "pink" land, it is a question of construction of the deed of grant and covenant whether the right of way terminates with the yearly tenancy, or continues to subsist in favour of the covenantee, his heirs and assigns, owners of the "pink" land, and where the latter is the true construction a lessee of the assignee of the heirs of the covenance the tenjoyment of the right of way. *Hymer* v. *MeIlroy*, 66 L. J. Ch. 336; [1897] 1 Ch. 528; 76 L. T. 115; 45 W. R. 411.

> - Personal Privilege for Life of Grantee.] -A.'s and B.'s lands adjoined each other, A. land being on the south and B.'s on the north, and about the middle of the boundary was a gate into-B.'s land at the end of a lane or road leading to this gate from the public street, and passing through A.'s land. On the eastern side of B.'s land adjoining the highway, was a honse in a ruinous state, which was once, in 1830, a dwellinghonse, and in the centre of B.'s land, equidistant from the gate and the house, and surrounded by a garden, was a separate building, then used as a kitchen for the house. The remainder of B.'s kitchen for the house. The remainder or p. is aliand had been partly and at different times garden, orchard, grass, &c. The owner of A.'s, and B.'s premises, who died in 1830, by his will devised to his nephew, B.'s predecessor, the kitchen and gardien. The will then continued as follows:—"I will and direct that my nephew, John Harrison, shall have the privilege or right of a road for loading coals and dung, and other necessary things, through the gate, to the kitchen and garden." This right of a road, which was the lane or road above mentioned, was at that time the only approach to the kitchen and garden. Shortly afterwards the remainder of the premises now occupied by B. came by inheritance into the possession of John Harrison, whereby he had

other access to the highway through the ruined | legally appurtenant; or unless it appears from dwelling-house, though the only approach for a horse and cart was through the way in dispute. B., who carried on the business of a coal higgler, used the kitchen as a stable for his horse, and made use of the way with his cart and horse :-Held, that this grant of a right of way was merely a personal privilege for the life of the grantee; for that by the words of the devise merely a life estate in the easement passed, and it was manifestly the intention of the testator that the right should not extend beyond the lifetime of the devisee. Pym v. Harrison, 33 L. T. 796-C. A.

#### b. General Words.

"All Ways appertaining."]—Where an under-lease described a road demised and the ways granted by the words, "all ways thereunto appertaining," it seems that a right of way over the original lessor's soil would not pass by these words. Harding v. Wilson, 2 B. & C. 100; 3 D. & R. 287; 1 L. J. (o.s.) K. B. 238; 26 R. R. 287.

"All Ways used before with." ]-In an action for the disturbance of a right of way, leading from a public street through the defendant's premises to a yard at the back of the plaintiff's house, originally forming part of the premises demised by lease to the defendant :—Held, that a grant of "all ways, used or enjoyed before with" the plaintiff's premises, was good, though there, was no express grant of the way in question. Kooystra v. Lucas, 1 D. & R. 506; 5 B. & Ald. 830.

"Ways now or heretofore enjoyed "-Way at Date of Grant physically incapable of Use. |- In 1872 the owner of two adjoining pieces of land granted one to the plaintiff and the other to the defendant. The grant to the plaintiff contained the general words, "together with all ways, &c., easements, and appurtenances whatsoever to the said tenement and premises hereby granted, or any part thereof, now or heretofore held or enjoyed, or reputed or known as part or parcel thereof, or appurtenant thereto."—Prior to 1852 the occupiers of the two tenements had used in common a formed private road, for the purpose of going to and from their respective tenements to the high road .- There was access to the plaintiff's tenement from the high road without passing over the private road, but the only access to the defendant's tenement was by means of that road. In 1852, by the permission of the owner, the then occupier of the plaintiff's tenement built a wall which entirely separated his tenement from the private road, and from that time down to 1872, and afterwards, with one exception, down to the issue of the writ, the occupiers of the plaintiff's tenement made no use of the private road, but obtained access to the tenement directly from the high road :- Held, that under the circumstances the inference that the word "heretofore" in the grant to the plaintiff was used in its ordinary grammatical meaning was rebutted, and that no right to the use of the private road passed to him. Roev. Siddons, 22 Q. B. D. 224; 60 L. T. 345; 37 W. R. 228; 53 J. P. 246—C. A.

"All Ways to the Same belonging." - Where one seised in fee of premises, and of the soil over which a way, not of necessity, has been used by the occupier of them, grants those premises "with all ways, roads, &c. to the same belonging, or in anywise appertaining," no way will pass, unless line passing under G. Street, near the property in

the grant itself that the parties meant to use the word in a sense more extended than the legal one. Barlow v. Rhodes, 3 Tyr. 280; 1 C. & M. 439 : 2 L. J., Ex. 91.

"Right occupied or enjoyed as Parcel or Member" of Tenement granted. - A railway company purchased, under the powers of their act, a piece of land on which was a stable. By the conveyance to the company the premises were granted together with all "rights, members, or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member thereof." The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience, and had used it ever since; the soil of this road was not conveyed to the company and no express mention of it was made in the conveyance. The plaintiff refused to allow the company to use the road :-Held, that notwithstanding the unity of possession of the stables and the private road at the date of the convey-ance to the company, a right of way passed to the company under the general words in the conveyance. Kay v. Ozley (L. R. 10 Q. B. 360), and Witts v. Kelson (L. R. 6 Ch. 166), followed. Bayley v. G. W. Ry., 26 Ch. D. 434; 51 L. T. 337—C. A.

The fact of the stable having been purchased by a railway company for the purposes of their undertaking did not preclude them from claiming the right of way so long as they used the premises as a stable; which they might lawfully do till such time as they were required for the special purposes of the railway, or were sold as. superfluous land. Whether the railway company would be entitled to claim the right of way after they had ceased to use the premises as a stable, and had converted them to some purpose connected with the railway, quære. Ib

Access "to and from every or any Part of the Parcels"-Intervening Lands of Grantor-Use of one Line of Access.]-Where the right of of one Line of Access, —Where the right of access to a private right of way over land belonging to the grantor has been granted "to and from every or any part of the parcele" convyed to the grantee, the latter and his successors may avail themselves of such right at any point, notwithstanding that only one particular line of access has been made and used during a long period. Cooke v. Ingram, 3 R. 607: 68 L. T. 671.

Implication-Streets not yet formed. ]deed of conveyance land was conveyed to the respondent's predecessor in title, "the situation. dimensions, and boundaries whereof are particularly described in the map or plan drawn on these presents ... together with all streets, ways, rights, easements, and advantages." The plan showed a piece of land at the intersection of "G. Street" and "M. Street," which were delineated communicating on a level. The land was in fact, at the date of the conveyance, waste building land on the outskirts of a town, and neither of the streets had been made or dedicated to the public. The soil of the intended streets was the property of the vendor. Houses were built on the land fronting M. Street, and both streets were made, and used as streets; but the appellant company afterwards made a branch question, and thereby altered the level of that | street, and cut off the access for horses and vehicles from M. Street into G. Street; a means of access for foot-passengers remained :-Held that the conveyance granted to the purchaser a right of way from M. Street into G. Street, and that the alteration of levels had "injuriously affected" the land so as to entitle the respondents to compensation. Furness Ry. v. Cumberland Co-operative Building Society, 52 L. T. 144; 49 J. P. 292—H. L. (E.)

"All other Liberties, &c., needful to." -A. granted to B, his heirs, and assigns, occupiers of houses abutting on a piece of land about eleven feet wide, which divided those houses from a house then belonging to A., the right of using the piece of land as a foot or a carriage way; and gave him "all other liberties, powers, and authori-ties, incident or appurtenant, needful or necessary, to the use, occupation or enjoyment of the road, way, or passage ":-Held, that under these road, way, or passage":—Held, that under these words B. had a right to put down a flagstone in this piece of land in front of a door opened by him out of his house into this piece of land. Gerrard v. Cooke, 2 Bos. & P. (N.R.) 109.

"Close and Appurtenances."]-A., by deed, granted to S. close A., together with all ways, paths, passages, particularly the right and privi-lege to and for the owners and occupiers for the time being of close A., and all persons having occasion to resort thereto, of passing and repassing for all purposes, over a road in close B. :-Held, first, that the grant conferred on S. a right to use the road for purposes unconnected with the enjoyment of close A. Ackreyd v. Smith, 10 C. B. 164; 19 L. J., C. P. 315; 14 Jur. 1047.

Held, secondly, that such a right being nucon-nected with the enjoyment or occupation of close A. could not be annexed to it, so as to pass by a conveyance of "close A. and the appurtenances" from S. to the occupier. Ib.

"Appurtenances." ]-The plaintiff and defendant were tenants under the same landlord of adjoining farms near the sea-coast, to which a highway ran through the defeudant's farm; the plaintiff's farm communicated with the highway by a private road, which joined the highway at A. From a point on the plaintiff's farm and on the private road, an ancient lane ran to a spot on the highway nearer than A. to the sea-coast; this lane was not only the nearest way from the plaintiff's farm to the sea-coast, way from the planneds tarm to the sca-cosso, but was also level, whereas the private road was steep and hilly. The lane, which was a formed roadway bounded on either side by tarf banks roadway bounded on either side by turn banks and hedges, ran wholly through the defendant's land, except for a few yards where it started from the private road on the plaintiff's farm, but it had no communication on either side with the defendant's land, and was only open to the defendant's access at the point where it joined the highway; it had been used for many years by the plaintiff, and had been from time to time repaired by him. Prior to 1873 the plaintiff and defendant were tenants from year to year of their respective farms; in that year the landlord granted to the defendant a lease of his farm, which contained no reference to the lane, or to its user by the plaintiff; but the soil of the lane was admittedly included in the admeasurements

all houses, buildings, and appurtenances thereto belonging," in which no specific mention was made of the lane or of any right of way over it. The defendant having interfered with the plaintiff's user of the lane :- Held, that the lease to the defendant did not amount to a demise of the soil of the lane free from the plaintiff's right of way, inasmuch as the lessor, not being in possession at the date of the lease, could not make such a demise without derogating from the grant to the plaintiff under which his then existing tenancy was constituted; that there was an implied reservation of the right of way out of the defendant's lense; and that the right of way over the lane passed to the plaintiff by the lease of 1878 under the word "appurtenances." Thomas v. Oven, 57 L. J., Q. B. 198; 20 Q. B. D. 225; 58 L. T. 162; 36 W. R. 440; 52 J. P. 516 -C. A.

By deed of partition, two estates formerly distinct, but which had become vested in coparceners, were conveyed to a trustee, together with all ways, paths, passages, easements, &c., to the said messuages, &c., belonging, appertaining or therewith usually held and occupied or enjoyed, to have and to hold the said messuages, &c., with the appartenances as to one estate, to the use of A. in fee, and as to the other to the use of himself in fee, to become tenant of the pracipe in a recovery :-Held, that, on this deed, there was sufficient evidence of an intention that a way which had been usually enjoyed by the occupier of the one estate over the other, and which was used up to the time of the deed of partition, should pass to the uses limited as to the other estate under the word appurtenances, and that as the re-lessee to uses as to the one property took no estate, he had not such a seisin of the soil of the two as should extinguish the right of way. James v. Plant, 4 A. & E. 749; 6 N. & M. 282; 6 L. J., Ex. 260—Ex. Ch.

Reference to Maps and Plans. ]-A company and E. each purchased lands of W., which were separated by a road, over which a right of way was reserved to each (the freehold remaining in W.) with a joint obligation to repair. In the conveyance to the company, the land purchased by them was described as containing thirty-one acres or thereabouts, "which, with the abuttals and boundaries thereof, were more particularly described in the map or plan thereof affixed to and forming part of the conveyance, together with full and free liberty, licence and authority for the company, their successors and assigns and tenants, and all persons coming to or going from the same lands and hereditaments or any part thereof, to use and enjoy, with horses, carts, and carriages, or on foot, jointly or in common with others, the person or persons for the time being entitled to the like liberties, licences and authorities, the roads or ways leading to and from the same lands and hereditaments, as the same roads or ways are described in the said map or plan." At the time of the conveyance the land so purchased by the company was separated from the road by a hedge, in which were two gates, one at the upper, the other at the lower end of the road. The company removed the hedge, and built a wall with two gates thereon, both at the same distance from the spot where the old gates had stood. E. obstructed the access to these new gates by excavating the road to the depth of between four and five feet;—Held, that he was of the defendant's farm. In 1878 the landlord between four and five feet :—Held, that he was granted to the plaintiff a lease of his farm "and liable to an action at the suit of the company;

altering the position of the gates or not, the company were still entitled to the uninterrupted use of the way as granted to them. South Metropolitan Cometery Co. v. Eden, 16 C. B. 42.

P., owner in fee of an estate called "the Lyde Field Estate," having sunk a shaft for working coals theremuler, staked and set out a road across the Lyde Field estate from a highway on the west to the colliery, and to the east to another highway. The road from the west to the colliery being formed, but the remainder to the east being only staked out, P. in 1832 agreed with A. for the sale to him of a piece of land which was described in the conveyance (not executed until the 1st of December, 1840) as being "bounded on the north by the road leading to the said Purser's colliery," "together with the free use and enjoyment by A., his heirs, appointees, tenants, and assigns, of the abovementioned road leading to the colliery at all times, and on all occasions, he and they contributing a proportionate part of the expense of keeping such road in repair." In 1846, A. conveyed this piece of land, together with the right of way, to W.:—Held that the deed of 1840 conveyed to A. and his assigns the right to use the road across the Lyde Field estate to the east as well as to the west, though part of it was only staked out at the time of sale. Wood v. Stourbridge Ry., 16 C. B. (N.S.) 222.

In December, 1854, P. conveyed another piece of land to W., which was described in the conveyance as "bounded on the north by a road laid out by P. across the Lyde Field estate, from a road leading from the Lyde waste into the road leading from Dudley to Cradley, together with the free use and enjoyment by the grantees, their heirs, appointees, tenants and assigns, of the above-mentioned road leading across the Lyde Field estate at all times and on all occasions, on contributing a proportionate part of the expense of keeping it in repair." At the date of this conveyance, the road across the Lyde Field estate had been completely formed throughout its whole length, but a chain or a bar had been placed by P. across the road to the east of W.'s premises and the right to use that part of the road was occasionally disputed by P.:—Held, that, under the deed of December, 1854, W. acquired a right of way over that part of the road across the Lyde Field estate which lay to the east of his premises, for

the use of the premises conveyed by that deed. Ib.
In 1858, W. purchased from B. a piece of land (abutting upon the land conveyed to A. by the deed of 1st December, 1840), which was described in the conveyance as "adjoining at one end thereof to a road or highway leading from Crad-ley Forge to Rowley Regis." At the time of this purchase, the only mode of access to this piece of land was by means of an opening at the west corner, upon the road described in the convey-By an act for the formation of a railway, a new road was directed to be made in lieu of a portion of the old road, numbered 4 on the plan deposited under the standing orders, and that so much of the road numbered 22 thereon as should lie between the point at which such new road terminated and the point where the road numbered 4 met the road numbered 22 should eease to be used as a highway, "without prejudice to

for that, whether the company was justified in mises over that part of the road numbered 22 which lay between the new road and the point where the road numbered 4 met it. Ib.

#### c. Sale without Notice.

Purchaser for Value without Notice of Contract with Vestry to dedicate to Public.]—In December, 1864, B., who was in possession of land adjoining the river Thames, under an agreement for a lease for eighty years, gave notice to the Board of Works for the district that he desired to divert a public footway which crossed the land, and that he proposed to substitute a better footway, and also to make a new roadway to the waterside between two points specified, and throw the same open to the public. The vestry agreed to the application, subject to the proposed new roadway being made and thrown open to the use of the public, and the new footway being properly made. In April, 1865, the justices made an order for the stopping up and diversion of the old footway. This was done by B., and he also constructed the new road. The owners of the fee, however, did not give their consent, and there was, in the opinion of the court, no sufficient evidence of any actual dedication of the way to the public. In May, 1866, a lease of the land to B. was executed, in which it was described as "all that piece of land, &c., as the same are more particularly delineated and described on the plan drawn in the margin hereof," and the habendum was made "subject to the existing rights of way over the said land." In the plan rights of way over the said land. In the plan the new road was shown, but was marked "Private road." There were other rights of way over the land. In June, 1866, B. assigned the lease for value to the B. company, and there was nothing to shew that they had any notice of B.'s agreement, or of the existence of a right of way over the road, other than such notice as was given by the lease itself, there being, in the opinion of the court on the evidence, nothing in the appearance of the road or in the extent of its user by the public, to convey to a person inspecting the property any notice that there was a public right of way. After other assignments, the lease became vested in W., to whom the defendants were tenants. In the sale plan, by reference to which W. purchased, the road was marked "Private road," but appeared to termi-nate at the Thames at a point marked "Ferry from Blackwall Stairs." The defendants stopped up the road. An information was filed by the attorney-general, at the relation of the vestry of the parish, to restrain the defendants during the remainder of their term from obstructing the road. The defendants, by their answer, alleged that W. was a purchaser for value without notice of the agreement between B, and the vestry :-Held, by Fry, J., that there was a valid contract between B. and the vestry for a licence to the public to use the new road during his term, which the vestry could have enforced against B., and that probably W. ought to be held to have purchased with notice of it; but that, looking at the lease and the plan together, no notice of the existence of a right of way over the new road was given to the B. company, and that as they had no other notice of its existence, they were purchasers of the lease for value without notice of same for all purposes ".—Held, that this reserved darks, as claiming through them, stood in the two way, and therefore entitled to hold same for all purposes ".—Held, that this reserved darks, as claiming through them, stood in the to W. a right of way to the whole of their preassignees had acquired the lease with notice of poration v. Riggs, 49 L. J., Ch. 297; 13 Ch. D. the right of way; and that the information must 798; 42 L. T. 580; 28 W. R. 610; 44 J. P. 345. therefore be dismissed :- Held, on appeal, that as the defendants had not, by their answer, alleged that the B. company had no notice of the right of way, they could not avail themselves of the defence that the B. company were purchasers for value without notice; but that the defence that W. was a purchaser without notice was sustained, there not being enough on the sale plans to affect him with notice that there was a public right of way; and that, therefore, assuming the existence of an agreement which could have been enforced against B., it could not be enforced against the defendants. Att.-Gen. v. Biphosphated Guano Co., 49 L. J., Ch. 68; 11 Ch. D. 327; 40 L. T. 201; 27 W. R. 621—C. A.

#### 2 By NECESSITY

Creation of.]-A right of way of necessity can only arise by grant, express or implied. Proctor v. Hodgson, 3 C. L. R. 755; 24 L. J., Ex. 195; 10 Ex. 824.

Grant of a surrounded Close.]-In 1839, A. being owner of five closes, two of which, called the Holme closes, were separated by two of the others from the only available highway, sold the entire property in three lots. M. purchased the Holme closes, N. one of the other closes, and D. the remaining closes. Over the latter the tenants of A., from 1823, used a way for the occupation of the Holme closes. The deeds of conveyance to the three purchasers were all executed on the same day, but it could not be ascertained in what order of priority they were executed. No special grant or reservation of any particular way was contained in any of them, but in the conveyance to M. were the usual words, "together with all ways, roads, &c. to the closes belonging or appertaining." For several years after the execution taining." For several years after the execution of the conveyances, the plaintiffs, who occupied the Holme closes, as tenant of M. had used the way, but, in 1848, the defendant, who had purchased D.'s closes, disputed the plaintiffs right, and obstructed the way:—Held, first, that assuming that the conveyance to M. was expected to the plaintiff of the plaintiff euted before that to D., the plaintiff was clearly entitled to the way; for where a person, having a close surrounded by his land, grants the close to another, the grantee has a way over the grantor's land as incident to the grant. Pinnington v. Galland, 9 Ex. 1; 1 C. L. R. 819; 22 L. J., Ex. 348,

Held, secondly, assuming that the conveyance to D. was executed before that of M., the plaintiff was nevertheless entitled to the way; for, while the property in the Holme closes remained in A., he had that way of necessity, as being the most convenient mode of access to his premises; and it passed by his conveyance to M., under

the words "all ways to the closes belonging or appertaining." Ib.

Where the owner of a close surrounded by his own land grants the land and reserves the close, the implied right to a way of necessity to and from the close over the land operates by way of re-grant from the grantee of the land, and is limited by the necessity which created it. This regrant, however, does not create a right to a way of necessity when the total purposes for which the close may at any time be used, but only such a right of way as will enable the owner of the close to enjoy it as in the condition it happened to be at the time of the re-grant. London Cor- during the unity of possession, have been used

For instance, if at the time of the re-grant the close was agricultural land, the owner of the close can only claim such a right of way as is suitable to the enjoyment of land in that condition; he cannot claim a right of way suitable to the user of the close as building land. Ib.

Semble, the same rule applies if the grant is of the landlocked close with an implied grant of a way of necessity over the surrounding land. Ib.

— Necessary Access.] — Where one as a trustee conveys land to another, to which there is no access but over the trustee's land, a right of way passes of necessity as incidental to the grant. Howton v. Frearson, 8 Term Rep. 50; 4 R. R. 581.
The lessee of an inner close has by necessity a

right of way suitable to the business for which the lease was made, over an outer close which belongs to the same landlord, Gayford v. Moffat.

L. R. 4. Ch. 133.

But the lessee of one close cannot as such by user acquire an easement over another close which belongs to the same landlord. Ib.

The right of one proprietor to an uninterrupted flow of water, by means of pipes which run through the land of another, carries with it the right to enter upon that land for the purposes of cleaning and repairing or otherwise for the preservation of the pipes; and the court will grant an injunction to restrain the servient owner from the commission of any act which causes the dominant owner greater difficulty and expense in the exercise of his rights, or which, if suffered, might materially affect his rights in future. Goodhart v. Hyett, 32 W. R. 165.

Passing in general Words.]—By indenture of lease of the 23rd of September, 1878, one Berridge demised to Brett a public-house at Hampstead, "together with all ways, waters, watercourses, drains, cellars, vaults, paths, passages, lights, easements, profits, privileges, commodities, advan-tages and appurtenances whatsoever to the said premises belonging or in anywise appertaining." At the rear of the premises was a path across the garden to a doorway in the boundary wall which opened on to a private road (the property of Berridge) leading to Hampstead Heath. On the 1st of October, 1878, Berridge (pursuant to an agreement of November, 1867) granted to the defendant Clowser a lease for ninety-nine years of land which comprised the private road leading from the back of the public-house to Hampstead Heath; and on the 9th of October in that year Clowser built up the doorway in the boundary wall. This way had, by special agreement between himself and his lessor Clowser, for several years been used by one Haughton, a former tenant of the public-house, whose tenancy had been determined in June. 1878 :- Held, that the way in question not being a way of necessity did not pass to Brett by the general words in the lease of September, 1878; and that the defendant Clowser was not estopped from denying the existence of the alleged right of way by having allowed Haughton to use it whilst he was the occupier of the public-house. Brett v. Clouser, 5 C. P. D. 376. See Wheeldon v. Burrows, infra, col. 1098.

On Severance of Tenements. ]—On a severance of two tenements, no right to use ways which,

and enjoyed in fact, passes to the owner of the dissevered tenement, unless there is something in the conveyance to shew an intention to create the right to use these ways de novo. Pearson v. Spencer, 1 B. & S. 571; 7 Jur. (N.S.) 1195; 4 L. T. 769. Affirmed on appeal, 3 B. & S. 761; 1 N. R. 373; 8 L. T. 166; 11 W. R. 471—Ex. Ch. Where property devised or granted is landlocked, and there is no other way of getting at it without being a trespasser, so that it cannot be enjoyed without a way of some sort over the land of the testator or grantor, a way of necessity is 196—C. A. ereated de novo. Ib.

The ground on which the way of necessity is created is, that a convenient way is implied by grant as a necessary incident. Ib.

The way of necessity, once created, must remain

the same way as long as it continues at all. Ib.
Where an owner of a farm divided it by his will into two portions, devising them to A. and B. respectively, and the portion of B. was land-locked, so that in order to reach it it was necessary that he should have a right of way over the property of A., and the devisor during his life had used a way in a certain direction over that

property:—Held, that a right to use that way passed to B. by the devise. *Ib*.

E. H. and J. P. were tenants in common of N. and V. estates. By a deed of partition V. was conveyed to E. H., and N., "together with all and every their rights, members, easements, and appurtenances," was conveyed to J. P., who sold years from V. to N., and had been used up to the time of partition by E. H. and J. P.:—Held, that such right of way did not pass to J. P. by the general words used in the deed of partition.

Worthington v. Gimson, 2 El. & El. 618; 29

L. J., Q. B. 116; 6 Jur. (N.S.) 1053.

For whose Use. ]-When a right of way is granted to "the owner and owners for the time being" of lands, and the lands are subsequently severed, the grant gives a right of way to the owner for the time being of every part of the severed lands. Newcomen v. Coulson, 46 L. J., Ch. 459; 5 Ch. D. 133; 36 L. T. 385; 25 W. R.

469-C. A.

Strips of land having been allotted by an award under an inclosure act to different persons, there was awarded to the owners for the time being of the allotments "a way, right and liberty of passage for themselves and their respective tenants and farmers of the lands and grounds, as well on foot as on horseback, as with their carts and carriages, and to lead and drive their horses, oxen and other cattle" as often as oceasion should require, from a highway adjoining the outside strip over the east end of the allotments to their respective allotments, "doing as little damage to the soil, or the corn, grass or herbage," as might be, with a provision that if any owners should street out the way through their respective allotments, the same should be made and for ever remain at least eleven vards wide :- Held, that there was no implied restriction of the right of way to agricultural purposes. Ib.

Held, also, that a person entitled to a right of way is entitled to make an efficient way for any purposes for which he is entitled to use it, and desires to use it; and held, therefore, that the owners of any allotment on converting the same into building land might form a metalled road to the highway over the east end of the inter-

vening plots. Ib.

\_\_\_\_Implied Reservation.]—By the grant of part of a tenement there will pass to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted and have been hitherto used therewith: but, as a general rule, there is no corresponding implication in favour of the grantor, though there are certain exceptions to this, as in the case of ways of necessity. Wheeldon v. Burrows, 48 L. Ch. 853: 12 Ch. D. 31: 41 L. T. 327: 28 W. R.

A contract to sell land with the appurtenance does not pass a right to a way to the land sold which the vendor has used over adjoining land of his own. Bolton v. Bolton, 48 L. J., Ch. 467;

11 Ch. D. 968; 40 L. T. 582.

On Sale-Notice to Purchaser. ]-On the sale of land to a purchaser, who has notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land necessary to the yender, such right of way is reserved to the vendor by impliagain of way is reserved to the ventor by impli-cation as a way of necessity. *Duvies* v. *Sear*, 38 L. J., Ch. 545; L. R. 7 Eq. 427; 20 L. T. 56; 17 W. R. 390.

Where other Access. -An owner of land built a house on the front of it with a cottage at the back, the access to the cottage being by a passage through the house. He conveyed the cottage to B, in fee with the right of passage, and two years afterwards he conveyed the house with a garden to D. in fee. From the time the house was built, D. and the prior owners and occupiers of it used a part of the passage, which was included in the ground conveyed to B., for the purpose of passing between the house and the garden and offices, through a doorway open-ing from that part of the passage into the garden. There was, however, another mode of getting to the garden through a room in the house. Within twenty years of the building of the house, B. blocked up the doorway:—Held, that D. had not, as owner of the house, any right of way over the part of the passage, either by necessity or otherwise. *Dodd v. Burchull*, 1 H. & C. 113; 31 L. J., Ex. 364; 8 Jur. (N.S.) 1180.

Where a grantee is entitled to a way of neces-

sity over another tenement belonging to the grantor, and there are to the tenement granted more ways than one, the grantee is entitled to one way only, which the grantor may select. Bolton v. Bolton, supra.

Way of Necessity-Land taken Compulsorily Public Undertaking.]-A. and B. had respectively acquired interests under building agreeevery acquired interests timer building agree-ments in two adjoining plots of land. A local board under their compulsory powers took half an aere, part of A.'s holding, and five acres, part of B.'s holding, for the purpose of sewage works, the necessary proceedings laving been taken as against A. and B. in respect of their several interests, and against the reversioner C., in respect of the whole five and a half acres. The only way to the land taken was a warple way over another part of A.'s building plot, which for thirty years before the building agreements had been used by the occupiers of both A.'s and B.'s land for purposes of cultivation, and since the building agreements had been used by A. for his own building purposes :- Held, that the local board had a right of way over the warple ways for all necessary purposes in connection with the sewage works. Soff v. Acton Local Bourd, 55 L. J., Ch. 569; 31 Ch. D. 679; 54 L. T. 379; 41 L. T. 379; 54 W. R. 563.

Underlease.]-Where a lease of a parcel of building ground described premises as abutting on an intended way of thirty feet wide, which was not then set out, the soil being the property of the lessor, and the lessee underlet the premises, and described them as abutting on an intended way without mentioning the width; and the soil of the intended way, together with the adjacent land on the other side, was afterwards sold by the lessor to another person, who narrowed the intended way to twenty-seven feet by building a wall thereon :-Held, that the tenant of a house built by the under-lessee was entitled only to a way of necessity and convenience. Harding v. Wilson, 3 D. & R. 287; 2 B. & C. 96; 1 L. J. (o.s.) K. B. 238; 26 R. R. 287.

Reasonable User-Evidence.]-As between a lessor and lessee, the proper question to be left to a jury, as to the right to a way of necessity, is whether the easement was, at the time of granting the lease, necessary for the fair and reasonable enjoyment of the demised premises. Semble, that the acts of the parties are evidence of what was necessary for such enjoyment. Geraghty v. M. Cann, Ir. R. 6 C. L. 411.

- Right of Turning a Carriage.]-Au indenture of lease demised to K. property, includ-ing a yard, together "with the right of way for K., his executors, administrators, and assigns, his and their servants, agents, and workmen, horses, carts and carriages, from D. Street to the yard and workshops as at present by K. enjoyed, which premises respectively are more particularly delineated and described on the plan drawn on the margin of these presents coloured red and green":- Held, both on the construction of the grant, and on the evidence of user, that the right of way was over the whole of the premises coloured green. Know v. Sansom, 25 W. R. 864.

Held, also, that where the turning of a carriage or cart is necessary to the convenient enjoyment of the dominant premises, such a right of turning over a piece of land may be a part of the right of way to the dominant premises, Ib.

The court will not declare a greater right than is necessary to satisfy the right of the plaintiff as claimed Ib.

— On Parol Demise.]—If, at the time a landlord lays out a farm for letting there is a usual and manifest way of access from it to the high road through other lands of the landlord, and if he demises the farm with the appurtenances and all easements usually enjoyed with it, the way will pass, even under a parol demise from year to year, although the way was not a strictly legal way of necessity, but a way the use of which was essential to the convenient use of the farm. Clancy v. Byrne, Ir. R. 11 C. L. 355.
In such a case, evidence of user is to be

applied, not to shew that the tenant, after the commencement of the tenancy, began to use the way, but that, anterior to his tenancy, it was the usual way, and as such afterwards enjoyed. Ib.

Proof that, at the time of the commencement of the snaney, the way was the usual and recognised way of approach, without which the farm could not be conveniently enjoyed, will sustain of the land; and no such right can be presumed

nothing is said about it at the time of the demise. Skull v. Glenister, 16 C. B. (N.S.) 81; 33 L. J., C. P. 185; 9 L. T. 763; 12 W. R. 554.

A., having a right of way to a close, demised the close to B. B., being possessed of an adjoining close, upon which he was creeting houses, used the way for carting bulkling materials to A's close for the purpose of using them upon his own land:—Held, that it was properly left to the jury to say whether B's use of the road was a bona fide exercise of the right of way to A.'s close, or a mere colourable mode of getting to his own land. Ib.

User involving Trespass.]-If a way granted by a lease cannot be used, by reason of its passing over the land of third persons, and there is no other way to the lessee's house, he is entitled to a way of necessity to the nearest public highway, by the shortest line across the granter's land. Osborn v. Wise, 7 Car. & P. 761,

When Way Impassable. ]-A person who prescribes in a que estate for a private way cannot-justify going out of it on the adjoining land because the way is impassable. Barrison, 4 M. & S. 387; 16 R. R. 493. Bullard v.

It is not a good justification in trespass that the defendant has a right of way over part of the plaintiff's land, and that he had gone upon the adjoining land because the way was impassable from being overflowed by a river. Taylor v. Whitehead, 2 Dougl. 475.

Cesser of Right.]—A way of necessity is limited by the necessity which created it; and when such necessity ceases, the right of way also ceases; therefore, if at any subsequent period, the party formerly entitled to such way can approach the place to which it led, by passing over his own land by as direct a course as he would have done by using the old way, such way ceases to exist as of necessity. Holmes v. Goring, 9 Moore, 166; 2 Bing, 76.

A way of necessity exists after unity of possession of the close to which, and the close over which it leads, and after a subsequent severance; if a person purchases close A., with a way of necessity thereto over close B., a stranger's land, and afterwards purchases close B., and then prochases close C. adjoining to close A., and through which he may enter to close A., and then sells close B. without a reservation of any way, and then sells closes A. and C., the purchaser of close A. will nevertheless have the ancient way of necessity to close A. over close B. Bucksby v. Coles, 5 Taunt, 311; 15 R. R. 308,

Pleading.]-A way of necessity cannot be pleaded generally, without shewing the manner in which the land, over which the way is claimed, is charged with it. Bullard v. Harrison, 4 M. & S. 387; 16 R. R. 493.

#### 3. BY USER AND PRESCRIPTION.

#### a. Acquisition.

to have arisen from dedication, inasmuch as there within s. 8. Symons v. Leaher, 54 L. J., Q. B. can be no such act as a dedication to a part of 480; 15 Q. B. D. 629; 53 L. T. 227; 33 W. R. the public. Bermandsey Vestry v. Brown, 35 [87; 49 J. P. 778. the public. Bermondsey Vestry v. Brown, 35 Beav. 226; 11 Jur. (N.S.) 1031; 13 L.T. 574; 14 W. R. 213.

If a particular class of persons uses a pathway, and the owner does not interrupt the user for some private reason not communicated to the persons using the path, a public right of way is gained by the user after a lapse of twenty years. Reg. v. Broke, 1 F. & F. 514.

Acquiescence of Owner.]—A right of way may be acquired, as against a lessee for years, by uninterrupted user as of right for a period of forty years, during the entirety of which period the lease has been in existence, though the owner of the reversion has not acquiesced in such user, and the dominant and servient tenements are held under different landlords. Bengun v. M. Donald, 2 L. R., Ir. 560-C. A.

Knowledge of Landlord. ]-The user of a way during the occupation of tenants does not bind the landlord, unless he was aware of it; but if the user has been for a great length of time, it may be presumed that he was aware of it. Davis v. Stevens, 7 Car. & P. 570.

Tenants under same Landlord. ]-A prescriptive right of way may be acquired in respect of one tenement, by user for forty years, against another held for a term of years under the same landlord; and such right is not necessarily determined upon the expiration of the lease, when the tenant of the servient tenement continues in occupation upon the same terms as before. Fahey v. Dwyer, 4 L. R., Ir. 271.

Rights of Lessees, |-- Where a plaintiff derived title to a locus in quo under a lease from the owners within the last twenty years (without any reservation of a right of way), and the defendant had within that time occupied part of the locus, and taken adjoining premises by a subsequent lease from the original lessors:—Held, that he could not set up a right of way over the land by user, or of necessity. Walter v. Williams, 2 F. & F. 423.

Against Reversioners. ]-The assignee of a lease granted for lives, by a bishop in right of his sec, used a way, without interruption, to and from his premises for more than twenty years, over the locus in quo; the defendant, by assign-ment of a similar lease of it, obstructed the way: —Held, first, that since 2 & 3 Will. 4, c. 71, the user conferred no title as against the reversioner, the bishop; nor, secondly, against his lessee, or persons claiming under such lessee during the term. Walker v. Bright, 1 C. M. & R. 211; 4 Tvr. 502. Sub nom. Bright v. Walker, 3 L. J., Ex. 250.

A declaration claiming a right of way, "by rason of" the possession of premises, is sup-ported by proof of a reservation of way in a con-veyance of them granted by a tenant for life to the plaintiff. Ib.

Where a right of way is claimed by virtue of forty years' enjoyment under the Prescription Act, 2 & 3 Will. 4, c. 71, the period during which the servient tenement has been vested, in a tenant for life, with remainder in fee, cannot be deducted from the period of forty years' enjoy-ment, for the remainderman is "not a person entitled to the reversion expectant on a term"

In 1728, land was let on a building lease, which expired at Lady-day, 1824. In 1819, the plaintiff by virtue of a demise from an under-lessee, which expired in 1820, was in possession of a house erected on part of this land; and, under that demise, exercised, as all his predecessors had done for more than thirty years, a right of way over a passage on one side of his house, as necessary for the use and enjoyment thereof, particularly for repairing the eastern side; the underlessee's interest expired in 1822; the defendant was in possession of the soil of the passage, by virtue of an assignment, in 1791, of the lease of 1728; in 1819, the party possessed of the reversion expectant on the lease of 1728 demised to the plaintiff the house of which he was in possession, as above, for fifty-seven years and a half, to hold from Lady-day, 1824, together with all the appurtenances to the same belonging, subject to a covenant for repairs. In 1822, the reversioner demised the soil of the passage to the defendant for sixty-one years, to hold from Lady-day, 1824: —Held, that under the demise of 1819, the plaintiff was entitled to a right of way over defendant's passage. Hinchlife v. Kunnent (Eurl), 5 Bing. (N.O.) 1; 6 Scott, 650; 1 Arn. 342; 8 L. J. C. P. 105. The doctrine of the case of Walker v. Bright

(1 C. M. & R. 211) does not apply where the enjoyment on which the right of the easement depends has been for a period of forty years. Beggan v. M. Donald, 2 L. R., Ir. 560—C. A.

When absolute and indefeasible.]-Under such circumstances the right to the easement becomes at the expiration of the period of forty years absolute and indefeasible as against the lessee for the residue of the term, though liable to be defeated by the reversioner within three years after the determination of the lease.

Covenant consistent with Demise. ]-In an action for obstructing a right of way, the plaintiff proved an uninterrupted user for seventeen years. The defendant claimed a right to the soil under a subsequent demise, containing a covenant that the lessee should contribute a ratable proportion of the expense of repairing the fences, paths, ways, &c., used in common with the occupiers of other premises near or adjoining thereto, belonging to the lessor. The passage over which the plaintiff claimed a right of way was the only one to which this covenant could apply :-Held that the right of way in the plaintiff was not inconsistent with the demise of the defendant. Oakley v. Adamson, 1 M. & Scott, 510; 8 Bing.

Law of Jersey-Proof of Title.]-By the law of Jersey a public right of way in the nature of an easement over the soil of another cannot be created by a mere dedication by the owner of the fee simple at any time followed by user of the way so dedicated. Quare, whether an easy-ment or servitude can be created by any enjoyment, even from time immemorial, without proof of title; and whether forty years' possession by a parish of a way as a public way accompanied by acts of ownership would prove title in the parish to either the soil or the servitude. De Carteret v. Baudains, 55 L. J., P. C. 33; 11 App. Cas. 214-P. C.

Law of Scotland—Knowledge of Proprietor.]—In order to found a prescriptive right of way according to Scotch law, the nets of possession relied on most be of seah a classractor, or done in such circumstances, as to indicate unequivocally to the proprietor of the servicus tenement the fact that a right is asserted and the nature of the right. McLivry V. Athele (Duke), [1891] A. C. 629—H. L. (Sc.)

#### b. Evidence of User.

Actual Exercise for Forty Years, —It is sufficient primă facie proof of a preseription for a general easement as a right of way for all purposes to shew the actual exercise of the right for more than twenty years, for all the purposes to owhich the use or enjoyment of the premises at different times required its exercise, although for some of these purposes it appears that it was first used in fact within that period. Dure v. Heathoode, 25 L. J. Ex. 245.

To an action of trespass quare clausum fregit, the defendant pleaded a user as of right for forty years of a way over the plaintiff's lands from a public highway. There was evidence that, during the whole period, the defendant used the way without interruption, but that the plaintiff erected across the way a gate which he kept locked for the last six years at least, allowing a key to be given to the defendant and others using the way.—Held, that, in the absence of evidence that the key was given to the defendant in consequence of his assertion of a right, the fact of its being given did not constitute an acquiescence in the user by the plaintiff, and that there was, therefore, no evidence of enjoyment as of right proper to be submitted to the

jury. Barry v. Lowry, Ir. R. 11 C. L. 483.
The plaintiff and the defendant occupied contiguous portions of land. For more than forty years, and as far back as living memory went, the occupiers of the plaintiff's land had been in the habit of passing over the defendant's land to a brook which lay on the other side of that land. and of damming up the brook, where necessary, so as to force the water into an old artificial watercourse which came across the defendant's land to the plaintiff's land. They did this for the purpose of supplying their cattle with water whenever they wanted the water, except when the owners of the defendant's land used the water, as they did at certain seasons of the year, for irrigation:—Held, that the jury was war-ranted in inferring a user, as of right, by the occupiers of the plaintiff's land, of the easement on the defendant's land, and that, for the interruption of such casement, the plaintiff might maintain an action against the defendant. Beeston v. Waute, 5 El. & Bl. 986; 25 L. J., Q. B. 115; 2 Jur. (N.S.) 540; 4 W. R. 325.

Up to Date of Action.]—A plea of twenty years' enjoyment of a way must be supported by user for that period down to the commencement of the action. Purker v. Mitahell, 3 P. & D. 655; 11 A. & E. 788; 9 L. J., Q. B. 194.

Proof of user commencing forty years ago, but discontinued four or five years before the commencement of the action, is insufficient. Ib.

To support a plea of a right of way enjoyed for forty years, evidence may be given of user more than forty years back. Lawson v. Langley, 4 A. & E. 890; 6 L. J., K. B. 271.

General Evidence.)—In an action for a treapass to land the defeatinal pleaded pleas, alleging enjoyment as a right of way cover the land for twentry years and forty years. It support of the pleas general evidence was given of user of the right of way, commencing about forty-eight years before the commencement of the action, and continuing until within about two years of that time, and that there had been no interruption by others:—Held, that the pleas were not proved, and that there was no evidence in support of them. Lonce v. Carpenter, 6 Bx. 825; 20 L. J., Ex. 874; 15 Jul. 883.

User as of Right. — In 1823, M. built two adjoining houses, behind each of which was a piece of ground appropriated as a yard, but no wall divided the yards. In 1832, M. permitted the defendant to occupy one of the houses without payment of rent, and he was accessformed to pass over the yard of the other house, which was let from time to time to different tenants, to a public highway. M. continued owner of both houses until his death in December, 1835, In August, 1830, the trustees under his will conveyed the last-mentioned house and the ground behind it to a person through whom the plaintiff derived his title. In September, 1830, the trustees conveyed the other house and ground to the defendant, who continued to occupy it and use the way across the plaintiff's yard without interruption until 1853.—Held, that there was no user of the way as so right for twenty years. Winship v. Hudspetch, 10 Ex. 2 C. L. R. 1042; 32 L. J., Ex. 268; 2 W. R. 528.

Immemorial Private Right, —Upon a plen of an immemorial private right of way, there must be evidence of a user for at least twenty years as of right, in order to make out a prima facie case in support of it, and if during part of the time, and for more than twenty years before the alleged trespasses, there has been a user of the way less convenient, it will be for the jury, on the whole of the evidence, and especially with reference to the non-user for so many years before the time of the trespass, to say whether the alleged way was ever acquired as of right, or whether it was abandoned; that is, whether it existed, and was a subsisting right, at the time of the alleged trespasses. Durling v. Clue, 4 F. & F. 329.

Award of Inclosure Commissioners.]—
To an action for entering and passing over a close
of the plaintiff, the defendant plended a right of
way from time immemorial, and a user for forty
years and twenty years respectively. A neer in
fact for more than forty years was proved. In
fast, all ways not set out in an award were extinguished by act of parliament, and this way was
not set out:—Held, that it could not be presumed
from the user that the award was otherwise than
properly made, and that less than twenty years
having elapsed since the award, no right had
been gained under the statute. Holden v. Titley,
1 F. & F. 601.

Where no evidence appeared to shew that a way over another's land had been used by leave or favour, or under a mistake of an award which would not support the right of way chimed, such a user for above twenty years, excerised adversely and under a claim of right, was sufficient to presume a grant which must have been made within twenty-six years, as all former ways

not disproved by shewing that, forty-eight years ago, B. was part of a common, inclosed under an act of parliament, and allotted to the party under whom the defendant justifies. Codling v. Johnson 4 M. & Ry, 671; 9 B. & C. 933; 8 L. J. (o.s.) K. B.

#### c. Continuous User.

How computed.]-Under 2 & 3 Will. 4, c. 71, ss. 7, 8, the time during which the servient tenement has been under lease for a term exceeding three years is to be excluded from the computation of a forty years' enjoyment, but not from the computation of an enjoyment for twenty years. Palk v. Skinner, 18 Q. B. 568; 22 L. J., Q. B. 27; 17 Jur. 372.

Enjoyment as of Right-How defeated. The enjoyment of an easement as of right, for twenty (or forty) years next before the com-mencement of the suit, within 2 & 3 Will. 4, c. 71, means a continuous enjoyment as of right for twenty (or forty) years next before the commencement of the suit of the easement as an easement, without interruption, acquiesced in for a year; and such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession has its inception after the completion of the twenty (or forty) years. Battishill v. Reed, 18 C. B. 896; 25 L. J., C. P. 290.

- Interruption of. ]-When a person sets up an enjoyment of a right of way, or other easement, under 2 & 3 Will. 4, c. 71, s. 2, and it appears there has been an interruption of such enjoyment, the question whether such interruption has been acquiesced in or not for one year, as specified in s. 4, is one to be left to the jury as specified in 8, 4, is one to be left to the first and settled by them; and it is not necessary to bring any action or to commence a snit in order to prove that the interruption has not been acquieseed in. Bennison v. Cartieright, 5 B. & S. 1; 33 L. J., Q. B. 187; 10 Jur. (N.S.) 847; 10 L. T. 266; 12 W. R. 425.

- Agreed Alteration.]-A plea of twenty years' right of way is not defeated by proof of an agreed alteration of the line of way, nor by a temporary non-user under an agreement of the parties. Payne v. Shedden, 1 M. & Rob. 382.

— User of Way at Long Intervals.]—In an action where a right of way was claimed under the Prescription Act (2 & 3 Will. 4, c. 71), s. 2, in respect of twenty years' user as of right it appeared that the way had only been used by the party claiming it, the defendant, for the removal of wood cut upon an adjoining close. The wood was cut upon this close at intervals of several years; the last cutting having been in the year in which the action was commenced, the one next previous fifteen years before, and the next at another interval of fifteen years, Between these intervals the road was occasionally stopped up, but the defendant used it as often as he wished while the wood was being cut : -Held, that there had not been an uninterrupted enjoyment of the way for twenty years within the meaning of s. 2 of the Prescription Act, purposes in an altered condition of the property.

were at that time extinguished by the operation, of an inclosure act. Campbell v. Wilson, 3 East, 294; 7 R. R. 462.

A plea of way by prescription over A. to B. is 33 W. R. 5; 48 J. P. 580—C. A.

#### 4. EXTENT OF RIGHT.

Confined to Foot-passengers.]-By a lease a demise was made of a dry dock, described as bounded on the west by a roadway or a passage running between the dock and certain newlyerected warehouses, together with free liberty and right of way for the lessee, his workmen and servants, and all other persons and person, by his authority or permission, from time to time, and at all times thereafter during the continu-ance of the demise, in, by, through and over the roadway, lying to the west of the demised premises, jointly with the lessor and his tenants. Between the dock and the warehouses was a strip of land of twenty-three feet in breadth. At the date of the lease that part of the strip, fourteen feet in breadth, which lay nearest to the warehouses was paved, and there was at the extremity of the pavement a strong kerb three inches high. On this kerb a strong fence was erected either before or soon after the date of the lease :- Held, that the right of way conferred by the lease extended over the whole strip, and not merely to the portion of it adjacent to the dock; but that it was confined to foot-passengers. Cousens v. Rose, L. R. 12 Eq. 366; 24 L. T. 820; 19 W. R. 792.

For all Purposes.]—A conveyance to the plain-tiff granted to him a right of way through the gateway of the vendor (which opened into a close afterwards bought by the defendant) to a wicket-gate to be erected by the plaintiff at a given point into a piece of garden ground, part of the premises purchased by the plaintiff. The plaintiff built a cart-shed on this piece of garden ground close to the point where the wicket-gate was to be, and claimed a right of carriage-way to it :- Held, that he was not confined to a right of footway, but was entitled to a right of footway, but was entitled to a right of way for all purposes. Watts v. Kelson, 40 L. J., Ch. 126; L. R. 6 Ch. 166; 24 L. T. 209; 19 W. R. 338.

Alteration in Tenement-Excess of User.] In an action for trespass over the plaintiff's yard, at the back of the defendant's house, it was found that for upwards of twenty years, during which the defendant had occupied his house as a dwelling-house, he had possessed a right of way across the yard to his back door for himself and his friends. During the last two years the defendant had opened a small shop in one room of his house, and a few customers had crossed the yard for the purpose of going to the shop by the back door. Upon the plea to a new assignment to the plea of the right of way, the jury had found for the plaintiff :-Held, that this was not such an alteration in the dominant tenement that the facts could constitute an excess of the defendant's user of his right of way; and that the verdict must be entered for the defendant on the new assignment. Sloan v. Helliday, 30 L. T. 757.

Increased Burden, ]—The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all

Agricultural Purposes.]-When a road had been immemorially used to a farm, not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farmhouse and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm :-Held, that that did not establish a right of way for carting the materials required for building a number of new houses on the land. Ib.

Semble, that the fact that the occupiers of the farm, in passing with carts from a particular point to a certain gate over a common on which no definite road was marked out, did not keep to one line, but used several tracks, did not prevent their acquiring a right of way between that point and the gate. Ib.

- Minerals.]-User for twenty years of a way to a field used only for agricultural purposes does not give a right of way for mineral purposes. Bradburn v. Morris, 3 Ch. D. 812—

The owner of a field, with a right of way to it through an occupation road, agreed to sell the surface of the field, reserving the minerals. The field had never been used for mining, and the vendor did not appear to have any present intention of working the minerals:—Held, that the vendor, having had a right to use the road for agricultural purposes only, could not prevent the purchaser from so altering the road as to make it unfit for the use of the vendor in working the minerals under the land agreed to be sold, Ib.

Held, also, that even if the vendor had a right to use the road for minerals, masmuch as he had no present intention of working the minerals, the court would not interfere. Ib.

A right of way for agricultural purposes is a limited and qualified right of way, and does not necessarily confer a right to use such way for general and universal purposes, Jackson v. Stacey, Holt, N. P. 455; 17 R. R. 663.

Tramway for carriage of Coal. -An estate was intersected by a canal company under the powers of its act, and an accommodation bridge was built by the company, over which a private road, leading across the property to a high road, was carried. Coal-pits were opened upon the estate, which, when the canal was made, had been used as a farm. For some time the coals were carried down to the canal by a tramway which did not cross the bridge. The coal-owners subsequently carried the tramway across the bridge (excavating the soil of the roadway on the bridge and approaches), in order to carry their coals to a line of railway on the other side of the property. An action for trespass having been commenced, and a writ of injunction applied for by the canal company, the coal-owners submitted in the action to judgment for 11. damages and costs, and gave an undertaking not to repeat the trespass complained of. The coal-owners having, a few months afterwards, again laid down the

where that would impose a greater burden on the servicut tenement. Wimbledon and Putney recognised and established, the defendant's right Commons Conservators v. Dizen, 45 L. J., Ch. J., T. J., Ch. J., Ch. J. D. 362; 33 L. T. 679; 24 W. R. 466 bridge did not justify the making by them of a tramway upon the bridge and the approaches thereto, and injunction granted accordingly :-Held, on appeal, that the undertaking given by the defendants formed a good ground for the interference of the court, without going into the question of their right to make the tramway, Neath Canal Co. v. Ywisarwed Resolven Colliery Co., L. R. 10 Ch. 450.

> As if Public Roads-Right to lay down Gas.] -A freeholder of land, which was let for building purposes, entered into a covenant that the owners and occupiers of the houses should have a free right of way over certain roads, and should have full use and enjoyment of the roads in as absolute a manner as if they were public roads. The roads had not been dedicated to the public. At the invitation of the occupiers, but without the consent of the freeholder, a gas company broke up the surface of the roads in company broke up the same to the reasts in order to lay down gas to some of the houses. The freeholder filed a bill for an injunction against the company. The occupiers of the houses to which gas had been already laid down not having been made parties, the cause was ordered to stand over for them to appear. The occupiers appearing, and consenting to the acts of the company, the bill was dismissed with on the company, the bit was assussed with costs. Selby v. Crystal Palace District Gas Co., 8 Jur. (N.S.) 422. Affirmed, 4 De G. F. & J. 246; 31 L. J., Ch. 595; 10 W. R. 636.

> For all Manner of Carriages. ]-Evidence of a prescriptive right of way for all manner of carriages does not necessarily prove a right of way for all manner of cattle. Bullard v. Dyson,

> 1 Taunt, 279. But it is evidence of a drift way, for the jury to consider, together with the other evidence

> The extent of the usage is evidence of a right only commensurate with the user. Ib.

> For certain Purposes. ]-User of a road with horses, carts and carriages, for certain purposes, does not necessarily prove the right of road for all purposes, but the extent of a right is a questhe form the jury, under all the circumstances of the case. Courling v. Higginson, 4 M. & W. 245; 1 H. & H. 269; 7 L. J., Ex. 265.

> Footways.]-Footways (but not for carriages, or for horse people) through Richmond-gate, and through East Sheen-gate, across Richmond Park, established. Rex v. Burgess, 2 Burr. 908.

> - Carriage-way includes. ]-If a defendant pleads a footway, his plea is supported by proof of a carriage-way, as a carriage-way always includes a footway. Duris v. Stevens, 7 Car. & P.

> For removal of Tithes. ]-A rector cannot claim a permanent right of way for the purpose of carrying away his tithe, unless by prescription or grant. James v. Dods, 2 C. & M. 266; 4 Tyr. 101; 3 L. J., Ex. 47.

The owner or occupier of the soil, provided he damway, but without breaking the soil on the bridge, the vice-diameellor-held that, independ of the farm, has a right to vary and stop up a deathy of the undertaking in the action, by by which tithe has been carried, although the alteration puts the tithe-owner to great circuitous route for the purpose of carrying away his tithe. Ib.

Reasonable User.]—Where premises are demised or conveyed "with the right of way thereto," it may be a question for the jury what is a reasonable use of such right. Hawkins v. Carbines, 27 L. J., Ex. 44.

Where a right of way was expressed to be "through the gateway" of the plaintiff (which gateway led to other premises of the plaintiff), and at the time of the lease, earts could come in to load and unload, and turn round and go out again, but, through alterations of the premises, could not do so without slightly trenching upon the plaintiff's premises:—Held, that in the reasonable use of the right of way the defendant had a right to do this; and that, what was a reasonable user was for the jury. Ib.

The owner of field A., who had a right of way

over the plaintiff's close for the more convenient use of A., made a gateway from field B., into A., mowed both fields, stacked all the hay in A., and some months after sold the whole hay to the defendant, who carried it all away over the said way. The plaintiff brought an action of trespass : the defendant justified under the right of way, and the plaintiff new assigned :-Held, that whether there had been an excess of user was not a question of law; but that it was a question of fact for the jury whether the stacking and carrying away was a reasonable and proper user of the way for the purposes of A., or merely colourably so, and really for the purposes of B.; and on their finding that the former was the case, the defendant was entitled to the verdiet on the new assignment. Williams v. James, 36 L. J., C. P. 256; L. R. 2 C. P. 577; 16 L. T. 664; 15 W. R.

Liability to repair.]-Semble, that where one grants to another a right of way, the latter must bear the expense of making it available, by forming the road, keeping it in repair, and erecting the necessary fences. Ingram v. Morecroft, 33 Beav. 49.

# 5. CESSER OF USER OR ABANDONMENT.

Proof of.]—Although a grant of an occupation-way cannot be presumed from a user of less than twenty years, yet it is not necessary, in order to destroy the right to such an easement, that a cesser of the use for twenty years should be proved. Reg. v. Chorley, 12 Q. B. 515; 12 Jur.

Effect of. ]-A cesser of the use for any period less than twenty years, accompanied by an act clearly indicative of an intention to abandon the right, is sufficient to destroy such an easement.

Dedication to Public.]-If an owner of land has granted to an individual the easement of an occupation-way over it, then the subsequent absolute dedication by him of a footway to the public, in the same place, cannot be presumed, without also presuming, or proving in fact, a release of the easement by the individual; for without the release the owner can only be supposed to have given what he himself had—a right of user not inconsistent with the easement.

Intention to Abandon-Non-User. |-Where inconvenience, by compelling him to use a more the use of an immemorial right of way to a close was discontinued, because the occupiers had a more convenient access to it over another close in their occupation :--Held, that the non-user afforded no evidence of an intention to abandon the right. Ward v. Ward, 7 Ex. 838; 21 L. J., Ex. 334

In 1839 the appellant's predecessor in title conveyed a portion of his land, together with a right of way over the land he retained, to the respondent's predecessor. In 1886 and 1888 certificates of title to their respective lands were issued to the appellant and respondents under the Transfer of Land Statutes, neither of which contained any notice of the casement. In an action by the respondents to assert their right :-Held, that abandonment being a question of intention, absence of user by the respondents, together with user by the appellant of land subject to the easement, was insufficient under the circumstances to shew any intention to abandon the right. James v. Stevenson, 62 L. J. P. C. 51; [1893] A. C. 162; 1 R. 324; 68 L. T. 539—P. C.

- After Non-User and Release. - When a way is substituted for a pre-existing one, with the consent of the person entitled, and non-user of the original easement is accompanied by acts which warrant the court or a jury in inferring an intention to release it, the right of resumption becomes forfeited; nor is it necessary in such a case that the non-user should extend over twenty years or any defined period. Mulville v. Fallon,

— Substituting New Way for Old.]—A parol agreement for the substitution of a new way for an old prescriptive way, and a consequent discontinuance to use the old way, afford no evidence of an abandonment thereof. Lovell v. Smith, 3 C. B. (N.S.) 120.

· Putting up Paling. ]-The fact that the grantee or his successors have run a paling along their boundary and only opened one gate in it at the point where such access had been enjoyed. is no proof of an intention to abandon their right to access at any point. Cooke v. Ingram, 3 R. 607; 68 L. T. 671.

Agreement in Expired Lease.]—In 1850, the owner in fee of a plot of ground near a town demised the coal under it for six years to K., the owner in fee of the adjoining land; and in the lease was an agreement that a street, to be called Union Street, should within five years be made aeross the land under which the coal lay and K.'s land; that a sewer should be made under such road; that the lessor and lessee should, at their own cost, construct and repair so much of the road and sewer as should extend along their respective lands; and that the road should be used as a public road for all purposes for ever thereafter, and should be maintained by each of the parties so far as the same should extend over his land, until it should be adopted by the surveyor of highways. The road and sewer were never made, and there was no dedication of a highway to the public by notice under the Highway Act. A brickfield, and afterwards (in 1851) a colliery, were opened on K.'s land, and gaps were opened through which access was obtained to the premises for carts and foot-passengers. In

1869 posts and chains were placed across one of | by a set-out carriage drive or sweep, entering in 1871 conveyed to the plaintiff in fee, and in 1872 the Local Board of Health called upon him to sewer and pave the alleged street under the Public Health Act, 1848 :- Held, that the agreement in the expired lease had been abandoned and could not be enforced; and that it did not amount to a dedication of a right of way to the public. Healey v. Batley Corporation, 44 L. J., Ch. 642; L. R. 19 Eq. 375.

Right extended by Statute.]-A prescriptive right of way on a public towing-path on the by that part of the river adjoining the towingby that part of the river adjoining the dwing-path having been converted by statute into a floating harbour, although such towing-path was thereby subject to be used at all times of the tide; whereas before it was only used at those times when the tide was sufficiently high for the purposes of navigation. Hex v. Tippett, 3 B. & Ald. 193: 22 R. R. 346.

### 6. UNITY OF POSSESSION.

Effect of ]—No way or other easement can subsist in land of which there is a unity of possession. Morris v. Edgington, 3 Taunt. 24; 12 R. R. 579.

One entitled to a right of way over a strip of land independently of the ownership thereof, purchased the strip of land :—Held, that during the ownership, his right of way over the plot was suspended, but would revive on his ceasing to be owner. Charlesworth v. Gartsed, 3 N. R.

land during his own occupation, demises premises with all ways appurtenant, unless it is shewn that there were some ways appurtenant in alieno solo, to satisfy the words of the grant, it will be intended that he meant the ways appurtenant. Morris v. Edgington, supra.
Where A. and B. are in the possession of lands

under C., B. cannot prescribe for a right of way over the land of A. Large v. Pitt, 2 Peake, 152.

See Bull, N. P. 74.

Devise of "Appurtenances" - Extinguishment.]—One, being seised in fee of the adjoining closes, A. and B., over the former of which a way had immemorially been used to the latter, devised to B. with the appurtenances:—Held, that the devisee could not, under the word "appurtenances," claim a right of way over A. to B., as no new right of way was thereby created, and the old one was extinguished by the unity of seisin in the devisor. Whalley v. Thompson, 1 seisin in the devisor. W Bos, & P. 371; 4 R. R. 826.

A., being a termor of land, built two houses on it; the whole was then released to him in fee, with all ways, easements, advantages and appur-tenances thereinto belonging, or therewith usually used, leased, held, occupied or enjoyed. agrany used, leased, neur, occupient or empoyen. Internating and the principal definition on house, and the appartmentances of thereinto belonging, to B., and the other to C., year to year could not create a right of way in similar terms. During A's ownership of both, without the concurrence of the lanulord, and the entrance from the high road to the principal door of the house afterwards devised to B. was a Jamieson v. Coulter, 21 W. R. 852.

the openings, but after a few months the chains the openings, but after a few months the chains were removed. In 1870 K,'s land was sold, and of the house afterwards devised to C, to B,'s door, and then returning round an oval garden in front of C.'s house, but at a greater distance from it, to the same point of entrance. B.'s house had a coach-house, opening only into the high road, and a back entrance into the same. After A.'s death C. made a fence geross so much of the carriage-drive as passed immediately in front of his house and across the oval garden, leaving the further way to B.'s front door by the same carriage drive open. B. claimed the way as appurtenant to his house and garden:—Held, first, that the way as used in A.'s time, during the unity of ownership in him, immediately in front of C.'s house, did not pass to B. with the house devised to him, under the word "appurtenances" in A.'s will, Pheysey v, Vicary, 16

> Way of Necessity.]—Held, secondly, comme semble, that it did not pass as a way of necessity, whether taken in the strict sense, or a way without which the most convenient and reasonable mode of enjoying every part of B.'s premises could not be had, Ib,

> User by Vendor of his own Land. --General words in a conveyance passing all ways with the land conveyed, occupied or enjoyed, will not convey to the vendee a way which originated in the user by the vendor of his own land for his own convenience, and which had no existence prior to the unity of possession of the vendor. Thomson v. Waterline, 37 L. J., Ch. 495; L. R. 6 Eq. 36; 18 L. T. 545; 16 W. R. 686.
>
> The case would be different had the way

> existed prior to the unity of possession of the vendor, and been thereby extinguished or sus-

pended. Ib.

User by Lessee of his own Land. ]-A hard gravelled roadway or track made across a farmyard-of which farmyard there had always up to 1866 been unity of possession—had been regularly used by the occupier for his own con-In 1866 the lessee of the farmyard venience. surrendered a portion of it, bounded on one side by the roadway, to the lessor, "together with all ways therewith used, occupied and enjoyed," with a proviso that the lessor should fence off the portion surrendered :-Held, that no right of way properly so called having existed along the roadway or track previously to the surrender or the unity of possession, no such right passed or was created or revived by the surrender.

Langley v. Hammond, 37 L. J., Ex. 118; L. R.

3 Ex. 161; 18 L. T. 8.8; 16 W. R. 937.

Where the defendant, a tenant from year to

year, holding two farms from the same landlord, made a beaten road from one over the other and was subsequently obliged to give up the farm which was benefited by the right of way to another tenant, under whom the plaintiff claimed, who used the road till obstructed by the original maker of the road; which acts of obstruction took place thirty-three years after the making of the road, during all which time it was enjoyed by owners

1113

Grant of one of adjoining Closes-Ordinary general Words. -- Where two closes in one ownership adjoin, and a formed way leads over one to the other and is used therewith, and the owner grants the latter close "with all ways now used therewith," a right of way over the way passes to the grantee, whether the way was constructed before the unity of possession or not. The defendant, the owner of two pieces of land, P. and B., made an agreement with the plaintiff to convey so that P. should belong to the defendant and B. to the plaintiff. The only access to B. was by a defined gravelled path crossing P., which path, it was assumed in this action, had not existed before the unity of possession. By a conveyance executed in pursuance of the agreement, P. and B., "with all ways with the same now enjoyed," were conveyed to a trustee as to half thereof to the use of the defendant and as to half to the use of the plaintiff. P. was then occupied by the defendant, B. by the plaintiff. The defendant stopped up the path, and the plaintiff was compelled to buy a right of way over adjoining land. The plaintiff brought this action, asking that the conveyance might be action, asking that the conveyance might be recitified by vesting B. in her with a right of way over the path, and vesting P. in the defendant, subject to the right of way:—Held, that a conveyance of the reconstruction of the reconstruction. veyance executed in pursuance of the agreement ought to have contained an express grant of the right of way; that such right would have passed by a conveyance containing the common general words: that it was immaterial whether the way was constructed before the unity of possession or not; that the plaintiff had not abandoned her right; and that she was entitled to rectification as claimed. Barkshire v. Grubb, 50 L. J., Ch. 731; 18 Ch. D. 616; 45 L. T. 383; 29 W. R. 929.

There being two tenants of adjoining premises held under the same landlord, the tenant of one of the premises acquired a right of way to his vanits through the adjoining premises. landlord sold both premises at one sale, with a condition that they were to be subject to, and with the benefit of, as the ease might be, all subsisting rights or easements of way or passage, so far as any lot might be affected thereby : Held, that the vendor being subject to no liability as to a right of way, the purchaser of one tenement could not enforce a right of way as against the other. Daniel v. Anderson, 31 L. J., Ch. 610; 8 Jur. (N.S.) 328; 7 L. T. 183; 10 W. R. 366.

Mortgage of Servient Tenement without Reservation-Devise of the Two Tenements to different Persons-Reconveyance to Devisee. 1-The owner of freehold land on which were two houses occupied the first and let the second. retaining a right of way along a walled passage across the premises of the second. This passage was not a way of necessity. She mortgaged the

continuance of the mortgage she died, leaving the houses by her will to different persons. The devisee of the second house paid off the mortgage, took a reconveyance of all the interest of the mortgagee, and subsequently blocked up the passage. The plaintiff, who had purchased the first house from the devisee thereof, sued the devisee of the second house for trespass :- Held, that the plaintiff had no equity against the defendant, inasmuch as they were both volunteers under the will, and the defendant had, by the reconveyance, which was not merely the release of a security, acquired a larger estate than that given by the will. Taux v. Knowles, 60 L J., Q. B. 641; [1891] 2 Q. B. 564; 65 L T. 124; 39 W. R. 675; 56 J. P. 68—C. A.

Reservation in Long Lease. |- In a lease for ninety-five years, a right of way over the demised premises was reserved to the lessor and his heirs, as long as they should retain adjoining lands held in fee, and after he or they should alienate such adjoining lands then reserving to the lessor, his heirs and assigns, a different right:—Held that the reservations were valid, and that on ceased. Ardley v. St. Panorus Guardians, 39 I. J., Ch. 871.

- Covenant with Lessor, whether as Owner of Reversion or Owner of Adjoining Land-Conveyance of Reversion to Lessee-Merger. D. and C., eo-owners of an estate, by deed demised for a term of 1,000 years a strip of land intersecting the estate for the purpose of making a canal, with the proviso that nothing should prevent D. and C., "their heirs or assigns," from using any of the land demised, or any stream of water flowing over the same, or from granting: any wayleaves across the same for the carriage of goods, &c., or for any other purpose in like manner, as they could have used the same in ease the lease had not been granted, but so as not to injure the canal. The canal was made, and the estate was afterwards partitioned by deed between D. and C., the reversion in a portion of the canal being conveyed to C., and the adjoining lands on each side of that portion being eonveyed to D. C. afterwards conveyed the reversion in that portion of the eanal to the lessees. D., as owner of the lands intersected by that portion of the canal, having claimed to grant waylcaves, &c., and build a bridge across it for the purpose of making an access from one side to the other :- Held, that, upon the true construction of the lease, the proviso operated as a covenant with D. and C. as owners of the reversion, and not as owners of the adjoining lands; that this eovenant ran with the reversion; and that when the reversion in that portion of the canal became vested in the lessees, there was a merger, and the rights under the proviso were extinguished as to that portion of the canal.

Dynever (Lord) v. Tennant, 57 L. J., Ch. 1078;
13 App. Cas. 279; 59 L. T. 5; 37 W. R. 193—

—H. L. (E.)

#### 7. OBSTRUCTION OF.

Action against Railway Company.]-Action for obstruction by a railway company of a private right of way. No special damage was alleged. Plea, justifying under a private act of the company, and other acts therewith incorporated. Replication, that the way was a road within the | removal of such obstruction. provisions of the 8 & 9 Vict. c. 20, and that the Byerley, 28 L. T. 553; 21 W. R. 668. company had interfered with the same within the meaning of that act, and had not caused a a sufficient road to be made in its stead, as required by the act :-Held, that the 8 & 9 Vict. 20, takes away the common-law right of action for an interference under the powers of a railway company with a private right of way, except when special damage has been sustained. Watkins v. G. N. Ry., 16 Q. B. 961; 20 L. J., Q. B. 391; 15 Jur. 127.

Action by Reversioners.] — A reversioner cannot sue for the obstruction of a right of way, unless the obstruction is such as either perma nently injures the estate, or operates in denial of the right. Hopwood v. Scholfield, 2 M. & Rob. 34.

A declaration by a reversioner alleged that he was entitled to a right of way for his tenants over a close of the defendant, and charged that he wrongfully locked, chained, shut and fastened a gate, standing in and across the way, and wrongfully kept the same so locked, and thereby obstructed the way; and that by means of the premises the plaintiff was injured in his reversionary estate:—Held, on motion in arrest of judgment, that the declaration was sufficient, masmuch as such an obstruction might occasion injury to the reversion, and it must be assumed, after verdict, that evidence to that effect had been given. Kidgell v. Moore, 9 C. B. 364; 1 L. M. & P. 131; 19 L. J., C. P. 177.

Stationary Obstruction.]-P. was the owner of an inn, the yard of which was approached by a passage over adjoining property of M. They agreed to alter their boundary, and substitute a new passage for the old one, M. accordingly, in 1854, conveyed to P. a small strip of land reaching across the end of the new passage where it entered the yard, and granted to him, his heirs and assigns, "rights of way at all times and for all purposes along a passage intended to run between the piece of land hereinbefore conveyed and a street called the Tyrrels," By another deed P. released his rights of way over the old passage. The plaintiff was a lessee of the inn and yard under P. The defendants were tenants of M., occupying warehouses on his property, and the bill was filed to prevent the defendants from allowing carts and waggons to remain stationary in the passage in course of loading and unloading, so as to obstruct the access to the yard :- Held, that the necessity of the business of the defendants did not give them any right to occupy the passage by stationary obstructions when any other person having a right of way required to pass. Thorpe v. Brumfitt, L. R. 8 Ch. 650.

Held, also, that the right of way was not a right in gross, but was appurtenant to the pro-perty occupied by the plaintiff, so that his lease gave him a right to the enjoyment of it. Ib.

Cart standing in Narrow Way.] -A. occupied business premises, the only approach to which was by a private road passing a warehouse belonging to B. The roadway was too narrow for vehicles to pass each other, and carts stand-ing at B.'s warehouse created an obstruction, and margined access to A's place of business:— egress and ingress. The only entrance was Held, that A., having equal and reciprocal rights intrough an entrance or a gateway with a paved with B., was entitled to require the immediate road under the landlord's house:—Held, that

Shoesmith v.

By Grantor-Grantee may go Extra viam. If the grantor of a right of way obstructs it, the grantee may go, extra viam, over the granter's land; and the granter or a purchaser with notice from him will not be allowed to obstruct the substituted mode of access so long as the original obstruction exists. Selby v. Nettlefold. 43 L. J., Ch. 359; L. R. 9 Ch. 111; 29 L. T. 661; 22 W. R. 142.

- Notice of Deviation, - Notice of right of way, and also of an obstruction to it, is notice of the grantee's right of deviation. Ib.

Notice of such an interrupted right of way is notice of all the rights appertaining thereto. This right to go extra viam is one which can be protected by injunction, but the injunction must be limited to the time during which the obstruction lasts, and is not to prevent the grantor from substituting any other convenient mode of user, and is not to extend so as to anthorise the grantee to use the mode of access, across the defendant's land, for the continuous passage along the way granted. Ib.

Use of Ways in and through an Estate-Obstruction at further End. ]-It was stipulated by an agreement between the parties to the suit, that the plaintiff, his heirs and assigns, should have full and free permission "to use at all times the roads and ways in and through the defen-dant's estate." There were two roads traversing the defendant's estate, at the further extremity of which, where his land terminated, certain existing obstructions were continued by the defendant, so that the plaintiff, whilst he had the use of the roads over the defendant's estate, could not pass beyond it. The court granted an injunction to restrain the defendant from making and continuing the obstructions at the extremity of his land. *Phillips* v. *Treeby*, 8 Jur. (N.S.) 711; 2 Giff. 632; 6 L. T. 313. Affirmed, 8 Jur. (N.S.)

Injunction when granted to prevent.]-A lease contained a covenant to do nothing to the annoyance or damage of the lessor or his adjoining tenants or occupiers. The lease granted a right of way over a certain passage as then used and enjoyed by the lessee. At the date of the lease the lessee used the passage for the purpose of a business carried on in the premises, and the lessor, who occupied the adjoining premises, used to lock the gate of the passage in the evening, and kept it locked until the morning. Many years afterwards the lessee's representative turned part of the business premises into a place for entertainments, and claimed a right of entry to his premises at all hours. The lessor's representative filed a bill for injunction against the unisance, and against being prevented from locking the gate at night:—Held, that he was entitled to the injunction asked for. Collins v. Slade, 23 W. R. 199.

Under an agreement for a lease, the tenant had power to creet a workshop on a portion of the premises, for the purposes of his business, but was not to obstruct the entrance to the pre-mises, except by using it for the purposes of egress and ingress. The only entrance was the tenant had an implied right of way through and obstruction; and that, therefore, as the the gateway for horses and carts, as well as for plaintiff had the same rights over the road as foot passengers, and that he was entitled to an the public would have over a public highway, he injunction to restrain the landlord from obstructing the gateway by loading and unloading carts there. Cunnon v. Villars, 47 L. J., Ch. 597; 8 Ch. D. 415; 38 L. T. 939; 26 W. R.

1117

- Delay.]-A railway company had constructed its line so as to leave the passage for a private road two intervals of 9 feet 8 inches each. The interval required by the Railway Clauses Act, for a similar right of way, was 12 feet. The plaintiff's right of way was not disputed; but he had lain by and allowed the railway works to proceed, and the damage accruing to the plaintiff in consequence was of small amount:-Held, that he, having delayed the assertion of his legal right, and the damage being slight, the court would not grant an injunction to restrain the infringement on the legal right. Wintle v. Bristal and South Wales Union Ry., 6 L. T. 20; 10 W. R. 210.

Injunction or Damages-Lord Cairns' Act. 1-Where a plaintiff has established his right to a perpetual injunction against the defendant, the court has no power under Lord Cairns' Act to oblige him against his will to accept damages in lieu of the hijunction. Krehl v. Burrell, 48 L. J., Ch. 252; 11 Ch. D. 146; 40 L. T. 637; 27 W. R. 805—C. A.

Extent of Right-Road granted as if Public Road. ]-The defendant, the owner of a building estate, conveyed to the predecessor in title of the plaintiff one of the plots of ground on the estate, and in the conveyance granted to him the right for himself, his heirs and assigns, and his and their families, tenants, servants and workpeople, with or without horses, cattle, carts and carriages, to pass over the several roads made or to be made through the estate; in the same puone roads. Two of the roads on the estate were 40 feet wide, 20 feet in the middle being a reasonable user of the passage previous to the gravellet for cart and carriage traffic, and there being a strip of grass 10 feet wide on either side. The plaintiff, in common with other residents on the estate, was accordanced traffic. along these grass strips to and from his house, which was built on the plot of ground so conveyed as above stated. The defendant caused voyet as above stated: In electronant during the passengers in the use of a zoocway six ditches or trenches, each about 15 inches through the passengers in that the first question wide and 10 inches deep, to be cut completely alone ought to have been left to the jury, but as across the strips of grassland at the sides of the that question appeared to have been fairly and the property of the prop road near the plaintiff's house, the earth taken out of the ditches being banked up at the edges out of the difference being burners up to the origes or a universal metric and use over summitted for the difference, and the plaintiff's passage along cronecously did not form any ground for selting the strips was thereby rendered difficult and, saide the verdict for the plaintiff on the first dangerous. The plaintiff claimed an injunction question, and that the finding on that question and that the finding on that question that the contract of the plaintiff or the first plain against the defendant to restrain the continuance of the impediments to his right of way. The defendant contended that the plaintiff's right of way was the same as that of the public along a 8 L. R., Ir. 385—C. A. highway, and that the public ways had similar ditches and trenches cut through the grass at their sides for drainage and similar purposes and it was

was entitled to the injunction. Nicol v. Beau-mont, 53 L. J., Ch. 853; 50 L. T. 112.

Right to Foreshore. - In an action to restrain the removal of shingle from, and the placing of bathing-machines upon, a part of the foreshore of the sea at M., the plaintiff claimed to be tenant in possession of the locus in quo under a building agreement granted him by the lord of the manor of M., who was tenant for life of the property under a settlement:—Held, that on the true construction of the building agreement the plaintiff had no estate whatever in the locus in quo, but only a right of entry thereon for the purposes of that agreement, and therefore could not maintain the action. Laird v. Briggs, 19 Ch. D. 22: 45 L. T. 238—C. A.

What amounts to.]—The plaintiff was entitled to a right of way on foot through a passage across the defendant's premises. This passage had been formerly level throughout, with the exception of a three-inch step. The defendant raised part of the passage, causing an ascent of four with a descent of three steps. The plaintiff brought an action for the obstruction to his right of way, caused by this alteration, and in his statement of claim alleged that his servants had been in the habit of carrying bales and other heavy goods along the passage. Evidence was given to shew that the alterations prevented goods from being conveyed by trucks along the passage, and that heavy burdens could only be carried through it at much greater inconvenience than formerly. The jury, after viewing the premises, found, in answer to questions left to them by the judge-(a) that the passage was rendered by the alterations substantially less convenient as a mere footway; (b) that it was rendered substantially less convenient for persons on foot carrying such burdens as might, previously to the alterations, have been carried through it: the jury that no right had been shewn to roll tracks or carry burdens not commonly carried by ordinary passengers in the use of a footway properly tried, the circumstance that other issues of a different nature had also been submitted and the judgment for the plaintiff upon it should accordingly stand, Austin v. Scottish Widows' Fund Mutual Life Assurance Society,

Abatement of Inhabited House.]-A person having a right of way which has been obstructed mers or change and similar purposes and it wiss a wing a right of way which has been obstrated ditches or "grips" were made:—Hickl, that the right of the public to use a highway extends to the whole road, and not merely to the part used though it is actually inhabited. Davies v. Williams (16 Q. B. 546) approved. Lane v. as via trita; that these ditches if cut on a public highway, would have amounted to a nuisance. L. T. 375; 40 W. R. 87. Threatened Destruction.]—The lessees of a collicy having agreed to grant to the lessees of a neighbouring colliery licence to use a right of way enjoyed by the former, the owner of the first colliery having granted to the second lessees the same right of way during a term of years, and afterwards, by assignment from the first lessees, become possessed of the first colliery, and the right of way; an injunction was granted to restrain him from removing the materials and destroying the way. Newmarch v. Brandling, 3 Swanst, 90, 3 Swanst, 90, 3

## 8. EFFECT OF STATUTES UPON.

Over Level Crossings. ]-A railway company was empowered for the purposes of their undertaking to take marsh lands at Harwich belonging to the Crown, and which had been acquired by the Crown for the purposes of defence, but they were required by their act to construct and maintain across, over or under their railway such communications as the Commissioners of Woods and Forests should adjudge to be necessary for the convenient use and occupation of the Crown lands. Accordingly the company took lands which lay between the railway and an estancy, and agreed with the commissioners to make four level crossings over their line as communications with these lands. At this time the land was used for grazing purposes only. Subsequently it was purchased by a land company and laid out for building. Therenpon the railway compiers of houses on the land to use the level crossings, on the ground that the right of way was restricted to the purposes for which com-munication with the severed lands was necessary at the time the railway was made :- Held, that the grant of the right of way was not so restricted, but gave the landowners a right of way over the level crossings for all purposes which would not interfere with the proper working of the railway. United Land Co. v. G. E. Ry., 44 L. J., Ch. 685; L. R. 10 Ch. 586; 33 L. T. 292; 23 W. R. 896.

A right of way acquired by prescription is restricted to the purposes for which it was acquired. But where such a right is acquired by grant, the limit to the right of user is a question depending on the construction of the instrument of grant. Ib.

The plaintiff had been entitled from 1855 to a carriage-way to property of his over a railway by a level crossing. By an act obtained by the company in 1875, reciting that it was expedient that the rights of way in respect of footways which crossed the railway on the level should be extinguished, it was enacted that all rights of way in proper of footways numbered 2, 4, 5, 6 and 7 on the deposited plans should be extinguished. No provision for compensation was made. The roadway in question was numbered 5 on the deposited plans, and was thereon marked "roadway and footway" the others being marked simply "footway" —Held, that upon the true construction of the act, it did not interfere with private rights of way, but only with public rights of way, and that an injunction restraining the milway company from obstructing the way had been rightly granted. Wellsy London, Tilwary and Southead Ry, 5 Ch. D. 126; 37 L. T. 302; 25 W. R. 325—0.4.

Under Inclosure Acts.]—H. was possessed of lands in the parishes of R. and W., the waste lands of which were about to be inclosed, and in respect of which he was entitled to an allotment. H. sold some of his land to the defendant, expressly reserving the intended allotments. Between the lands conveyed to the defendant and a high road to R, certain strips of land, forming part of the waste lands to be inclosed, were interposed, and over them there were track-ways, which had been used for more than forty years by the occupiers of the property conveyed to defendant as a means of access between part of the property and the high road, and which had been used by the defendant without dispute down to the time of the inclosure award. afterwards sold the allotments made to him. which included the strips of waste, to the person through whom the plaintiff claimed. The award. which was duly made and confirmed, did not set out any ways over the allotments. The defendant claimed a right of way over them where the of s. 68 of 8 & 9 Vict. c. 118, any rights of way which might have existed prior to the confirmation of the award were from that date extinguished, and that the defendant had no such right as that claimed; and that the extinguishing of the right of way was not a wrongful derogation from the grant of the plaintiff's prodecessor in title. Turner v. Crash, 48 I., J., Ex. 481; 4 App. Cas. 221; 40 L. T. 661; 27 W. R.

When a right of way is granted to "the owner and owners for the time being" of lands, and the lands are subsequently severed, the grant gives a right of way to the owner for the time being of every part of the severed lands, November 9, Conton, 46 L. J., Ch. 450; 5 Ch. D. 133; 36 L. T. 335; 25 W. R. 469-C. A.

Strips of land having been allotted by an award nuder an inclosure act to different persons, there was awarded to the owners for the time being of the allotments "a way right and liberty and passage for themselves and their respective tenants and farmers of the lands and grounds, as well on foot as on horseback, as with their carts and carriages, and to lead and drive their horses, oxen and other cattle" as often as occasion should require, from a highway adjoining the outside strip over the east end of the allotments to their respective allotments, "doing as little damage to the soil, or the corn, grass or herbage," as might be, with a provision that if any owners should street out the way through their respective allotments, the same should be made and for ever remain at least eleven yards wide :- Held, that there was no implied restriction of the right of way to agricultural purposes. Ib.

Held, also, that a person entitled to a right of way is entitled to make an efficient way for any purposes for which he is entitled to use it, and desires to use it; and held, therefore, that the owners of any allotment on converting the same into building land, might form a metalled road to the highway over the cast end of the intervening plots. Th.

By an inclosure act, it was enacted that all ways over a field, called West Field, allotted to B, should be extrigmished from the time of the making and completion of a new road, as therein directed; with a provise, that nothing in the act should extend, or be construct to extend to deprive A., his helrs or assigns, or his, or their

agents, of the right of ingress, egress, and regress, to and from a watercourse, for the purpose of rebuilding, repairing, opening, or shutting the sluices thereon, or to cleanse the same :—Held, that this reserved to A. his right of way unimpaired, over West Field, for the purposes in the act mentioned. Advanc v. Mortlock, 7 Scott, 189; 5 Bing, (N.C.) 236; 1 Arn, 488; 8 L. J., C. P.

Under Canal Act-" Freed from all Estates, Charges and Incumbrances."]—The enactment in the Ulster Canal Transfer Act conveying certain lands to the Commissioners of Public Works in Ireland "freed and discharged from all estates, charges and incumbrances heretofore made, permitted or suffered by the said canal company. does not extinguish rights of way over said lands

Under the Education Act.]-A school board taking lands under the Elementary Education Act, 1870, need not give notice to treat to the owners of easements over the lands taken ; but compensation in respect of such ensements is to compensation in respect of such casements is to be given as for lands injuriously affected. Clark v. Landon School Board, 43 L. J., Ch. 421; L. R. 9 Ch. 120; 29 L. T. 903; 22 W. R. 354.

Extinction by Implication.]—A corporation were empowered by a provisional order of the Board of Trade, made under the authority of the General Pier and Harbour Act, 1861, and confirmed by a subsequent special act, to construct a pier in accordance with certain deposited plans. The plans shewed that the pier, when constructed, would be physically inconsistent with the existence of an alleged public right of access to the seashore from a street with which the pier was connected. The provisional order contained no words expressly extinguishing the right of way, or substituting another right of way for it:

Held, that, if the alleged right of way had ever existed, it was extinguished by necessary implication, and that it was not saved by ss. I1 & 14 of

coming to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A availed himself of this permission, by placing a quantity of slates there in such a manner that B., in using the road, sustained damage :- Held, that A. was liable to

an action. Corby v. Hill, 4 C. B. (N.S.) 556; 27 L. J., C. P. 318; 4 Jur. (N.S.) 512; 6 W. B., 576. Held, also, that the declaration was not objectionable for not averring that the obstruction was placed on the road without permission; inas much as such an allegation, if traversed, would have presented an immaterial issue. Ib.

# 10. PROCEEDINGS RELATING TO.

#### a. Jurisdiction.

On Motion. ]-The Court of Chancery has no jurisdiction to decide the question of a public or private right of way upon a motion in a petition suit. Pryor v. Pryor, 27 L. T. 257-L.JJ.

A bill by a lessee for twenty-one years, under the dean and chapter of W., against a lord of a manor and the tenant of a particular house, which obstructed plaintiff's way, praying that the house might be pulled down, and that plaintiff be quieted in the possession of the way :- Held. that the dean and chapter of W., who were the owners of the inheritance, were necessary parties. Poore v. Clark, 2 Atk. 515.

It is no objection to an action by a lessec of a private road for an injunction to remove an obstruction that his lessors or his assignees in bankruptcy are not made parties. Semple v. London and Birmingham Ry., 9 Sim. 209.

#### c. Evidence.

does not extinguish rights of war over said and previously acquired by third parties against the canal company. Wilson v. Hurnsby, Ir. R. 3 (C. L. 52. dence of the state of the premises at the time of granting the lease, and will then put a construction on the lease as to the line along which the way is granted; but he will not receive evidence of the declarations or acts of the parties, either before or after the lease, as shewing where the way is or was intended to be; but if it is uncertain, on the words of the grant, which of two ways is intended, the judge will receive parol evidence to shew which the grantor meant to grant. Osborne v. Wise, 7 Car. & P. 751.

In order to prove a grant of an occupation-way through a lane to the defendant's premises, he offered two deeds, which purported to be grants by the owners of the soil of an occupation-way through the lane, to tenants of premises situated on the opposite side of the lane from the defendant's premises:—Held, that the deeds were wrongly admitted for that purpose, Reg. v. Chorley, 12 Q. B. 515; 12 Jur. 822.

The question being as to a right of way over the locus in quo, on an equitable plea that the defendant had contracted to purchase from C. a close, to which was attached the right of way, and that the plaintiff had contracted with C. to the General Pier and Harbour Act, 1861. Yar-mouth Corporation v. Shumons, 4T. L. J., Ch. 792; purchase the locas in quo, subject to such right mouth Corporation v. Shumons, 4T. L. J., Ch. 792; of way, but that by mutual mistake it had been 10 Ch. D. 518; 38 L. T. 881; 26 W. R. 802. sible on the part of the plaintiff, as to what C, said at the sale as to the close conveyed to the Liability of Party Using.]—An owner of land having a private road for the use of persons coming to his house owners.

To prove User.]—Where in trespass the defendant justified, on the ground of a right of way, and proved a constant user of the way with carts and carriages, he was allowed to put in evidence a deed 120 years old relating to the property, as appurtenant to which the way was claimed, and containing a description of the way, for the purpose of shewing that the way had always been enjoyed in conformity with the description contained in the deed. Brownserd v. Harris, 3 F. & F. 853.

When Deed Lost.]—The defendant pleaded a grant of right of way by deed, subsequently lost. The plaintiff traversed the grant. At the trial, there being conflicting testimony as to the uninterrupted user of the way, the judge directed the jury, that if, upon this issue, they thought the defendant had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, they would find for the defendant; if they thought there had been no way granted by deed, they would find for the not in the nature of a condition precedent, and plaintiff:—Held, that this direction was right. need not be alleged in the declaration. Ib. Livett v. Wilson, 3 Bing. 115; 10 Moore, 439; 3

L. J. (o.s.) C. P. 186.

In trespass quare clausum fregit, the defeudant pleaded that A. was seised in fee; and, being so seised, granted a right of way by non-existing grant. The plaintiff replied, traversing the grant :- Held, that on these pleadings it was not competent for the plaintiff to give evidence to shew that A. was not seised in fee for the purpose of rebutting the presumption of the grant. Cowlishaw v. Cheslyn, 1 C. & J. 48.

Occupation.]—The defendant justified a right of way over the locus in quo in the tenants and occupiers of premises adjacent thereto, and it being proved that he was only seised of the premises in respect of which the right of way was claimed, and occupied by means of a tenant, to whom the premises were demised :--Held, that he was an occupier so as to sustain the plea of justification pleaded. Hollis v. Proud, 2 D. & R. 31. S. C., nom. Proud v. Hollis, 1 B. & C. 8.

Ownership. ]-A. was possessed of a close, the only way to which was along a green lane between two other closes, one of which belonged to A, and the other to B. In the absence of any direct evidence of ownership, the jury was told that they might presume the soil of the land to belong in moieties to the owners of the adjoining closes, and that, in respect of the close at the end of the lane, A. had a mere casement :- Held, a proper direction. Smith v. Howden, 14 C. B. (N.S.) 398.

Particular Description. ]-A claim of a prescriptive right of way from A, over the defendant's close unto D., is not supported by proof that a close called C., over which the way once led, and which adjoins to D., was formerly pos-sessed by the owner of close A., and was by him conveyed in fee to another, without reserving the right of way; for thereby it appears that the prescriptive right of way does not, as claimed, extend unto D., but stops short at C. Wright v. Rattray, 1 East, 377

But where the right of way is proved to extend to the terminus ad quem, the fact of an intervening close belonging to the party claiming the right will not vitiate it. Juckson v. Shillito,

1 East, 381, n.

# d. Pleadings.

Declarations. ]-In an action for obstructing a right of way between two specified termini, over a close called the Terrace-walk; the way was claimed as appurtenant to a messuage in general terms, without reference to any obligation to re-On the trial, the easement proved was a right to pass forwards and backwards over every part of the close, and not merely between the termini specified; and it was shewn that the easement was enjoyed under a grant to D, his heirs, tenants, and assigns, and to other persons, "he, they, and every of them, from time to time, contributing and paying a ratable share and proportion towards repairing and amending the Terrace-walk" :- Held, no variance, the easement

The casement was granted in 1675; there was evidence that for ten years next before the commencement of the action part of the way claimed had become public :- Held, not necessary to state in the declaration that such part had become public. Ib.

One who has a grant of an occupation-way may declare in an action against the owner of the land over which the way leads for obstructing it, although it is proved that the public in general had used the way without denial for the last twelve years. Allen v. Ormond, 8 East, 4; 9 R. R. 368

In an action for obstructing the plaintiff's right of way, the declaration claimed a right of way for himself and his servants on foot to go and return, pass and repass, and also to lead and carry away manure; the word "lead" as used in the declaration is a word of general use in England, and means the conveying of goods or materials by cart. Brunton v. Hall, 1 G. & D. 207; 1 Q. B. 792; 10 L. J., Q. B. 258.

In an action for not repairing a private road leading through the defendant's close, it is sufficient to allege that the defendant, as occupier of the close, is bound to repair. Itider v. Smith,

3 Term Rep. 766.

A servant put into the occupation of a cottage, with less wages on that account, does not occupy it as tenant, but the master may properly declare on it as his own occupation in an action for a disturbance of a right of way over the defendant's close to such cottage, and it matters not that the cottage was divided into two parts, one of which only was in the occupation of such servant, the other being occupied by a tenant paying rent. Bertie v. Beaumont, 16 East, 33. 22 R. R. 802, n.

In an action for obstructing the plaintiff in the enjoyment of an easement, he must shew, in his declaration, that the obstruction was in the place wherein the plaintiff is entitled. Thus where a declaration alleged a right to take water at a cistern and complained that the defendant wrongfully locked up a door leading to it, and prevented the plaintiff from using the distern, issue was taken on the right to take water, and judgment arrested after verdict for the plaintiff, because non constat that he had right to go through the doorway in question, although he had a right to take water. Tebhutt v. Selby, 6 A, & E. 781; 1 N. & P. 710; W. W. & D. 312; 6 L. J., K. B. 175; 1 Jnr. 309.

In an action for interfering with the plaintiffs' right of way to a certain quarry, the plaintiffs alleged, in the first paragraph of their statement of claim, that they were entitled to a right of way from the public highway through a certain gateway along a certain passage to the said quarry, and back again from the said quarry to the public highway, for themselves, their agents, servants and licensees, on foot and with horses. carts and carriages, at all times of the year; and in the second paragraph they alleged that they were entitled to a right of way from the public highway through a certain gateway along a certain passage to the said quarry, and back again from the said quarry to the public highway, for themselves, their agents, servants and licensees, proved being only larger than the essement of not and with horses and carts, at all times alleged, and not different in kind. Duncan v. convenient and necessary for the working of the Long, b Q. B. 904; 14 L.J., Q. B. 185; 9 Jun. 346.

Held, also, that the obligation to repair was other material therefrom. On motion to set aside the first and second paragraphs of the state—at their free will and pleasure. Replication ment of claim:—Held, that the statement of traversing such right—Held, that, under the claim was sufficient. Kennare (Lord). Clasy, 12 L. R., Ir. 374.

Pleas—Sufficiency of.] — Action for breaking and entering a close called the Hencroft. Plea, that C., being owner in fee of the close, granted to H., by deed, a way over the close for the occupiers of a dye-house, and that the defendant being in the occupation of the dye-house, committed the trespass. The plaintiff set out the deed in his replication. By the deed C. granted to H, all those newly-erected buildings standing and being partly on the close called the Hencroft, and partly on B. C., together with all and singular out-houses, edifices, buildings, roads, ways, &c., and appurtenances, with the premises usually held, occupied, or enjoyed, C. reserving to himself exclusively Hencroft, with the rights, privileges, and appurtenances within and to the same belonging :- Held, that the plea was bad, in omitting to aver that the way had been usually held, occupied or enjoyed with the Hencroft. Tutton v. Hummersley, 3 Ex. 279; 18 L. J., Ex. 162.

To a declaration quare clausum fregit, the defendant pleaded that he was the occupier of a close called B. M., with certain lands thereunto adjoining, and another close called M., with two other closes next adjoining thereto, and that he, and the occupiers of the several closes and lands, had enjoyed a right of way for twenty years from the close called B. M., over the locus in quo, into and unto the close called M. :-Held, that inasmuch as the termini of the way elaimed were specially described by name, and two closes at least in respect of which the way was claimed were specially described by name, and as the defendant was not bound to prove his right in respect of any but the two named closes, the plea was sufficiently certain, though all the closes pien was summetricly certain, rhough at the choses in respect of which the right of way was claimed were not specially described, cither by name or by all their metes and bounds. Holt v. Daze, 16 Q. B. 990; 20 L. J., Q. B. 365; 15 Jnr. 1074.

A plea of a right of way, under 2 & 3 Will, 4 c. 71, s. 5, must state the enjoyment to be "as of right," within the very terms of the act. Halford v. Hankinson, D. & M. 473; 5 Q. B. 584; 13 L. J.,

Q. B. 115; 8 Jur. 463.

In pleading a prescriptive right of way it is not necessary to describe all the closes intervening between the two termini. Simpson v. Leuthwaite, 3 B. & Ad. 226; 1 L. J., K. B. 126.

To a plea of forty or of twenty years' enjoy-ment of a way, a licence, if it covers the whole time, must be pleaded. Tiehle v. Brown, 4 A. & E. 369; 6 N. & M. 230; 1 H. & W. 769; 5 L. J.,

K. B. 119.

But a verbal or other licence, given and aeted on within the forty or twenty years, may be proved under a traverse of the enjoyment as of right; and this, whether such licence is granted for a single time of using, or for a definite period. Ib.

In a plea it is sufficient to allege that the user has existed for forty years before the commencement of the suit, and it need not be alleged to have been for forty years before the act complained of in the declaration. Wright v. Wildiams, 1 M. & W. 77; 1 Tyr. & G. 375; 5 L. J., Ex. 107.

Trespass quare clausum fregit. Plea, a right of way for the occupiers of a close for twenty v. Clarke, 2 Bing. (N.C.) 705; 3 Scott, 258; 2 years, for horses, carts, waggons, and carriages, Hodges, 100; 5 D. P. C. 50; 5 L. J., C. P. 281.

issue, the plaintiff might shew that the defendant had a right of way for horses, carts, waggons, and carriages for certain purposes only, and not for all, and was not compelled to new assign : and might shew that the purpose for which the defendant had used the road, and in respect of which the action was brought, was not one of those to which the right extended. Cowling v. Higginson, 4 M. & W. 245; 1 H. & H. 269; 7 L. J., Ex. 265.

To an action for breaking and entering the plaintiff's close (which was set out by abuttals), and pulling down the posts and bars standing thereon. Plea, that there was a public footway over the close, and that the defendant, because the posts and bars obstructed the way, pulled them down. Replication, traversing the footway :- Held, that on these pleadings the defendant was entitled to a verdict, on proof of a right of footway in any direction over the close, and was not bound to prove a way over the place where the posts and bars stood. Webber v. Sparks, 10 M. & W. 485; 12 L. J., Ex. 41.

A plea, that defendant was seised in his demesne as of fee, and that he and all those whose estate, &c., have a right of way for himself, his and their farmers and tenants, occupiers, &e., is good, without alleging that the defendant is occupier. Stott v. Stott, 16 East, 343; 14

R. R. 354.

- Divisibility of Claims. ]-In an action for an obstruction to a right of way, the declaration claimed a right of way for himself and his servants, on foot, to go and return, pass and repass, and also to lead and carry away all the manure which might be made on his premises. Plea, denying the right:—Held, that this right was not divisible; and that proof that the plaintiff had a right of footway only, would not support a verdiet for him on this issue. Brunton v. Hall, 1. Q. B. 792; 1 G. & D. 207; 10 L. J., Q. B. 258; 6 Jur. 340.

Replications-Validity of ]-To a plea of enjoyment of a right of way over the plaintiff's close, by the occupiers of a close called W., for twenty years next before the commencement of the action, the plaintiff replied, that, before the period of twenty years, A. was seised in fee as well of the close mentioned in the declaration as of the close called W., and continued so seised during part of the period of twenty years, until he died so seised :- Held, bad, for that unity of seisin was not inconsistent with the right as alleged in the plea, and unity of possession (if that was meant by the replication) might have been given in evidence under a traverse of the right as alleged in the plea. England v. Wall, 10 M. & W. 699; 12 L. J., Ex. 273.

A replication of a life estate to a plea of enjoyment for forty years, must shew that the plaintiff is the person entitled to the reversion expectant on the determination of the life estate. Wright v. Williams, 1 M. & W. 77; 1 Tyr. & G. 375; 5 L. J., Ex. 107.

Plea of a way used for forty years by the occupiers of the defendant's farm, as of right, and without interruption. Replication, traversing the user as of right :-Held, that under this issue the plaintiff might give in evidence that the way had been used by leave and licence only. Beasley

way, and that the gate being wrongfully erected across the same, he took it down and deposited it in a convenient place for the use of the plaintiff, to which the plaintiff replies a subsequent conversion; proof that the defendant put the gate upon his own premises, whence the plaintiff might have taken it if he had pleased, will not sustain the replication. *Houghton* v. Butler, 4 Term Rep. 364; 2 R. R. 411.

To an action of trespass, the defendant pleaded a right of way across the locus in quo, for the occupiers of B. field, on foot, and with eattle and carriages, enjoyed as of right and without interruption for twenty years before the com-mencement of the suit. The replication traversed so much of the alleged right of way as was claimed to be used with carriages, and as to the residue of the plea, set forth an act of parliament, under which a navigation company, before the commencement of the twenty years, made a haling-path for towing vessels along the river, across the locus in quo, into B. field; that after the commencement of the twenty years, under the powers of another act, another haling-path was set out near the river, but also across the locus in quo, and into B. field; and that thereupon the navigation company abandoned the former haling-path, which thenceforth ceased to be used as such : that, before and at the commencement of the twenty years, the occupiers of B. field used and enjoyed, as of right and without interruption, by virtue and under the provisions of the first act, a way along the first-mentioned but that, from that time until the commencement of the suit, the occupiers of B. field, claiming right to the way, as a continuation of the right before enjoyed by them under the act of parliament, continued to use the same way; which way, and the use and enjoyment along the haling-path as aforesaid, is the same way, and the same use and enjoyment thereof as in the plea mentioned, except as to the user with carriages:-Held, that the replication was good; that it disclosed facts shewing that the defendant's user, although as of right and without interruption (luring the twenty years, within the meaning of the 2 & 3 Will. 4, c. 71, ss. 2, 5, was not such as would, before the statute, have been sufficient to prove a claim by prescription or nonexisting grant; and that those facts must be replied specially, and could not have been given in evidence under a traverse of the right of way alleged in the plea. Kinlack v. Nevile, 6 M. & W. 795; 10 L. J., Ex. 248.

To a declaration in trespass quare clausum fregit the defendant pleaded, that he and the former occupiers of a house and land had, for twenty years, used and enjoyed as of right a cer-tain way on foot and with horses, &c., from and out of a common highway, towards, into, through, and over the plaintiff's close, to the defendant's house and lands, and back, at all times of the year, at their free will and pleasure. The replication averred, that the defendant, &c., used and enjoyed the right of way mentioned in the plea, but that they did so under the plaintiff's leave and licence. At the trial, it appeared that the defendant and the former occupiers of his house and land had an admitted right of way thence

If, to an action for pulling down and carrying | the highway, to a close called Reddings, and that away a gate, the defendant pleads a right of | for the last twenty years they had had a license for the last twenty years they had had a licence from the plaintiff to use, whenever they pleased, a way from the defendant's house and lands over the locus in quo to the highway and back, when they had not any intention of going to Reddings: -Held, that the replication was not supported by this evidence, and that the plaintiff was bound to shew a licence co-extensive with the right claimed in the plea, and admitted by the replication. Colchester v. Roberts, 4 M. & W. 769; S L. J., Ex. 195,

> New Assignments-Validity. ]-To an action for entering the plaintiff's close, and enting down the rails there standing. Plea, a right of way across the close, and because the rails were there standing in and across the way, a justification of their removal. Replication, that the rails were not standing in or across the way, and issue thereou :—Held, that the defendant maintained the issue by proving that some of the rails cut down were standing on a highway; and that the plaintiff could not recover in respect of the rails which were not on the highway, and that, in order to do so, he should have new assigned. Bravegirdle v. Peavoch, 8 Q. B. 174 : 15 L. J., Q. B. 73 : 10 Jur. 9.

Trespass quare clausing fregit, with abuttals. Plea, a right of way. New assignment, trespass stopped up the way in the former plea men-tioned, wherefore the defendant did necessarily go a little out of the highway, qua est eaden. At the trial, it appeared that there was a public haling-path, across the locus in quo, on foot and with earlier with the dealer of the haling-path; the defendant claimed as public, but which the plaintiff had stopped up, and it was proposed to try the question as to the existence of a public right over the second way. The judge being of opinion that no issue was raised as to the second way, directed a verdict for the plaintiff :- Held, that the direction was right, for the precise locality being material to the defence, the defendant was bound to shew it in his pleadings, Ellison v. Iles, 3 P. & D. 391; 11 A. & E. 665; 9 L. J., Q. B. 103.

The 15 & 16 Viet. c, 76, ss. 77, 79, which allow a plaintiff to traverse the whole of a plea by a general denial, only enable him to traverse generally what he might have traversed before, and where a plaintiff, before that statute, must have new assigned, he must do so still. Gloverv. Dixon, 9 Ex. 158; 2 C. L. R. 309; 23 L. J., Ex. 12; 17 Jnr. 1012. S. P., Huddart v. Rigby, 10 B. & S. 911; 39 L. J., Q. B. 19; L. R. 5 Q. B. 139: 21 L. T. 641: 18 W. R. 213-Ex. Ch.

A declaration contained two counts, the second of which charged the trespass on other days and times, and on other parts of the closes in the first count mentioned. The defendant pleaded a right of way over the closes. The plaintiff traversed the right of way, and new assigned. To the new assignment there was a payment of money into court, and an acceptance of it :-Held, that the plea justified all the trespasses in the declaration; and that the defendant, there-Wood v. Wedgwood, 2 D. & L. 809; 1 C. B. 273; 14 L. J., C. P. 132.

Action for breaking and entering the plaintiff's close, and damaging the fences. Plea of justifi-cation under a right of way. New assignment, over the locus in quo to the highway, and across that the action was brought for a trespass on a

certain other portion of the close, setting it out action will lie. *Embrry* v *Owen*, 6 Ex. 353; 20 by abuttals. Plea to the new assignment, that L. J., Ex. 212; 15 Jur. 633. whilst the defendant so had the right to the way, the plaintiff obstructed the way by digging a trench across the same, and because the defendant could not remove the obstruction, he did, for the purpose of avoiding the same, and using the way, depart out of the same, along the other portion of the close in the new assignment mentioned; and because the fences in the new assignment mentioned were standing on a portion of the close in the new assignment mentioned, and that without breaking and damaging the same he could not go over the residue of the close, he did necessarily a little break and damage the fences:-Held, that the right of way stated in the plea to the declaration was not admitted by the plaintiff in his new assignmeut. Robertson v. Gantlett, 16 M. & W. 289; 4 D. & L. 548; 16 L. J., Ex. 156.

To a declaration in case for an injury arising from smoke issuing out of the defendant's factory chimneys, the defendant justified under a prescriptive right to have the smoke issuing from the chimneys. This plea was traversed, and the plaintiff new assigned. It was proved that one of the chimneys whence the smoke issued had been erected for more than twenty years :--Held, that upon the issue raised by the traverse to this plea, the defendant was entitled to have the verdict entered for him, Bennett v.

Thompson, 4 W. R. 594.

Verdict, on Jury's Finding.]—A defendant in a plea justified nuder an alleged right of way with horses, carts, and carriages, for the purpose of fetching goods and water from a navigable river. The jury affirmed the right set up, so far as it related to the fetching of water, but negatived it as to the rest :- The court directed the tree it is to the ress:—Inc cours arreads the verdict to be entered distributively (for the plaintiff as to the goods, for the defendant as to the water). Knight v. Ware, 5 D. P. C. 201:

3 Scott, 326; 3 Bing. (N.c.) 3; 6 L. J., C. P. 135. way on foot, and with horses, eattle, earts, waggons, and other carriages at all times, for the convenient occupation of his close K., and the replication traversed the right, and the jury found that the defendant had a right for the purpose of carting timber and wood only from K, :-Held, that the plaintiff was cutitled to the K.—Held, that the plaintiff was entitled to the plaintiff had established his title to the access of entire verdict, and that the defendant could not light by proof of enjoyment from time immecenter is distributively for such right as the jury found. Higham v. Rabbett, 5 Bing. (N.C.) 622; 7 D. P. C. 653; 7 Scott, 827.

# C. LIGHT AND AIR. 1. RIGHT TO.

#### a. Generally,

Shutting out a man's house from public view is not a legal injury. Butt v. Imperial Gaslight Co., L. R. 2 Ch, 158; 16 L. T. 820; 15 W. R. 92,

An owner of ancient lights is entitled not only to sufficient light for the purpose of his then business, but to all the light which he has enjoyed previously to the interruption sought to be restrained. Yates v. Jack, L. R. 1 Ch. 295; 12 Jur. (N.S.) 305; 14 L. T. 151; 14 W. R. 618.

Light and air are bestowed by Providence for the common benefit of men, and so long as the reasonable use by one man of this common property does not do actual and perceptible damage

An act of parliament alone can give any person the right of taking the property of another without his consent on payment of an adequate pecuniary compensation, and the right to light and air is as much property as the land which enjoys this easement on the land of another, Dunball v. Walters, 35 Beav. 565.

Where a purchaser takes with notice of adjoining windows, he is thereby put upon his inquiry as to whether they are privileged or not, and if privileged, it is immaterial whether as modern windows by grant, or as ancient by prescription.

Miles v. Tobin, 17 L. T. 432; 16 W. R. 465.

Windmill.]—An owner of a windmill cannot claim, either by prescription, or by presumption of a grant arising from twenty years' acquiescence, to be entitled to the free and uninterrupted passage of the currents of wind and air to rupted passage of the carrents of wind and are to his mill. Webb v. Bird, 10 C. B. (N.S.) 268; 30 L. J., C. P. 384; 4 L. T. 445; 9 W. R. 899. Affirmed on appeal, 13 C. B. (N.S.) 841; 31 L. J., C. P. 335; 8 Jur. (N.S.) 621—Ex. Ch.

Vertical Column of Air over Room.] - An owner of two contiguous houses in the city of Loudon sold one to the defendant by a conveyance which correctly marked out the ground site of the house conveyed. One of the first-floor rooms in the house retained by the owner projected over the site, and was supported by the other house:—Held, that the vertical column of air over so much of the room as overhung the defendant's site belonged, not to the owner, but to the defendant. Corbett v. Hill, 39 L. J., Ch. 547; L. R. 9 Eq. 671; 22 L. T. 268.

Unity of Possession.]-In a suit to restrain a defendant from building so as to obstruct the plaintiff's ancient lights, it was proved that for a period of more than twenty years, extending to But where the defendant pleaded a right of ay ou foot, and with horses, earthe, earts, wag on foot, and with horses, earthe, earts, wag, and other carriages at all times, for the was no cyclence of there ever having been any within a very short time before the bill was filed, unity of title; and it was proved that before the unity of possession commenced, the access of light to the windows had been cujoyed as far back as living memory went :- Held, that the morial, independently of the 2 & 3 Will. 4, c. 71 : for that the statute does not take away any of the modes of claiming easements which existed before the passing. Ayusley v. Glaver, 44 L. J., Ch. 523; L. R. 10 Ch. 283; 32 L. T. 345; 23 W. R. 459,

#### b. By Statute.

Indefeasible. —The right conferred or recognised by 2 & 3 Will. 4, c. 71, is an absolute indefeasible right to the enjoyment of the light without reference to the purpose for which it is used. Youngev. Shaper, 27 L. T. 643: 21 W. R. 135.

The right to ancient lights depends upon this rate right to another against appear to statute, and not upon any presumption of grant or fiction of licence; and being an absolute indefeasible and unqualified statutory right, cannot be lost by a subsequent intermission of enjoyment, not amounting to intentional abandonto the right of another to the similar use of it, no ment, nor can it be prejudiced by an attempt to

extend the access of light beyond that access which has so become indefeasible. *Tapling* v. Jones, 11 H. L. Cas. 290; 20 C. B. (N.S.) 106; 34 L. J., C. P. 342; 11 Juv. (N.S.) 309; 12 L. T. 555; 13 W. R. 617.

How acquired.]—A right to the access and use of light to a house cannot be acquired, under 2 & 3 Will. 4, c. 71, s. 8, by the lapse of time during which the owner of the house, or his occupying tenant, is also the occupier of the land over which the right would extend. Ladymens v. Grare, L. R. 6 Ch. 763; 25 L. T. 52; 19 W. R. 863.

During such period of unity of occupation, the running of the twenty years under the statute is

only suspended. Ib.

Semble, that the owner in fee of land demised for a term of years is subject to any right to for eacess and use of light over his land which may be acquired by the owner of an adjoining house during the demise. Th.

Retrospective J.—The 2 & S Will. 4, c, 71, s, 3, limiting twenty years as the period for acquiring an indefeasible right to the access and use of light, is retrospective, so that such an easement may be acquired by ritrue of enjoyment prior to the passing of the act. Simper v. Foley, 2 Johns. & H. 555; f b. L. 669.

Effect of Act on Nature and Extent of. ]—The 2 & 3 Will. 4, c. 71, has not altered the law as to the nature and extent of light to which the owner of an ancient light is entitled. Kelk v. Peursin, L. R. 6 Ch. 809; 24 L. T. 890; 19 W. R. 665.

The owner of an ancient light is cutifled to prevent his neighbour from obstructing the access of light, so as to render the house possessing the ancient light substantially less fit for

occupation. 1b.

The right of an owner of ancient lights is to prevent his neighbour from obstructing the access of sufficient light and air to such an extent as to render his house substantially less comfortable and enjoyable, and the Prescription Act, 2 & 3 Will. 4, c. 71, has not altered the nature of the right or the principle on which it is to be determined whether it has been intringed, but has userely substituted a statutory title for an assumed grant. City of London Brewery Ch. v. Tranand, 43 L. J., Ch. 457; L. R. 9 Ch. 212; 29 L. T. 755; 22 W. R. 172.

"Access"—" The Right thereto."—The word access in s. 3 of the Prescription Act refers not to the access through the aperture of the jominant tenement, but to the freedom of passage over the servicut tenement, although the aperture which admits the light into the dominant tenement defines the area which is to be kept free over the servicut tenement. "The right thereto" means the right to the same access and use of light to and for any building. Scott v. Zape. 55 L. J., Ch. 426; 31 Ch. D. 554; 54 L. T. 399; 34 W. R. 465; 50 J. P. 645.

One of Light.]—The right acquired under the Prescription Act, s. 3, is a right to the access and use of the whole or a substantial part of the particular cone of light which has passed for the statutory period over the servient to the dominant tenement. It.

"User of."]—The word "nse" in s. 3 of 2 & 3 Will. 4, c. 71 (the Prescription Act), points to the actual admission of light into a building, and not to the existence of any particular user either in kind or degree, the object of the section being to give title to relief, but not to define its extent. Mackey v. Scattish Wildows Frond Life Assurance Society, Ir. R. 11 Bq. 541—C. A.

"Other Building" — Dwelling house or Workshop.]—The words "other building" used in the Prescription Act (2 & 3 Will, 4, c. 71), s. 3, in connection with any "dwelling-house, workshop—" mean some building of a like charwith a dwelling-house or workshop, and will not necessarily include every structure which may be a building for the purposes of the Metropolitan Building Acts. Accordingly, a permanent structure used for storing and seasoning timber and shewing it to customers, which consisted of apright banks of timber or standards fixed in stone bases built on brick piers, with cross-beams and diagonal from braces, divided into floors or stagings with open unglazed ends or apertures between the uprights, and which served for drying the timber and also for admitting light, is not a "building" within s. 3, so as by twenty years' uninterrupted enjoyment of the access and use of light to and for the apertures, to have acquired an absolute and indefeasible right thereto. Harris v. De Pinna, 56 L. J., Ch, 344; 33 Ch. D. 238; 54 L. T. 38; 50 J. P. 308-C. A.

- Unconsecrated Chapel-Memorial Windows-Mural Decorations-Special Purpose. ]-The effect of the decision in Moore v. Hall (3 Q. B. D. 178) is, that light required for a special purpose is not protected under the Prescription Act, unless it has been previously used for that special or a like purpose, or there is a reasonable probability of its being so used. There is, however, no rule that such special amount of light must have been used for the ordinary prescriptive length of time. A memorial chapel, unconsecrated, used for Church of England and Presbyterian services and for confirmation and other classes, and decorated with stained windows and mural mosnics :- Held, to be a "building within s. 3 of the Prescription Act, entitled to protection with regard to the light necessary not only for conducting the services and classes, but also for the designed illumination of the works of art. Alt. Gen. v. Queen Anne Mansions, 60 L. T. 759: 37 W. R. 572.

Inchoste Right—Injunction.]—Notwithstauding s. 4 of the Prescription Act (2 & 3 Will. 4, c. 71), the court will not interfere by injunction to protect the inchoste right to an easement of light, although the light may have actually been enjeyed without intercuption for more than ninchen years next before action brought. Hatterwee (Lord) v. Souver Commissioners, 65 L. J., Ch. 81; [1895] P. Ch. 708; 13 R. 795; 73 L. T. 116; 44 W. R. 124; 59 J. P. 728.

Actal Enjoyment.]—An actual enjoyment of lights for twenty years, even under a permission verbally asked for by the occupier of a house, and given by the person laving right to obstruct, is sufficient to confer a right under 2 c. 8 Will. 4, c. 71, s. 3. The enjoyment under that section need not be as of right or adverse. London Corporation v. Practever' Co., 2 M. & Rob. 409.

Under 2 & 3 Will. 4, c. 71, s. 3, a party is not the servient tenement has been demised by the entitled of right to the access and use of light over contiguous land, unless his enjoyment thereof has been for the full period of twenty years, in the character of an easement, distinct from the enjoyment of the land itself. Harbridge v. Warwick, 3 Ex. 552; 18 L. J., Ex. 245.

In order to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to an ancient window, open, uninterrupted, and known enjoyment of such light in the manner in which it is at present enjoyed and claimed must be shewn to research of twenty and cannet mass be snown for a period of twenty years. Lanfranchi v. Machemsie, 36 L. J., Ch. 518; L. R. 4 Eq. 421; 16 L. T. 114; 15 W. R. 614. But see Lazarus v. Artistic Photographic Co., 66 L. J., Ch. 522; [1897] 2 Ch. 214; 76 L. T. 457; 45 W. R. 614.

To acquire a right to the access of light and air by actual enjoyment, under 2 & 3 Will. 4, c. 71, s. 3, it is not necessary that the house should be occupied, or that it should be fit for immediate occupation during the statutory period. *Courtauld* v. *Legh*, 38 L. J., Ex. 45; L. R. 4 Ex. 126; 19 L. T. 737; 17 W. R. 466.

A house was structurally completed, the roof finished, the floors laid, and the windows put in, but it was not internally completed nor fit for habitation. It so remained till within a period maintain an action for the obstruction of its windows. Ib.

Where a house was, twenty years before an action brought, structurally completed, the windows being placed, the joists laid, and the roof slated, but the window sashes were not then in, and it was otherwise not completed internally so as to be fit for habitation, an injunction was granted to restrain an interference with the access of light to the windows. Courtuald v. Legh (L. R. 4 Ex. 126) followed. Collis v. Laugher, 63 L. J., Ch. 851; [1894] 3 Ch. 659; 8 R. 760; 71 L. T. 226; 43 W. R. 202.

The title to light acquired under 2 & 3 Will. 4, c. 71, s. 3, by a twenty years' enjoyment is a right to a certain amount of light only, and does not prevent the owner of one of the adjacent tenements from altering the aperture through which that amount of light approaches. Maguire

v. Grattan, 16 W. R. 1189; Ir. R. 2 Eq. 246. Under 2 & 3 Will, 4, c. 71, ss, 3 and 4, a party is prescriptively entitled to the access and use of light, if his enjoyment thereof commenced twenty years next before the bringing of an action in which the right is contested; provided such enjoyment has not at any time been interrupted. and the interruption acquiesced in for a whole and the interruption acquisecer in for a whole year. Flight v. Thomas, 8 Cl. & F. 231; West, 671; 5 Jur. 811. S. C., in K. B. and Ex. Ch., 11 A. & E. 688; 3 P. & D. 442; 10 L. J., Ex. 529.

The period of twenty years' enjoyment, which confers a right to the access of light, under 2 & 3 Will. 4, c. 71, s. 3, is, by s. 4, the period of twenty years next before any suit or action wherein the claim to the right was brought into question, and is not limited to the period of twenty years next before the pending suit or action. Cooper v. Hubbuck, 12 C. B. (N.S.) 456; 31 L. J., C. P. 323; 9 Jur. (N.S.) 575; 6 L. T. 826.

A tenant of premises can, by enjoying access of light for more than twenty years over adjoining premises demised to another tenant by the same landlord, acquire an absolute right thereto house for the use of lights is not an interruption under s. 3 of the Prescription Act. The fact that of the enjoyment within 2 & 3 Will. 4, c. 71, s. 3.

landlord subsequently to such right being acquired, and the fact that the tenant of the dominant tenement has, after the expiration of his lease, remained in possession under an agreement, are immaterial. Robson v. Ednards, 62 L. J., Ch. 378; [1893] 2 Ch. 146; 3 R. 336; 68 L. T. 195; 44 W. R. 569. The use of light has been "enjoyed" with a

building within the meaning of s. 3 of the Prescription Act, if the owner of the building has had the amenity or advantage of using the access of light. It is not necessary that there should have been a continuous user. Copper v. Straker, 58 L. J., Ch. 26; 40 Ch. D. 21; 59 L. T. 849; 37 W. R. 137.

The owner of a building having windows with movable shutters, which are opened at his pleasure for admission of light, acquires a right to light under s. 3 of the act at the end of twenty years, if he opens the shutters at any time he pleases for the admission of light during those twenty years, and if also there is no such interruption of the access of the light over the neighbouring land as is contemplated by s. 4. In such a case, if it be proved that the windowopenings have remained unchanged for twenty years, and that the shutters were constructed so that they might be opened or closed at the pleaof twenty years before action, and was then sure of the owner of the building, the onus is finished:—Held, that the owner was entitled to thrown upon the owner of the neighbouring land to prove that the right has not been acquired.

> Interruption of Continuous Enjoyment. ]twenty years' enjoyment which, under 2 & 3 Will, 4, c. 71, s. 3, gives an absolute and indefeasible right to the access of light, need not be an enjoyment in fact "without interruption" for the period mentioned, but an enjoyment without such an interruption as is contemplated by s. 4, viz. "an interruption submitted to or acquiesced in by the party interrupted for one year" after notice. Glover v. Coleman, 44 L. J., C. P. 66; L. R. 10 C. P. 108; 31 L. T. 684; 23 W. R. 163

> And, in order to negative submission to or aconjescence in the interruption, it is not necessary that the party interrupted shall have brought an action or a suit, or taken any active steps to remove the obstruction: it is enough to shew that he has in a reasonable manner communicated to the party causing the interruption that he does not really submit to or acquiesce in 77.

When, therefore, the plaintiff had for more than twenty years enjoyed the access of light to his workshop, through a window against which the defendant had about forteen months before action brought erected a permanent building which obstructed it, and the plaintiff had taken no active measures to cause the obstruction to be removed, but had several times, himself or by his tenant, complained of and protested against it : -Held, that it was a question proper to be left to the jury whether or not there had been such a submission to or an acquiescence in the interruption of the enjoyment as to deprive the plaintiff of the right to the light. Ib,

Semble, that the same sort of evidence of user or enjoyment need not be given in the case of a light as in the case of a claim of a right of way.

Mere payment of rent by the occupier of a

Plasterers' Co. v. Parish Clerks' Co., 6 Ex. 630; | read with it. The Crown, not being named in 20 L. J., Ex. 362; 15 Jur. 965-Ex. Ch.

Fluctuating Interruption - Onus of Proof. |- In an action for an injunction damages for interference with the ancient lights of the plaintiff's house by raising an old party wall fifteen feet above its original height, the defendant pleaded that he had for several years been in the habit of piling up empty packingcases against the wall to a height exceeding the new wall. The evidence was conflicting as to the minimum height of the pile of packing-cases, and as to the time they remained there, but it was proved that they were removed from time to time, some to be returned to the owners, and the rest to be broken up :-Held, that there had been no interruption of the plaintiff's enjoyment of light within the 4th section of the Prescription Act, and that the plaintiffs were entitled to an inquivy as to damages, Presland v. Bingham, 41 Ch. D. 268: 60 L. T. 433: 37 W. R. 385: 53 J. P. 583-C. A.

Per Cotton and Lindley, L.J.:-Semble, if in an action for obstruction of light it appears on the plaintiff's evidence that there has been some interruption, which in its nature is permanent, the owns is on the plaintiff of proving that such interruption did not in fact continue with his acquiescence for a year; but if the interruption is in its nature fluctuating and temporary, the onus of proving that it in fact continued and was acquiesced in by the plaintiff for a year, lies on the defendant, Ib,

Uninterrupted Access-Definite Channel. In order to acquire an absolute and indefeasible right to light under s. 3, it must be shewn not only that there has been an uninterrupted access of light to the building in respect of which the easement is claimed, but also that the light has reached the building by one and the same channel for the statutory period. Without therefore deciding whether the particular structure was a Without therefore "building" within the Prescription Act, s. 3 :-Held, that as from the nature of the structure and the mode of carrying on business, timber would be so piled as from time to time to block up one or other of the apertures so that the plaintiffs could not prove that there had been an uninterrupted access of light by any one aperture for the statutory period, their claim to an easement failed. Harris v. De Pinna, 56 L. J., Ch. 344; 33 Ch. D. 238; 54 L. T. 770; 50 J. P. 486 -C. A.

- Rights of Crown and its Assignees or Lessees. |- The Crown not being named in s. 3 of the Prescription Act is not bound thereby; therefore, where land had been held upon trust for the Crown from a date prior to the Prescription Act:-Held, that no prescriptive right to the access of light over such land to adjoining buildings had been acquired against the Crown during its beneficial ownership, although the legal estate therein was not vested in the Crown, and that purchasers from the Crown were entitled to build thereon so as to interfere with such access of light. Perry v. Eames, 60 L. J., Ch. 345; [1891] 1 Ch. 658; 64 L. T. 438; 39 W. R.

Enjoyment against Lessee of the Crown. ]-Sect. 2 of the Prescription Act does not apply to easements of light, which are governed by s. 3 — Unity of Possession.]—A right by way and the subsequent sections, which have to be of easement to the uninterrupted access of air not

s. 3, is not bound by it. Wheaton v. Maple, 62 L. J., Ch. 963; [1893] 3 Ch. 48; 2 R. 549; 69 L. T. 208; 41 W. R. 677—C. A.

Limited and qualified easements are not within the scope of the Prescription Act; accordingly, an easement of light cannot arise under s. 3 as against a lessee of the Crown, to exist only during the continuance of the lease. Ib.

Presumption of Lost Grant. ] - The assignee of a Crown lease for ninety-nine years from 1815 surrendered it in 1892, and agreed to take a new lease, under which he proceeded to erect a building so as to interfere with the access of light which W. had enjoyed in respect of a house on contiguous land without interruption since 1852, when such house was built. In 1893 W. commenced an action to restrain this building :- Held, that there was no ground for presuming a lost grant, or for inferring immenorial prescription, in favour of W. Principle of Bright v. Walker (1 C. M. & R. 211) followed; Perry v. Eames ([1891] 1 Ch. 658) approved.

Lease preventing Right being acquired—"Adjoining or contiguous"—Medium filum.]— A declaration in a lease empowering the lessors, their successors and assigns, to erect or suffer to be creeted on any of the adjoining or contiguous premises any buildings, whether such buildings should or should not diminish the lessee's light and air, prevents the losses from acquiring a right to light under s. 3 of the Prescription Act. Mitchell v. Cautrill (37 Ch. D. 56) distinguished. Haynew K. King, 63 L. J., Ch. 21; [1893] 3 Ch. 439; 3 R. 715; 69 L. T. 855; 42 W. R. 56.

Where a lessor is owner of land on both sides of a street and leases one side to A, and the other side to B, :- Held, that A,'s land might be said to be "adjoining or contiguous" to B.'s land. Ib.

Access of Air by undefined Channel. ]to a free passage for wind to a windmill is not such an easement as comes within 2 & 3 Will, 4, c. 71 (Prescription Act), s. 2, which section refers to easements upon the surface of land capable of being interrupted. Webb v. Bird, 10 C. B. (N.S.) 268; 30 L. J., C. P. 384; 4 L. T. 445; 9 W. E. 899. Aftirmed on appeal, 13 C. B. (N.S.) 841; 31 L. J., C. P. 335; 8 Jur. (N.S.) 621-Ex. Ch.

A grant of a free passage of air to a windmill over the soil of another cannot be presumed from twenty years' user of the windmill; for the presumption of a grant only arises where the owner of the servient tenement had it in his power to prevent the enjoyment, and did not; and it is not practically in the power of an owner of neighbouring land to preclude the passage of air to a windmill. Ib.

The access of air to the chimneys of a building cannot, as against the occupier of neighbouring land, be claimed either as a natural right of property, or as an easement by prescription from the time of legal memory, or by a lost grant, or under the Prescription Act (2 & 3 Will. 4, c. 71). Webb v. Bird (13 C. B. (N.S.) 841; 31 L. J., C. P. 335) followed. Bryant v. Lefecer, 48 L. J., C. P. 380; 4 C. P. D. 172; 40 L. T. 579; 27 W. R. 592

-C. A.

coming by any definite channel, but over the general unlimited surface of the alleged servient tenement cannot be acquired under the Prescription Act, s. 2, by mere enjoyment for the statutory period; and the fact that the alleged dominant and servient tenements were both held under a common lessor, either of itself, or at any rate when coupled with the fact that the lease of the servient tenement was the earlier, negatives any claim to the easement as arising out of implied covenant. Harris v. De Pinna, 56 L. J., Ch. 344; 33 Ch. D. 238; 54 L. T. 770; 50 J. P. 486.

\_\_\_\_Nuisance.]—Where one of two neighbouring owners of land, by something done on his own premises, causes such difficulty in ventilating his neighbour's premises that smells which before were harmless become a nuisance, no action will lie against him for a nuisance, unless he has sent on to his neighbour's land something which makes the air impure. Bryant v. Leferer (4 C. P. D. 172) followed. A right to have free access of air, not through a defined aperture or channel, but generally over a neighbouring property, cannot (in the absence of agreement, express or implied) be established; not on the ground of prescription at common law, unless the house in respect of which it is claimed has been in existence since before the commencement of legal memory; nor under s. 2 of the Prescription Act, because the passage of air is not an easement within that section; nor on the presumption of a the lease of rights and easements was controlled lost grant, because the enjoyment of the alleged by the anticeedent agreement, which was to be right could not have been interrupted. Semble tread as part of the lease; and that A, was not the Kay, L.J.) an interference with light or air cutified to restrain the lessees of the opposite within that section; nor on the presumption of a not otherwise actionable cannot be restrained by injunction on the ground of unisance. Chastey v. Juliardon on the ground of finisance. Chastey V. Ackland, 64 L. J., Q. B. 523; [1895] 2 Ch. 889; 12 R. 420; 72 L. T. 845; 43 W. R. 627—C. A. But see S. C., 66 L. J., Q. B. 518; [1897] A. C. 155; 76 L. T. 480—H. L. (E.)

Custom in City.] — A prescriptive title is acquired under 2 & 3 Will, 4, c, 71, by an adverse enjoyment for twenty years, without interruption, of the access of light to the windows of a house in the city of London, notwithstanding a local custom of the city for the owners of an ancient messuage or foundation to build thereon to such height as the owner may please against the windows of any adjoining house, and darken them. Salters' Co. v. Jay, 2 G. & D. 414; 3 Q. B. 111; 11 L. J., Q. B. 173; 6 Jur. 803.

The custom to rebuild to any height upon ancient foundations in the city of London, is destroyed by the 2 & 3 Will. 4, c. 71, s. 3. Merchant Taylors' Co. v. Truscott, 11 Ex. 855; 25 L. J. Ex. 173; 2 Jur. (X.s.) 356; 4 W. R. 295. S. P., Cooper v. Hubbuck, 12 C. B. (X.s.) 456.

Onus of Proof. - A plaintiff who alleges a twenty years' enjoyment of light must prove affirmatively a prima facie case of enjoyment. But, when he has done this, the defendant may «lisplace the prima facie case, either by proving years' user or by grant from the owner of the the existence of an obstruction at the commencement of the twenty years, or a statutory inter-ruption of the enjoyment at some time during ruption of the enjoyment at some time turning the twenty years, or by shewing by other evidence that the plaintiffs evidence of enjoyment caunot be relied upon. In either way the defendant will discharge the onus which is east defendant will discharge the onus which is east to maintain an action at law. Leech. Schweder, on him. Seddon v. Bank of Bolton, 51 L. J., Ch. 43 L. J., Ch. 487; L. R. 9 Ch. 463; 30 L. T. 586; 542; 19 Ch. D. 462; 46 L. T. 225; 30 W. R. 362.

Statutory Power of London School Board. The School Board of London having, under the Elementary Education Act, 1870, and the Lands Clauses Act, 1845, acquired land as a site for a school, proceeded to build so as to interfere with the light of an adjoining owner whose houses the board had not acquired power to take :- Held, that the board was not entitled by its building to interfere with the plaintiff's rights, leaving him to claim compensation under the Lands Clauses Act, s. 68, but that he was entitled to an injunction. Clark v. London School Bourd, 48 L. J., Ch. 421; L. R. 9 Ch. 120; 29 L. T. 903; 22 W. R. 354.

### c. By Grant.

Grant controlled by prior Agreement. ]-An agreement to grant A, a lease, in a form set out in a schedule, of property in the city, as soon as the house then in course of erection by A, on the property should be completed, contained a provise that nothing therein contained should give A. a right to any easement which did not belong to the premises agreed to be demised as they then existed, not to any right of light and air derived from over the houses opposite (which belonged to the lessors). The lease subsequently granted was of the land together with the honse crected thereon, and all lights, easements, and appurtenances thereto belonging, in accordance with the scheduled form :- Held, that the grant by the lease of lights and easements was controlled houses from building so as to obstruct the access of light and air to his premises from over such honses. Saluman v. Giorer, 44 L. J., Ch. 551; L. R. 20 Eq. 444; 32 L. T. 792; 23 W. R. 722.

Parol Agreement-Part Performance.]-The plaintiff and defendant, the owners of adjoining houses, being about to rebuild, entered into a verbal agreement that the plaintiff should pull down a party wall and rebuild it lower and thinner, and that each party should be at liberty to make a lean-to skylight with the lower end resting on the party wall. The plaintiff rebuilt the party wall and erected a lean-to skylight on his side of it as agreed; the defendant also erected a skylight on his side, but instead of a lean-to, so shaped it as to obstruct the access of light to the plaintiff's premises more than the agreed lean-to skylight would have done:— Held, that the effect of the agreement was to give to each party an easement of light over the other's land; and that the plaintiff, having performed the agreement on his part, was entitled to have it enforced on the part of the defendant, Mc Manus v. Cooke, 5: L. J., Ch. 662; 35 Ch. D. 681; 56 L. T. 900; 35 W. R. 754; 51 J. P. 708.

By Covenant. ]—There is no difference in the right of an owner of land to the ordinary casement of light, whether it is acquired by twenty servient tenement; and if the grant is accompanied by a covenant for quiet enjoyment of the premises, such covenant does not enlarge the right of the covenantee so as to entitle him to an injunction in equity to restrain an obstruction where the damage is not sufficient to enable him

But it is otherwise where the right to light possession of the house from the lessee for breach case a court of equity will grant an injunction without regard to the amount of damage. Ib.

Implied Reservation of Light in adjoining Tenements.]-By the grant of part of a tenement there will pass to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted and have been hitherto used therewith; but, as a general rule there is no corresponding implication in favour of the grantor, though there are certain exceptions to this, as in the case of ways of necessity. Wheeldon v. Burrows, 48 L. J., Ch. 853; 12 Ch. D. 31; 41 L. T. 327; 28 W. R. 196 -C. A.

A workshop and an adjacent piece of land belonging to the same owner, were put up for sale by auction. The workshop was not then sold, but the piece of land was then sold, and was soon afterwards conveyed to the purchaser. A month after this the vendor agreed to sell the workshop to another person, and in due time conveyed it to him. The workshop had windows overlooking and receiving their light from the piece of land first sold :- Held, that as the vendor had not when he conveyed the piece of land, reserved the right of access of light to the windows, no such right passed to the purchaser of the workshop, and that the purchaser of the piece of land could build so as to obstruct the windows of the workshop. Ib.

Held, that whatever might have been the

case had both lots been sold at the same sale by auction, there was, under the circumstances, no implied reservation of any right over the piece

of land first sold. Ih.

A., the owner of two adjoining houses, granted a lease of one to B., there then existing in it a certain window, for a term which expired at Michaelmas, 1875; and afterwards, in 1874, leased the other house to C.:—Semble, that, during the currency of B.'s lease, C. could not build so as to interfere with the light coming to B,'s window; and that, on the expiration of B,'s lease, C, could build so as to interfere with the light coming to the window, as the lease to C, had been made by A, without any reservation of the right to light. Warner v. M'Bryde, 36 L. T. 860

Where a man, being seised in fee in possession of a house with windows, and of an adjoining field over which the light required for the window passes, devises the house to one person and the field to another, the right to light over the field is comprised in the devise of the house. The principle of Palmer v. Fletcher (1 Lev. 122) is applicable not only to conveyances for valuable consideration, but also to devises and voluntary conveyances. Phillips v. Low, 61 L. J., Ch. 44; [1892] 1 Ch. 47; 65 L. T. 552.

The owner (subject to a mortgage in fee) of a

house and a plot of land adjoining, first leased the house, then contracted to sell the land to the defendant, and afterwards contracted to sell the house subject to the lease to a person under whom the plaintiff claimed. The next step was a conveyance of the house by the owner and his mortgages to the plaintiff subject to the lease, which was followed by a conveyance (also by

claimed is not the ordinary easement, but a of condition :- Held, that no grant of light to special right created by the covenant; in which the house could be implied over land which the owner had contracted to sell before the sale or conveyance of the house, and that s. 6, sub-s. 2. of the Conveyancing Act, 1881, did not apply. Beddington v. Atlee, 56 L. J., Ch. 655; 35 Ch. D. 317; 56 L. T. 514; 35 W. R. 799; 51 J. P. 484.

> - Burden of Proof. ]-The grantee of a house has a prima facie right to light as against his grantor, and the burden of shewing that that right is limited or restricted lies on the grantor. Broomfield v. Williams, 66 L. J., Ch. 305; [1897] 1 Ch. 602; 76 L. T. 243; 45 W. R. 469-C. A.

> When implied intention of Building. -A. general grant of land, with an intimation by the purchaser of an intention to build, creates a legal easement of light and air, and gives the right to prevent the subsequent obstruction of light by subsequent purchasers of neighbouring land of the same grantor. Robinson v. Grave, 27 L. T. 648; 21 W. R. 223. Affirmed on appeal, 29 L. T. 7; 21 W. R. 569—L.JJ.

> In 1854, a conveyance was executed of land contracted to be sold in 1852; between those dates houses were erected :-- Held, that the conveyance conferred on the purchaser the right of light sufficient for the windows in the houses soerected, and to an injunction to restrain interference with it by purchasers, subsequent to the

contract, of neighbouring land, Ib.

In 1875 W. conveyed land to the trustees of a religious body who were desirous of erecting a chapel thereon. The deed of conveyance set forth fully the trusts upon which the grantees were to hold the hand, including trusts to erect a chapel in such manner as the grantees should with the sanction of the religious body deem necessary or expedient, and trusts in certain events to let, sell, or mortgage the lands and buildings; the conveyance also contained a covenant by the grantees with W. that all windows in the chapel looking out on the other land of W. should be of fluted or ground glass. There were no buildings upon the land at the date of the grant, and no plans or specificationsof the proposed chapel were submitted to W. for his approval. In February, 1878, the grantees commenced to build a chanel having windows looking out upon the land retained by W. Ju November, 1878, W, entered into an agreement to sell this land; and it was shortly afterwards conveyed by him to the defendants, who in May, 1890, commenced to build thereon in such a manner as to obstruct the light of the chapel :-Held, that W. had, in effect, given permission to the trustees of the chapel to erect such a building as they thought fit; and that, the chapel having been erected in a reasonable manner, neither W nor his assigns could complain of the position of the chapel or of the way in which it was lighted. That, it having been within the contemplation of the parties to the conveyance of 1875 that a chapel would be built on the land conveyed. having windows looking out on the land retained by W., W. and his assigns were under an implied obligation not to do anything to obstruct such windows. Bailey v. Icke, 64 L. T. 789.

- Description of Adjoining Land as "Building Land,"]-In a conveyance of a house the the owner and his mortgagee) of the land to the description of adjoining land belonging to the defendant. The plaintiff subsequently recovered grantor as "building land" does not show a "con-

trary intention" within s. 6, sub-s. 4, of the lights cannot erect new buildings so as to 305; [1897] 1 Ch. 602; 76 L. T. 243; 45 W. R. retained. Ib.

User of Building for special Trade-Injunction.]—In the case of a building agree-ment the amount of light implied from the grant is their surplus land to the plaintiff together with such as is reasonably sufficient for all ordinary purposes of business in the neighbourhood, and not thereon. The house was close to their line of such as may be requisite for a special purpose not shown to have been contemplated by the parties it hrough two of which there was some access of at the time of the contract. Corbett v. Junus, light to two of the lower windows of the plain-62 L. J., Ch. 43 > [1892] 3 Ch. 137; 3 R. 25; 67 tiffs house. The company retained in their own L. T. 191.

Building Scheme.]—The mortgagor in possession of certain lands which were the subject of a building scheme granted a lease of a house and land forming part of the property. Subsequently, the mortgagees sold the adjoining land, and the purchaser erected a hoarding which obstructed the access of light to the house in the lease. The hourding was not necessary for carrying out the building scheme, but to secure might have, the fee of the lands opposite the privacy for a recreation ground:—Held, that the plaintiff's house, and erected buildings thereon, lessee was entitled to an injunction to restrain the obstruction of light. Myers v. Catterson (43 Ch. D. 470) followed. Wilson v. Queen's Club, 60 L. J., Ch. 698; [1891] 3 Ch. 522; 65 L. T. 42; 40 W. R. 172.

The maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and Known to the grantee. Birmingham Banking Co. v. Ross, 57 L. J., Ch. 601; 38 Ch. D. 205; 59 L. T. 609; 36 W. R. 914—C. A. Affirming, 52 J. P. 421.

The corporation of a town granted a lease to the plaintiffs of a piece of land and a newly creeted building "with the rights, members, and appurtenances to the said premises belonging. The building abutted on a passage twenty feet wide, which the corporation agreed to keep open, and on the other side of the passage were old buildings about twenty-five feet high. The corporation demised the land on the other side of the passage to the defendant, who erected on the site of the old buildings a house eighty feet high, which materially interfered with the plaintiffs' light. The land on both sides of the passage was part of a larger piece of land laid out by the corporation under a building scheme for the improvement of the town :- Held, that there was poration not to obstruct the plaintiff's light which was to be implied from the relation in which they had placed themselves to the plaintiffs by granting them the lease, must be measured by the circumstances existing at the date of the lease and known to both parties; that having regard to the fact that the plaintiffs knew that the land was being laid out for building, and that they had stipulated that there should be a The conveyance to D. contained no reservation

Conveyancing Act, 1881, so as to exclude the obstruct those lights applies to the case where grantee's right to light under sub-s. 2 of that the grantor purposely leaves a strip of land section. Brownfeld v. Williams, 66 L. J., Ch. intervening between the house and the lands

> Railway Company-Sale of Surplus Lands with. House thereon-Implied Obligation to Pura house, which they had allowed him to erect railway, which there ran over a series of arches, light to two of the lower windows of the plainhands lands on the other side of the railway opposite the plaintiff's house; and their couveyance to him contained a recital that all the land acquired by them other than that sold to the plaintiff would be required by them for the construction of their railway, and it contained no express grant of right, or covenant as to light. The defendant's predecessor in title afterwards acquired from the company, under a conveyance subject to any right of light which the plaintiff and he also took a lease of the arches. The defendant subsequently acquired this property, and blocked up the openings of the two arches nearest the plaintiff's house with hoardings :-Held, that the company, on selling a portion of their surplus lands to the plaintiff, had entered into an implied obligation not to do or permit anything on the land retained by them which would interfere with the plaintiff's reasonable enjoyment of the land he purchased, except what was required for the construction of their railway; and that, the hoarding not being for that purpose, a mandatory injunction ought to-be granted. Myers v. Citterson, 59 L. J., Ch. 315; 43 Ch. D. 470; 62 L. T. 205; 38 W. R. 488—C. A.

For adjacent House.]-Upon a general conveyance of land, there is no implied grant, by the purchaser, of the easement of light necessary for the enjoyment of an adjacent house of the vendor. Ellis v. Manchester Carriage Co., 2 C. P. D. 13; 35 L. T. 476; 25 W. R. 229.

When the owner of a house which has by prescription acquired a right to light over the adjoining land, becomes the owner of such adjoining land and sells it without reserving the easement of light, the purchaser may build so as to obstruct the light. Ib.

In 1867, the plaintiff bought houses in Man-chester, the backs of which abutted on a street in grant, express or implied, in the lease to the or way, on the opposite side of which were plaintiffs of a right to uninterrupted light to the certain cottages. In 1868 he purchased these mew building; that the obligation on the corpremises had existed in their then state for more than twenty years. In 1870, the plaintiff sold the cottages to D., and ultimately D.'s interest therein became vested in the defendants, who pulled down the cottages and erected a large building upon the site of them and also upon a portion of the intervening street or way, and so obstructed the light to the plaintiff's windows. pasage twenty feet wide adjoining the new of any easement to the plaintiff's houses; and building, they had no right to complain of the it professed to convey the land up to the back obstruction caused by the defendant's house, and an injunction was refused. Ib.

The rule, that a man who grants a house with acquired an "absolute and indefensible" right

But it is otherwise where the right to light | possession of the house from the lessee for breach claimed is not the ordinary easement, but a case a court of equity will grant an injunction without regard to the amount of damage. Ib.

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of land first sold. Ib.

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Where a man, being seised in fee in possession of a house with windows, and of an adjoining field over which the light required for the window passes, devises the house to one person and the field to another, the right to light over the field is comprised in the devise of the house. The principle of Palmer v. Fletcher (1 Lev. 122) is applicable not only to conveyances for valuable consideration, but also to devises and valuatione consideration, but also to devises and voluntary conveyances. *Phillips* v. *Low*, 61 L. J., Ch. 44; [1892] 1 Ch. 47; 65 L. T. 552.

The owner (subject to a mortgage in fee) of a

house and a plot of land adjoining, first leased the house, then contracted to sell the land to the defendant, and afterwards contracted to sell the house subject to the lease to a person under whom the plaintiff claimed. The next step was a conveyance of the house by the owner and his mortgagee to the plaintiff subject to the lease, which was followed by a conveyance (also by the owner and his mortgagee) of the land to the description of adjoining land belonging to the defendant. The plaintiff subsequently recovered grantor as "building land" does not show a "con-

of condition :-Held, that no grant of light to special right created by the covenant; in which the house could be implied over land which the owner had contracted to sell before the sale or conveyance of the house, and that s. 6, sub-s. 2, of the Conveyancing Act, 1881, dil not apply.

Beddington v. Atlee, 56 L. J., Ch. 655; 35 Ch. D.

317; 56 L. T. 514; 35 W. R. 799; 51 J. P. 484.

> - Burden of Proof. |- The grantee of a house has a prima facie right to light as against his grantor, and the burden of shewing that that right is limited or restricted lies on the grantor. Broomfield v. Williams, 66 L. J., Ch. 305; [1897] 1 Ch. 602; 76 L. T. 243; 45 W. R. 469—C. A.

> When implied intention of Building. -A general grant of land, with an intimation by the purchaser of an intention to build, creates a legal easement of light and air, and gives the right to prevent the subsequent obstruction of light by subsequent purchasers of neighbouring land of the same grantor. Robinson v. Grave, 27 L. T. 648; 21 W. R. 223. Affirmed on appeal, 29 L. T. 7; 21 W. R. 569—L.JJ.

In 1854, a conveyance was executed of land contracted to be sold in 1852; between those dates houses were erected :- Held, that the conveyance conferred on the purchaser the right of light sufficient for the windows in the houses so erected, and to an injunction to restrain interference with it by purchasers, subsequent to the contract, of neighbouring land. Ib.

In 1875 W. conveyed land to the trustees of a religious body who were desirous of creeting a chapel thereon. The deed of conveyance set forth fully the trusts upon which the grantees were to hold the land, including trusts to erect a chapel in such manner as the grantees should with the sanction of the religious body deem necessary or expedient, and trusts in certain events to let, sell, or mortgage the lands and buildings; the conveyance also contained a covenant by the grantees with W. that all windows in the chapel looking out on the other land of W. should be of finted or ground glass. There were no buildings upon the land at the date of the grant, and no plans or specifications of the proposed chapel were submitted to W. for his approval. In February, 1878, the grantees commenced to build a chapel having windows looking out upon the land retained by W. In November, 1878, W. entered into an agreement to sell this land; and it was shortly afterwards conveyed by him to the defendants, who in May, 1890, commenced to build thereon in such a manner as to obstruct the light of the chapel :-Held, that W. had, in effect, given permission to the trustees of the chapel to creet such a building as they thought fit; and that, the chapel having been erected in a reasonable manner, neither W. nor his assigns could complain of the position of the chapel or of the way in which it was lighted. That, it having been within the contemplation of the parties to the conveyance of 1875 that a chapel would be built on the land conveyed, having windows looking out on the land retained by W., W. and his assigns were under an implied obligation not to do anything to obstruct such windows. Bailey v. Iche, 64 L. T. 789.

Description of Adjoining Land as "Building Land."]-In a conveyance of a house the grantee's right to light under sub-s. 2 of that section. Brownfield v. Williams, 66 L. J., Ch. 305: [1897] 1 Ch. 602; 76 L. T. 243; 45 W. R. 469—C. A.

User of Building for special Trade-Injunction.]—In the case of a building agreement the amount of light implied from the grant is such as is reasonably sufficient for all ordinary purposes of business in the neighbourhood, and not such as may be requisite for a special purpose not shown to have been contemplated by the parties at the time of the contract. Corbett v. Jonas, 62 L. J., Ch. 43 \* [1892] 3 Ch. 187; 3 R. 25; 67

- Building Scheme.]-The mortgagor in possession of certain lands which were the subject of a building scheme granted a lease of a house and land forming part of the property. Subsequently, the mortgagees sold the adjoining hand, and the purchaser erected a hoarding which obstructed the access of light to the house in the lease. The hoarding was not necessary for carrying out the building scheme, but to scoure privacy for a recreation ground:—Held, that the lessee was entitled to an injunction to restrain assee was diffused to in infinitetion to restrain the obstruction of light. Myers v. Cutterson (43 Ch. D. 470) followed. Wilson v. Queen's Club, 60 L. J., Ch. 698: [1891] 3 Ch. 522; 65 L. T. 42; 40 W. R. 172.

The maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and stances existing at the time of the grant and known to the grantee. Birmingham Banking Co. v. Ross, 57 L. J., Ch. 691; 38 Ch. D. 295; 59 L. T. 609; 36 W. R. 914—C. A. Affirming, 52

The corporation of a town granted a lease to the plaintiffs of a piece of land and a newly erected building "with the rights, members, and appurtenances to the said premises belonging."
The building abutted on a passage twenty feet wide, which the corporation agreed to keep open. and on the other side of the passage were old buildings about twenty-five feet high. The corporation demised the land on the other side of the passage to the defendant, who erected on the site of the old buildings a house eighty feet high, which materially interfered with the plaintiffs' light. The land on both sides of the passage was part of a larger piece of land laid out by the corporation under a building scheme for the improvement of the town :—Held, that there was no grant, express or implied, in the lease to the plaintiffs of a right to uninterrupted light to the new building; that the obligation on the corporation not to obstruct the plaintiff's light which was to be implied from the relation in which they had placed themselves to the plaintiffs by granting them the lease, must be measured by the circumstances existing at the date of the lease and known to both parties; that having regard to the fact that the plaintiffs knew that the land was being laid out for building, and that they had stipulated that there should be a passage twenty feet wide adjoining the new building, they had no right to complain of the

trary intention" within s. 6, sub-s. 4, of the lights cannot erect new buildings so as to Conveyancing Act, 1881, so as to exclude the obstruct those lights applies to the case where the grantor purposely leaves a strip of land intervening between the house and the lands retained. Ib.

> Railway Company—Sale of Surplus Lands with House thereon—Implied Obligation to Purchaser. - A railway company sold a piece of their surplus land to the plaintiff together with a house, which they had allowed him to erect thereon The house was close to their line of railway, which there ran over a series of arches, through two of which there was some access of light to two of the lower windows of the plaintiff's house. The company retained in their own hands lands on the other side of the railway opposite the plaintiff's house; and their conveyance to him contained a regital that all the land acquired by them other than that sold to the plaintiff would be required by them for the construction of their railway, and it contained no express grant of right, or covenant as to light, The defendant's predecessor in title afterwards acquired from the company, under a conveyance subject to any right of light which the plaintiff might have, the fee of the lands opposite the plaintiff's honse, and erected buildings thereon. and he also took a lease of the arches. The defendant subsequently acquired this property, and blocked up the openings of the two arches nearest the plaintiff's house with hoardings :-Held, that the company, on selling a portion of their surplus lands to the plaintiff, had entered into an implied obligation not to do or permit anything on the land retained by them which would interfere with the plaintiff's reasonable enjoyment of the land he purchased, except what was required for the construction of their railway; and that, the hearding not being for that purpose, a mandatory injunction ought to be granted. Myers v. Citterson, 59 L. J., Ch. 315; 43 Ch. D. 470; 62 L. T. 205; 38 W. R. 488—C. A.

> For adjacent House.]-Upon a general conveyance of land, there is no implied grant, by the purchaser, of the easement of light necessary for the enjoyment of an adjacent house of the vendor, Ellis v. Manchester Carriage Co., 2 C. P. D. 13; 35 L. T. 476; 25 W. R. 229.

> When the owner of a house which has by prescription acquired a right to light over the adjoining land, becomes the owner of such adjoining land and sells it without reserving the easement of light, the purchaser may build so

as to obstruct the light. 1b.
In 1867, the plaintiff bought houses in Manchester, the backs of which abutted on a street or way, on the opposite side of which were certain cottages. In 1868 he purchased these cottages, but by a different title. Both sets of premises had existed in their then state for more than twenty years. In 1870, the plaintiff sold the cottages to D., and ultimately D.'s interest therein became vested in the defendants, who pulled down the cottages and erected a large building upon the site of them and also upon a portion of the intervening street or way, and so obstructed the light to the plaintiff's windows.
The conveyance to D. contained no reservation of any easement to the plaintiff's honses; and it professed to convey the land up to the back obstruction caused by the defendant's house, and shall of the plaintiff's premises:—Held, that, an injunction was refused. The rule, that a man who grants a house with a quarter an absolute and indefensible "right

cottages to D., inasmuch as that conveyance was without reservation the defendants were guilty of no wrongful obstruction of the plaintiff's lights. Ib.

Where lights had been put out and enjoyed without interruption for above twenty years, during the occupation of the opposite premises. by a tenant, that will not conclude the landlord of such opposite premises, without evidence of his knowledge of the fact, which is the foundation of presuming a grant against him, and consequently will not conclude a succeeding tenant, who was in possession under such landlord, from building up against such cucroaching lights. Daniel v. North, 11 East, 372.

Lease at time of Severance of Ownership. The implication of a grant of easements of a continuous and apparent character, upon the alienation to different persons of tenements previously in the ownership of the same person, is not prevented by the fact that the dominant tenement at the time of the alienation is in lease, and consequently not in the possession of the alienor. Barnes v. Loach, 48 L. J., Q. B. 756; 4 Q. B. D. 494; 41 L. T. 278; 28 W. R. 32.

When Lessor acquires Fee Simple. -In 1864 A. granted to B. a lease for twenty-one years of a house "together with all edifices . . . lights . . . easements, advantages and appurtenances thereto belonging, or therewith held, used, or enjoyed." At the date of the lease A. held, for the residue of a term expiring at Christmas, 1868, an adjoining house, over which most of the light came to the back windows of the house leased to B. On the expiration of his lease A. purchased a fee simple of the adjoining house, and in 1872 he pulled down that house with the intention of rebuilding it to a greater height than its former height. B., whose lights were not ancient lights, filed a bill to restrain A. from raising the new house to a greater height than the old house :- Held, that the lease to B. only amounted to a grant of the light coming over the adjoining house during A.'s term in it, and that on subsequently acquiring the fee simple of the adjoining house A, was not estopped either at law or in equity from dealing with the house in such a way as to interfere with B.'s lights. Booth v. Alevek, 42 L. J., Ch. 557; L. R. 8 Ch. 663; 29 L. T. 231; 21 W. R. 743.

A lessor granted a lease for twenty-one years of a house with its appurtenances, amongst which lights were specified. At the time of the grant he held an adjoining house for a term of years. He subsequently acquired the reversion expectant on the term in the adjoining house; and after the expiration of the term he proceeded to build on the site of the adjoining house in a manner which might interfere with the lights of the demised house, those lights not being ancient lights:—Held, that the lessor was not by his

grant prevented from so building. Ib.

A lease of a house for twenty-one years was made by a deed containing general words, including "lights." At the date of the lease, the defendant was entitled, as under lessee, for a term of which rather more than four years were then unexpired, to certain premises adjoining the house so leased to the plaintiff, and over which light found access to the house. Nine years after the date of the lease, the defendant having purchased

to light at the time of the conveyance of the | building thereon so as to interfere with the light of plaintiff's house. In a suit by the plaintiff for an injunction to restrain the defendant from so building as to interfere with the light thus coming to his house:—Held, that no warranty or bargain could be implied from the general words that the plaintiff should have the access of light over the defendant's premises unimpeded for a longer time than that for which the defendant was at the date of the lease entitled to the

adjoining premises. Ib.

Held, also, that during the period for which the defendant was entitled as under-lessee to the adjoining premises, he could not lawfully have interfered with the plaintiff's light coming across

the adjoining premises, Ib.

Constructive Notice of Easement on Purchase, Disputes having arisen between the plaintiff and W. whether a window in the plaintiff's house overlooking W.'s land was an ancient light, an agreement, not under seal, was signed, by which W. agreed that the plaintiff should have access of light to the window, and the plaintiff agreed to keep the window opaque and make it open only in such a way that no person could look out of it. W.'s land was afterwards sold to the defendant, who had no actual notice of the agreement, but knew of the existence of the window :- Held, overruling Hall, V.-C., that the mere fact of there being windows in an adjoining honse which overlook a purchased property is not constructive notice of any agreement giving a right to the access of light to them. Allen v. Seckham, 48 L.J., Ch. 611 : 11 Ch. D. 790 : 41 L. T. 260 : 28 W. R. 26.

Lease by Mortgagor in Possession-Lessee's Rights against Mortgagee. ]-The effect of a lease granted by a mortgagor in possession under the powers of the Conveyancing Act, 1881, s. 18, is to bind the mortgagee and those claiming under him so as to prevent the interference with any casement to which the lessee is entitled as against the lessor and those claiming under him. Wilson v. Queen's Club, 60 L. J., Ch, 698; [1891] 3 Ch, 522: 65 L. T. 42; 40 W. B. 172.

Presumption of Grant-Light. The enjoyment of a light during a period of twenty years, with the clear knowledge and acquiescence of the owner of the adjoining premises, is sufficient to raise the presumption of a grant, and to give a right of action in case of obstruction. Maberley

right of action in case of obstruction. Adversey v. Diagram, 5 L. J. (o.s.) K. B. 261.

But, semble, that where a window has been opened in a building creeted by a tenant for the mere purpose of trade, and which is not annexed to the freehold, but may be removed by that tenant at his pleasure, or at the end of his term, no such right or presumption will arise. Ib.

— Passage of Air through defined Channel.]

The cellar of the plaintiff's public-house was ventilated by means of a shaft cut therefrom through the rock into a disused well situated in an adjoining yard, owned and occupied by the defendant, the air from the cellar passing through the shaft, and out at the top of the well. The cellar had been so ventilated for forty years at least, without interruption, and with the knowledge of the occupiers of the yard :- Held, that the plaintiffs could legally claim, as against the defendant, the easement of the free passage of air from the cellar; and that a lost grant of the date of the lease, the defendant having purchased right ought to be inferred. Bass v. Gregory, 59 the see of these adjoining premises, commenced L. J., Q. B. 574; 25 Q. B. D. 481; 55 J. P. 119. — By Custom of London.]—The presumption, rebuilding of his own house; that the plaintiff of a right, from twenty years multiturbed enjoy- had notice, and that the old building was pulled ment of light, is excluded by the custom of down, and the new one erected, and large sums. Winstanley v. Lee, 2 Swanst, 333, London

# d. Licence and Acquiescence.

Operation of.]-No licence or covenant from A., the owner of adjoining land, to put out or not to obstruct windows in the house of B., is to be inferred from the circumstance of A.'s being a party to the deed by which the house, with the windows in it, was conveyed to B., and by which deed A. conveyed part of the adjoining land to B. Blanchard v. Bridges, 5 N. & M. 567; 4 A. & E. 176; 1 H. & W. 630; 5 L. J., K. B. 78.

Where the owner of adjoining land witnesses, without objection, alterations in the windows, there is no agreement on his part to be inferred at any time before the expiration of twenty years not to obstruct the access of light and air, by building up to the extremity of his land. Ib. A., in licensing B. to build to the extremity of

B.'s ground adjoining that of A.'s, expressly reserves to himself the right of building to the extremity of his own ground when he shall think proper to do so. A. may at my time, within twenty years, build to the extremity of his own land, though he thereby renders the house of B. dark, damp, and uninhabitable. Ib.

What amounts to. ]-A., the side of whose house adjoined B,'s lawn, wrote to B, as follows : "Before the last coat of paint is put on the side wall, we wish to place a window in it, and our workness say it can be fluished off more neatly with your permission to place the necessary ladder. The motive for doing this is, that I should gain a more cheerful view of the coumon, and passing objects," B, replied, "You are welcome to place a ladder in my grounds": -Held, that this did not amount to a licence by B. to A. to open a window in the side of A.'s honse; and therefore that A. might obstruct the window by an erection on her own land. Bridges v. Blanchard, 3 N. & M. 691; 1 A. & E. 536.

When Presumed.]—Before the statute, twenty years' uninterrupted enjoyment of windows looking upon the land of another was sufficient ground for presuming a grant or a licence to open the windows, in the absence of evidence to the contrary. Cross v. Lewis, 4 D. & R. 234; 2 B. & C. 686; 2 L. J. (O.S.) K. B. 136.

Completion of Building.]—If an adjoining owner knowingly permits a message and premises to be rebuilt of an increased size and height, with the alteration of ancient lights, and the opening new lights upon an additional floor, he cannot object to them after they are complete, or assert a right to raise a party wall, and build upon his own property so high as to render the new buildings less accessible to light and air than they were at the completion of the work, Cotching v. Bassett, 32 Beav. 101; 32 L. J., Ch. 286; 9 Jur. (N.S.) 590; 11 W. R. 197.

Under Misrepresentations.]—A plaintiff com-plained of an obstruction of the light and air to his ancient windows; of the raising and creetwere occasioned by the pulling down and vent the easement becoming indefeasible after

of money were expended thereon by the defendant, with the knowledge, acquiescence and consent of the plaintiff, and on the faith that the plaintiff so knew of, acquiesced in, and consented to the so pulling down and rebuilding.
The plaintiff replied that he acquiesced and consented upon the faith of false representations. made to him by the defendant and her agents, that the grievances would not result from or beproduced by the pulling down and rebuilding :-Held, that the plea afforded a good defence on equitable grounds. Davies v. Marshall, 10 C. B. (N.S.) 697; 31 L. J., C. P. 61; 7 Jur. (N.S.) 1247; 4 L. T. 581; 9 W. R. 866.

Held, also, that the replication was a good equitable answer to the plea. Ib.

Consent or Agreement under the Prescription Act. |- K., the owner in fee of a freehold house, in 1814 put out four new windows, and signed and gave to S., the owner in fee of an adjacent freehold house overlooked by those windows, a. document declaring that they were put out and remained upon the leave of S., and that he, K., would, on the reunest of S., or his heirs or assigns, at any time thereafter block up the same, and in the meantime would pay S., his heirs and assigns, sixpence a year for the indulgence. This document was not signed by S. The rent was paid down to. K.'s successor in title, who had bought the property in 1865 with notice of the document, but had never paid any rent under it, to block up-the four windows, and proceeded to obstruct the-access of light to them. K.'s successor in title thereupon brought this action against him for an injunction, claiming to have acquired an inde-feasible right to the access of light to the fourwindows by actual enjoyment for twenty years. without intermission :- Held, first, that the enjoyment of light by K. and his successors had been by virtue of the document of 1814, and that such document, although signed by K. only, was a consent or agreement expressly made or given for the purpose of such enjoyment within the. meaning of the 3rd section of the Prescription Act, so as to prevent K, and his successors from acquiring any right to the access and use of light under that section; and secondly, that the agreement having been acted upon by payment of rent theremoler to within twenty years from the commencement of the action, was enforceable in equity irrespective of the statute. Beacley v. Atkinson, 49 L. J., Ch. 6; 13 Ch. D. 283; 41 L. T. 603—C. A. Affirming, 27 W. R. 452.
It was proved that in 1859 the agent of the

owner of S.'s tenement paid to him sixpence, stating verbally that it was for the lights in G.'s house (the house which had belonged to K.):

—Held, that the agent being dead, this was evidence of payment of the rent by G. in 1859. Ib.

In an action for obstructing light and air by the erection of a wall upon the defendant's premises .- contiguous to and against the plaintiff's premises,-the defendant relied upon an agreement entered into by the former owners of ing of walls and buildings, whereby the suoke the respective premises, reserving liberty to the and vapour from his chimneys were prevented then owner of the defendant's premises to build from being earried off; and that the defendant a wall which would or might obstruct light and air had deprived his house of the support to which from the plaintiff's premises:—Held that the agree he was entitled. He pleaded that the grievances ment, not being in writing, was ineffectual to pre-

v. Lowe, Ir. R. 7 C. L. 291

A landowner granted a lease to the plaintiff of a house and land with their appurtenances, except rights, if any, restricting the free use of any adjoining land, or the appropriation at any time thereafter of any such land for building or other purposes, obstructive or otherwise. More than twenty years after this lease the subsequent lessee of an adjoining piece of land under the same landowner commenced to build on it in such a way as to obstruct the plaintiff's light. The plaintiff having brought an action and moved for an injunction :- Held, that the exception of any right restricting the free use of the adjoining land did not operate as an agreement or consent on the part of the lessee that the owners of the adjoining land might always have a right to obstruct the access of light to the plaintiff's house within the exception in the 3rd section of the Prescription Act, and therefore, that the plaintiff had acquired an absolute prescriptive right to the light and was entitled to an injunction. Mitchell v. Cuntrill, 57 L. J., Ch. 72; 37 Ch. D. 56; 58 L. T. 29; 36 W. R. 229-C. A.

Acquiescence—Statute of Frauds.]—By a parol agreement between A., the owner of land and dwelling houses, and B., also the owner of land and buildings adjoining, a rocky piece of ground which stood close to A.'s freehold was reduced by B. so as to admit further light and air to A.'s dwellings, and buildings were creeted by B., so as to be attached to, and were an encroachment on A.'s freehold. A, was cognisant of and offered no objection to the work as it proceeded, but acquiesced therein :- Held, that the Statute of Frauds did not apply to such an agreement. Fisher v. Moon, 11 L. T. 623.

#### e. Abandonment and Alteration.

General Rule. |-- If an ancient light has been completely shut up with brick and mortar above twenty years, it loses its privilege. Lawrence v. Obce, 3 Camp. 514; 14 R. R. 830.

Evidence of Intention.]—A right to light is acquired by more user, and may be forfeited by non-user, though for less than twenty years, unless an intention is manifested, when the nonuser commences, to resume the right within a reasonable time. *Moore* v. *Rawson*, 5 D. & R. 234; 3 B. & C. 332; 3 L. J. (o.s.) K. B. 32; 27 R. R. 375.

In an action for obstruction of ancient lights it appeared they had been closed for nineteen years, but upon the defendant, who purchased the adjoining premises during that time, building so as to obstruct them, the plaintiff re-opened them. The judge directed the jury that the plaintiff was entitled, unless he had so closed up the lights as to manifest an intention of permanently abandoning them, or to lead the defendant to incur expense or loss in the reasonable belief that they had been permanently abandoned :-Held, that the direction was right. Stokee v. Singers, 8 El. & Bl. 31; 26 L. J., Q. B. 257; 3 Jur. (N.S.) 1256; 5 W. R. 756.

Any alteration of ancient lights, although not prejudicial to the owner of the servient tenement. gives him a right to obstruct them. Cotching v. Bassett, 32 Beav. 101; 32 L. J., Ch. 286; 9 Jur. (N.S.) 590; 11 W. R. 197.

twenty years' user, and that as a license it was an abandonment of the right will depend upon extinguished by the change of ownership. Judge the circumstances which caused the non-user. Ward v. Ward, 7 Ex. 838; 21 L. J., Ex. 334.

Where it is sought to establish a right to an easement by user, and it appears that the user has varied, it is for the jury to say, whether the user has been commensurate with the right claimed. Thomas v. Thomas, 2 C. M. & R. 34; 1 Gale, 61; 5 Tyr. 804; 4 L. J., Ex. 179.

An interruption which defeats a prescriptive right under 2 & 3 Will. 4, c. 71, s. 1, is an adverse obstruction, not a mere discontinuance of user by the claimant himself. Carr v. Foster, 3 Q. B. 581: 2 G. & D. 753: 11 L. J., O. B. 284.

If proof is given of a right enjoyed at the time of action brought, and thirty years before, but disused during any part of the intermediate time, it is always a question for the jury whether at that time the right had ceased or was still substantially enjoyed. Ib.

Material Alteration.]—The right to an unob-structed access of light and air through a window, is lost by a material alteration in the side of the wall in which the window was placed. Blanchard v. Bridges, 5 N. & M. 567; 4 Å. & E. 176; 1 H. & W. 630; 5 L. J., K. B. 78.

If the owner of ancient lights so alters and enlarges them that they would in course of time innose an additional servitude on neighbouring hand, comity will not restrain the owner of the servient tenement from obstructing them. Heath v. Buchnall, 38 L. J., Ch. 372; L. R. 8 Eq. 1; 20 L. T. 549; 17 W. R. 755.

There being a right to the access of light to windows in the walls of certain cottages, the walls of some of the cottages were set back and windows made in the new walls of the same size, and in the same relative positions as the former windows in the former walls:—Held, that the easement of light was not thereby destroyed. In the case of another of the cottages the occupier made an addition thereto, and for the purpose of so doing built a new wall with a window in it outside the old wall and window at a different angle, but the old window remained inside the new one, and still continued to receive the light. Held, also, that the right to the the light. cacess of light to the old window was not destroyed. Barnes v. Loach, 48 L. J., Q. B. 756; 4 Q. B. D. 494; 41 L. T. 278; 28 W. R. 32.

In rebuilding a house, which had an ancient light in its ground thoor front-room, the front wall, which originally stood out beyond the general building line 4 feet at one end and 7 feet at the other, was set back into the general building line; and in the new front wall was placed a window the position of which corresponded to a great extent with the position of the ancient light in the old front wall. The new room was about the same frontage breadth as the old, but included little more than half the site of it, viz. a depth of 9 feet at one end, and less than 4 feet at the other :- Held, that the right to Than 1 Test in the order 1 Test, and the steep the ancient light had not been lost. Bullers v. Dickinson, 54 L. J., Ch. 776; 29 Ch. D. 155; 52 L. T. 400; 33 W. R. 540.

The Prescription Act does not require any identity, structural or otherwise, in the building, which after the twenty years is to enjoy the right, with the building which has acquired the right; but the right, although not in gross, but one which must be claimed in respect of a (Sa) 580; 11 W. R. 197.

| Duikling, may be claimed in respect of any Whether mere non-user of a right amounts to building which is enjoying the whole or a

substantial part of the light which passed into over the servient tenement through the old the dominant tenement through the old aperture. windows passes also through the new windows. Ib. Consequently, no alteration in the plane of the windows of the dominant tenement, either by advancing or setting back the building, will destroy the right so long as the owner of the dominant tenement can shew that he is using through the new apertures in the wall of the new building the same, or a substantial part of apertures into the old building. But the right to relief may be lost even where there is no substantial alteration if the owner of the dominant tenement has by his alteration so confused the evidence that he cannot prove the identity of the Ijght. Scott v. Pape, 55 L. J., Ch. 426; 31 Ch. D. 554; 54 L. T. 399; 34 W. R. 465; 50 J. P. 645.

S., in 1872, pulled down a building in the cast wall of which were ancient lights, and erected on the site a new building with larger and more ammerous windows. No record was preserved of the positions or dimensions of the ancient lights, but it was found as a fact that substantial portions of six of the new windows corresponded with three of the ancient lights. The east wall had been advanced by distances varying from 2 ft. 3 in. to 13 in., the effect of which was slightly to alter the plane of the new windows:-Held, that the alteration made by S. did not that the plaintiff was entitled to an injunction to restrain any obstruction of so much of the six new windows as corresponded with the three ancient lights. Ib.

The mere alteration of a building containing ancient lights, without evidence of intention to abandon does not imply an abandonment of the statutory right, under the Prescription Act, 2 & 3 by evidence. The nature of the statutory right to the access of light discussed. Scott v. Pape i that to obstruct the new vindow. Binches v. (31 Ch. D. 554). considered. Greenwood v. Pansh, 11 C. B. (x.s.) 324; 31 L. J., C. P. 121; 55 L. T. 135; 35 W. R. 163.

Total Alteration of Structure.]—In 1868 three cottages containing ancient lights were pulled down, and a large warehouse built on their site containing three large windows. There was no evidence on which the court could rely as to the position of the windows in the cottages, though it was admitted that small parts of the new windows might occupy portions of space through which light was admitted to the cottages:— Held, that, in the absence of evidence as to the position of the ancient lights, the casement could not be maintained as to the new building. Fowler v. Walker, 51 L. J., Ch. 443—C. A. Affirming, 42 L. T. 356; 28 W. R. 579.

A building containing ancient lights was pulled down and replaced by another, in which the front was set back and a dormer window converted into a skylight:—Held, that the right to access of light was not lost. National Pro-rincial Plate Glass Insurance Co. v. Prudential Assurance Co., 46 L. J., Ch. 871; 6 Ch. D. 757; 37 L. T. 91; 26 W. R. 26.

Held, also, that any substantial alteration in the plane of the windows destroys the right. Ib.

Per Jessel, M.R. (on motion for injunction). Held, also, that the right remains where any portion of the light which would have passed right to the windows. Ib.

windows passes also through the new windows. Ib.

Mode of Enjoyment.]-A party may so alter the mode of enjoyment of ancient lights as to lose the right to them altogether. Sharp, 4 N. & M. 834; 3 A. & E. 325; 1 H. & W. 224.

Mode of User. ]-The principle as to ancient the same, light which passed through the old lights is, that the owner of the dominant tenement cannot depart from the mode of user substantially. He cannot change the position of his lights, nor increase the original aperture into which windows have been put; but if he has, in using his right, contracted to any given extent the original opening by windows of antique and clumsy structure, he may, without affecting his right, replace those windows by windows of an improved structure that let in more light and air. Turner v. Spaaner, 1 Drew & Sm. 467; 30 L. J., Ch. 801; 7 Jur. (N.s.) 1068; 4 L. T. 732; 9 W. R. 684.

If a building, after having been used for twenty years as a malt-house, is converted into a dwelling-house, in its new state it is entitled only to the same degree of light which was necessary to it in the former state, and the owner of the adjoining ground may lawfully ercet a wall which prevents the admission of sufficient amount to an abandonment of his right, and light for domestic purposes. if what is still admitted would be enough for the making of malt. Martin v. Goble, 1 Camp. 322.

Additional Window.] - Where an owner of the dominant tenement has exceeded the limits of the right which he has acquired to the access of light and air, by opening an additional window, leaving his ancient windows unaltered, Will 4, c. 71, to the access and use of light to he has not necessarily lost or suspended his and for any building which may be substituted admitted right, but the opening of the additional that no any outsing which may be substituted an administration to the original building; the intention to window justifies the owner of the servient tenerabandon the right must be clearly established ment in obstructing the ancient windows, if the doing so is unavoidable, in the exercise of his

Plaintiff being reversioner of a house which adjoined premises in the occupation of defendant, and had ancient windows, rebuilt the house, added an upper storey, opened windows in that storey, and enlarged the ancient windows and otherwise altered their position; such rebuilding and alterations being within twenty years of the commencement of the action. Defendant subsequently rebuilt his premises, and thereby darkened the windows in both the upper and the lower stories of the plaintiff's house :-Held, in an action by plaintiff as reversioner for this obstruction, that the plaintiff having by his alterations exceeded the limit of his right, and it being, owing to such alterations, impossible for the defendant in the lawful exercise of his own rights to obstruct such access without at the same time obstructing the plaintiff's former right, the plaintiff must be considered as losing his former right at all events until he restored his house to its original condition. Renshaw v. Bean, 18 Q. B. 112.

Semble, that such alteration did not destroy the right altogether. Ib.

Held, further, that a defence founded upon the fact of such alteration by the plaintiff, and the impossibility of a partial obstruction, was properly raised under a traverse of plaintiff's Identity of Apertures.]—Where a building and both expiring at the same time. B. by having ancient lights is pulled down, and a new building on his own premises obstructed a window one erected in respect of which the same right to in the house of A., though the latter had had an light is claimed, it is not sufficient to shew that some part of the new windows must occupy some part of the space of old windows; it must be shewn that some particular part of the new apertures coincides to a material extent with some particular part of the old apertures. Pendarres v. Monro, 61 L. J., Ch. 494; [1892] 1 Ch.

Where an old house is pulled down wherein were ancient lights, and a new one is built, the lights in the new house must be in the same place and of the same dimensions, and not more in number than the lights in the old house.

Cherrington v. Almey, 2 Veru. 646.

The warehouse of the plaintiffs, which had ancient windows, having been burned down, was rebuilt by them. In the new warehouse the windows were placed in different situations, were of different sizes, and altogether occupied more space than the windows of the old building. Some parts of some of the new windows coincided with some parts of the old; but a greater portion did not coincide. The defendants who had premises on the other side of the street, raised their own house and so obstructed the access of light to the new windows. They could not have obstructed the passage of light to such portions of the windows as were new, without at the same time obstructing its passage to such portions of the new windows as were in the sites of the old windows :- Held, that the plaintiffs in these circumstances, could not maintain an action against the defendants for obstructing the passage of light to their warehouse windows, as no one of the existing windows substantially corresponded with any of the ancient lights; and (per Channell, B., and Blackburn, J.) that it was not necessary in the present case to decide whether there is a right to block up a new window, if it cannot be done without also blocking up an ancient one. Hutchinson v. Copestale, 9 C. B. (N.S.) 863; 31 L. J., C. P. 19; 8 Jur. (N.S.) 54; 5 L. T. 178; 9 W. R. 896—Ex. Ch. See Newson

Window Raised and Enlarged. - If an ancient window is raised and enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light and air to any part of the space occupied by the ancient window, although a greater portion of light and air is admitted through the unobstructed part of the enlarged window than was anciently enjoyed. Chandler v. Thompson, 3 Camp. 80; 13 R. R. 756.

v. Pender, post, col. 1164.

# f. Extinguishment.

Unity of Ownership.]—A union of the owner-ship of dominant and servient tenements for different estates does not extinguish an easement for acquiring an indefeasible right to the access and use of light, but merely suspends it so long as the union of ownership continues, and upon a severance of the ownership the easement revives. Simper v. Foley, 2 Johns. & H. 555; 5 L. T. 669.

Where a right to an easement of this description is acquired against an owner of a leasehold interest in the servient tenement, it is acquired also against the owner of the reversion. 1b.

A. and B. occupied houses adjoining each other, as tenants under leases, both of which were granted by the same lessor on the same day,

uninterrupted enjoyment of light and air for more than twenty years :- Held, that the circumstance of the two houses being held under the same landlord, and for the same term, did not prevent the one tenant from acquiring anindefeasible right to light as against the other. Hudelessine right to lager as against the order. Freeven v. Philipps, 11 C. B. (N.s.) 449; 30 L. J., C. P. 356; 7 Jur. (N.s.) 1246; 9 W. R. 786—Ex. Ch. See also Wheaton v. Maple, [4893] 3 Ch. 48, commenting on the last case,

Where Light increased by Clearances effected. by others. The easement of a party to have his light and air unobstructed by newly-erceted buildings is not lost or diminished by the circumstance that, by means of clearances effected in the neighbourhood by other parties shortly before the alterations, the party acquired more light than the buildings could subtract. Dyers' Co. v. King, 39 L. J., Ch. 339; L. R. 9 Eq. 438; 22 L. T. 120; 18 W. R. 404.

Failure to produce Evidence of position of Old. Windows.]-In 1868 three cottages, containing ancient lights, were pulled down, and a large warehouse built on their site, containing threelarge windows. There was no evidence on which the court could rely, as to the position of the windows in the cottages, though it was admitted that small parts of the new windows might occupy portions of space through which light was admitted to the cottages :-Held, that in the absence of evidence as to the position of the ancient lights, the easement was lost as tothe new building. Finelers v. Walker, 49 L. J., Ch. 598; 42 L. T. 356; 28 W. R. 579. Affirmed. 51 L. J., Ch. 443-C. A.

Artizans' Dwellings.] - See ARTIZANS' DWELLINGS.

# 2. Obstruction.

## a. General Principles.

By whom. ]-The occupier of one of two houses built nearly at the same time and purchased of the same proprietor, may maintain an action against the tenant of the other, for obstructing his window lights, by adding to his own building however short the previous period of enjoyment by the plaintiff. Compton v. Richards, 1 Price, 27; 15 R. R. 682.

The owner of a house divided it into two tenements, and demiscil one of them to the defendant :. -Held, that he was liable to an action for obstructing windows existing in the house at the time of the demise, although of recent construction, and though there was no stipulation against the obstruction. Riviere v. Baver, R. & M. 24; 27 R. R. 726.

What amounts to,]—An action on the case-lies for darkening the plaintiff's windows by a wall erected by the defendant partly on his own. land and partly on the plaintiff's land. Wells v. Ody, 1 M. & W. 452; 2 Gale, 12; 5 D. P. C. 45; 1 Tyr. & C. 715; 5 L. J., Ex. 199. The plaintiff purchased a house of A, and the distantions that came it me provinced of A the

defendant at the same time purchased of A. the adjoining land, upon which an erection of one-storey high had formerly stood. In the convey-ance to the plaintiff, his house was described as bounded by building ground belonging to the cient to give the defendant a verdict. Manning defendant:—Held, that the defendant was not v. Gresham Hotel Co., Ir. R. 1 C. L. 115. entitled to a greater height than one storey, if by entities to a greater neight than one storey, if by so doing he obstructed the plaintiff's lights, Swansborough v. Coventry, 9 Bing, 305; 2 M. & Scott, 362 : 2 L. J., C. P. 11.

In an action for removing boards, under a plea of justification that they obstructed an ancient window through which the light ought to pass, it is sufficient to show that the window was one through which the light ought to be allowed to pass, though the window is proved to have been erected within living memory. Penwarden v.

Ching, M. & M. 400,

B. alleged that in 1864 he had obtained the consent of a company, the owners of an adjoining tenement, to open two windows in a party-wall separating the two tenements. B. had previously opened three other windows in the party-wall, In 1875 the company served B, with notice under the Metropolitan Building Act that they intended blocking up all five windows. The three windows in 1875 had been opened up eighteen years. Evidence of consent upon the company's part to B.'s opening the two windows was admitted by Malins, V.-C., who held that such consent was fully proved as to the two windows, and that as to the other three, after eighteen years a previous consent to open them must be implied :-Held, that the evidence of consent was inadmissible, and that as the other three windows were not ancient lights the plaintiff's case as to the five windows failed, and that part of his bill must be dismissed with costs. Bourke v. Alexandra Hotel Co., 25 W. R. 782—C. A.

The vice-chancellor had also granted an injunction as to eight other windows as to which there was no appeal: -Held, that as the plaintiff had succeeded as to part of his snit and failed as to the rest, the costs of the part as to which he had failed must be taxed and set off against those of the part as to which he had succeeded, and the balance of such costs only paid to the party

entitled to most costs. Ib.

Diminution of Light. ]-That diminution of light and air which the law recognises as the ground of an action against a party who builds near another's premises, is such as really makes them, to a sensible degree, less fit for the purposes of business or of occupation. Purher v. Smith, 5 Car. & P. 438.

To constitute an illegal obstruction, by building, of ancient lights, it is not sufficient that the plaintiff has less light than he had before; but there must be such a privation of light as will render the occupation of his honse uncomfortable, and prevent him, if in trade, from carrying on his business as beneficially as he had previously done. Back v. Stacey, 2 Car. & P. 465; 31 R. R.

To sustain an action for darkening windows, it is not sufficient that a ray or two of light should be obstructed. The question is, whether, in con-sequence of the obstruction, the plaintiff has less light than before, to so considerable a degree as to injure his property in point of value or occupation. Pringle v. Wernham, 7 Car. & P. 377. S. P., Wells v. Ody, 7 Car. & P. 410.

To give a cause of action for the obstruction of light, the diminution of light must be sensible ; but the plaintiff is entitled substantially to all

# b. Right to Obstruct.

Servient Owner. ]-The right to obstruct light possessed by an owner of a servient tenement is simply his right of building on his own land. and the opening of new windows by the owner of the dominant tenement neither confers nor of the dominant tenement nether confers nor enlarges such right. *Tapling v. Jones*, 11 H. L. Cas, 290; 20 C. B. (x.s.) 166; 34 L. J., C. P. 342; 11 Jur. (x.s.) 309; 12 L. T. 555; 13 W. R.

The "invasion of privacy by opening windows" is not a legal wrong or an injury, the opening of new windows being in law an innocent act. Ib. Where, therefore, the owner of a dominant tenement, whilst preserving one ancient window. altered old windows, and opened new windows upon the same side of his house, so that the owner of the servient tenement was obliged, in obstructing the new and altered lights, also to obstruct the ancient lights :- Held, that such obstruction was illegal. Ib.

Metropolis. ]-The Metropolitan Building Act of 1855, 8.8, par. 6, which gives "a right to the building owner to raise any party structure permitted by this act to be raised, upon condition of making good all damage occasioned thereby to the adjoining premises," does not authorise the raising of a structure so as to obstruct ancient Hights in the adjoining premises. Crafts v. Haldane, 8 B. & S. 194; 36 L. J., Q. B. 85; L. R. 2 Q. B. 194; 16 L. T. 116; 15 W. R. 444.

Grantor not to derogate from his own Grant. Russell v. Watts, aute, col. 1069.

Alterations by Owner. ]—In 1855, the owners in fee of a house and adjoining land granted to trustees a lease of the land for ninety-nine years, and they covenanted to build upon it secording to a plan. In 1856, the owners conveyed the reversion in fee of the lands to the trustees; in 1857, the owners conveyed the house in fee to a person under whom the plaintiff obtained possession. The defendant subsequently, with the authority of the trustees, built upon the land so as to obstruct the light and air. which for upwards of twenty years had come to the windows of the plaintiff's house. If he had built according to the plan in the lease, the obstruction would not have been to the same extent. Until the lease was granted there had never been any severance either in the title to or possession or occupancy of the land and house, and the same had been occupied and used together by the proprietors for upwards of fifty years :- Held, that the plaintiff could maintain no action against the defendant for building on the land so as to obstruct the light and which formerly came to the windows of the plaintiff's house. White v. Bass, 7 H. & N. 722;

plaintin's nouse. If have v. Dass. (In. & N. 122; 31 L. J., Ex. 283; 8 Jur. (N.S.) 312; 5 L. T. 843; An owner of a house, in which there were ancient lights, rebuilt it, and in so doing altered the position of some of the ancient windows, and also opened new windows. The defendant proposed to build so as to obstruct both the new Out the plantum is consider substantially to an proposed to built so as to observe both the new in the light which he eujoyed before the obstruction, and ancient windows:—Held, that as he could and evidence that enough of light remains to not possibly obstruct the new windows without enable him to carry on his business is not sufficient the same time obstructing the ancient lights,

Weatherley v. Ross, 1 H. & M. 349; 1 N. R. 228; 32 L. J., Ch. 128.

Where an owner of ancient lights puts in new lights, the owner of the adjoining land has a right to obstruct the new lights, and, if it is necessary for that purpose, even to obstruct the old lights. Davies v. Marshall, 1 Drew. & Sm.

557; 7 Jur. (N.S.) 720; 4 L. T. 105; 9 W. R. 368. A landlord of two houses granted a lease of one house and its appurtenances in consideration of certain repairs, part of which was the addition of windows. The tenant of the adjoining honse afterwards surrendered his lease to the landlord, and took a new lease from him:-Held, that the tenant of the adjoining house

could not obstruct the windows so added. Ib. A., the owner of two adjoining houses, granted a lease of one of them to B. He afterwards leased the other to C., there then existing in it certain windows. After this, B. accepted a new lease of his house from A. :-Held, that B. could alter his tenement, so as to obstruct windows existing in C.'s house at the time of C.'s lease from A., though the windows were not twenty years old at the time of the alteration. Contis v. Gorham, M. & M. 396.

If the owner of the tenement has windows looking upon the premises of another, he cannot increase their size or number, or claim more extensive rights, Coaper v. Hubbuck, 30 Beav. 160; 31 L. J., Ch. 123; 7 Jur. N.s. 457; 9 W. R. 352.

Any alteration of ancient lights, although not prejudicial to the owner of the servient tenement, gives him a right to obstruct them. Cotching v, Bussett, 32 Beav. 101; 32 L. J., Ch. 286; 9 Jur. (N.s.) 590; 11 W. R. 197.

Servitude substantially the Same. ]-Where a house is erected on the site of an old house which has been burnt down, the windows of which were ancient lights, the question whether the character of ancient lights attaches to the new windows depends on the question whether the servitude they would impose on the servient tenement is substantially the same as that which previously existed; and where the windows of a new house so erected, although somewhat differing in form from the windows of the old house. were of about the same area, and very nearly in the same positions:—Held, that the servitude imposed on the servient tenement not being a more onerous nor a different servitude, the character of ancient lights attached to the new windows. Curriers' Co. v. Corbett, 2 Drew. & Sm. Affirmed on appeal, 4 De G. J. & S. 764; 11
 Jur. (N.s.) 719; 18 L. T. 154; 13 W. R. 538.

Where the owner of a house sells a piece of adjoining land, the purchaser may build on it as he pleases; and the vendor cannot prevent his doing so, even although the buildings erected on it may interfere with his ancient lights. Ib.

Obstruction by Railway Company. ]-When land has been taken by a railway company for the purposes of its railway, the owner of the adjoining land is as fully master of it for all purposes as he was before, so that he does not Interfere with the proper working of the railway.

Norton v. L. & N. W. Ry., 47 L. J., Ch. 859.

Affirmed, 13 Ch. D. 268; 41 L. T. 429; 28 W. R. 173-C. A.

The owner of land adjoining a railway built on his own land a house having windows overlooking the railway. The company erected a the house. A testator being owner in fee of a

the owner was not entitled to an injunction. | large hoarding close in front of these windows, to prevent him from acquiring an absolute right to the access of light across the railway. This hoarding was afterwards blown down :-Held that as these windows in no way interfered with the working of the railway, the company had no right to creet the hoarding; and an injunction was granted to restrain them from re-erecting it.

> The plaintiff was owner of a house, some of the windows of which overlooked a piece of land belonging to a railway company and used as a goods yard of a station. When the house had been built sixteen years the company put up a screen opposite the plaintiff's windows, to prevent his acquiring an easement of light and air. The plaintiff brought an action for injunction to restrain the company from interfering with his light and air : and moved for an interlocutory injunction till the hearing :-Held, that the plaintiff had no equity to restrain the company prantal man in equity to resemble the considered from taking measures to prevent prescriptive rights from being acquired for windows looking upon their land. The injunction was therefore refused. Norton v. L. § N. W. 18y. (9 Ch. D. 283) and Swindon Waterworks Co. v. Witts and Berks Conal Varigation (b. L. E. 7 H. L. 697). Considered. Bonner v. G. W. Hy, 24 Ch. D. 1; 48 L. T. 619; 32 W. R. 190; 47 J. P. 580—C. A.

> By an act it was provided that nothing in the act contained should authorise a railway company to take, injure or damage, for the purposes of the act, any house or building which was erected on or before the 80th November, 1835, without the consent in writing of the owner or other person interested therein, other than such as were specified in the schedule to the act, unless the omission therefrom proceeded from mistake. A subsequent clause contained provisions for settling all differences which might arise between the company and the owners or occupiers of any lands which should be taken, used, damaged or injuriously affected by the execution of any of the powers granted by the act, and for the payment of satisfaction or compensation, as well for damages already sustained as for future, temporary or perpetual, or any recurring damages : Held, that the company was liable to the reversioner of a house erected before the 30th November, 1835, and not specified in the schedule, for damage done to it by the obstruction of its lights by a station erected by the company, and by the dust drifted from the station and embankment into the house; and that the reversioner was not bound to come in under the compensation clause. Turner v. Sheffield and Rotherham Ry., 10 M. & W. 425.

> When Right exceeded.]-Where the plaintiff is entitled to lights by means of blinds fronting a garden of the defendant's, which he takes away, and opens an uninterrupted view into the garden, the defendant cannot justify making an erection to prevent the plaintiff from so doing, if he thereby renders the plaintiff's house darker than before. Cotterell v. Griffiths, 4 Esp. 69.

> Severance of Ownership.]—Where the owner of a dwelling-house and adjoining land sells the house to one person and the land to another under contemporaneous conveyances, either purchaser being aware of the conveyance to the other, the purchaser of the land is not entitled to build thereon so as to obstruct the lights of

piece of land with two dwelling-houses thereon, light as to injure him in his business. and of another piece of land immediately adjoin-ing, with a warchouse at the further end thereof. devised his real estate to his two sons and another person in trust for sale, giving his two sons, or either of them, an option of purchasing any part of his real estate. By two separate but contemporaneous conveyances executed by the trustees of the will, the one piece of land and the two dwelling-houses thereon were conveyed for value, "together with all lights thereunto belonging," and all the estate, &c., to the one son in fee, and the other adjoining piece of land and the ware-house were conveyed for value, together with all lights, &c., and all the estate, &c., to the other son in fee. An injunction was granted restraining the successor in title to the purchaser of the last-mentioned piece of land and warehouse from building on his land in such a way as to obstruct his neighbour's lights. Wherldon v. Burrows (12 Ch. D. 31), considered. Allen v. Tuylor, 50 L, J., Ch. 178; 16 Ch. D. 355,

Open Space.]—The use of an open space of ground in a particular way requiring light and air for twenty years does not give a right to preclude the adjoining owner from building on his land so as to obstruct the light and air, Roberts v. Macord, 1 M. & Rob. 230.

Roberts v. Macord (supra), recognised and acknowledged to be good law in. Patts v. Smith, 38 L. J., Ch. 58; L. R. 6 Eq. 311; 18 L. T. 629; 16 W. R. 891.

Glebe Land.]-Where lights had been enjoyed for more than twenty years, adjoining land which within that period had been glebe land, but was conveyed to a purchaser under 55 Geo. 3, c. 147 : -Held, that no action would lie against such purchaser for building so as to obstruct the lights, as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. Barker v. Richardson, 4 B. & Ald. 579; 23 R. R. 400.

When a Nuisance. ]-A window-frame erected on a party-wall was not a common nuisance within 14 Geo. 3, c. 78, so as to deprive the owner of it of his right to the windows, which were proved to be ancient lights; and if it was, that it would not, without conviction, be an answer to an action for obstructing them. Titterton v. Conyers, 1 Marsh. 140; 5 Taunt. 165

## c. Injunction.

#### i. Who Entitled.

Lessees.]-A lessee of a dwelling-house, in which he carries on business as a diamond merchant, is entitled to an injunction restraining the owners of premises adjacent (who afterwards purchased the reversion of the lessee's house) from constructing the party-wall which they were about to rebuild so as to occasion such an obstruction of the lessee's ancient lights, however slight, as would injure him in his business. Herz v. Union Bank of London, 2 Giff. 686; I Jur. (N.S.) 127; 3 W. R. 49.

A lessee of a dwelling-house in which he has for nearly eight years carried on business as a repairer of jewellery and watches, is entitled to damages against the owner of adjacent premises who is in the process of constructing a building

Dillimore, 14 L. T. 183: 14 W. R. 511.

The lessee of a house and garden, forming part of a large area of building ground, will not be eutitled under his ordinary covenant for quiet enjoyment, or otherwise, in the absence of special contract, to restrain the lessor or persons claiming under him from building on the adjoining land so as to obstruct the free access of light and air to the garden. Potts v. Smith, 38 L. J., Ch. 58; L. R. 6 Eq. 311: 18 L. T. 629; 16 W. R. 891.

It is a rule of law that there can be no prescription' for an easement of light and air over

Where the owner of an ancient light is a lessee whose lease had expired during the obstruction, but who had agreed for a renewal:—Held, that he could still maintain his suit. Gale v. Abbott, 8 Jur. (N.S.) 987; 6 L. T. 852; 10 W. R. 748.

Where the plaintiff and defendant held adjoining pieces of ground under a common landlord, and the plaintiff, with the licence of the landlord, and without objection by the defendant, had erected a manufactory, an injunction was granted to restrain the defendant so building as to obstruct the lights of the plaintiff's manutory, pending a trial at law. Crook v. Wilson, 3 W. R. 378.

Occupier. ]-When the darkening of the ancient windows of a dwelling-house materially injures the comfort of the existence of those who dwell in it, the Court of Chancery will interfere by injunction. Jackson v. Newcastle (Duke), 3 De G. J. & S. 275; 33 L. J., Ch. 698; 10 Jur. (N.S.) 688, 810; 10 L. T. 635, 802; 12 W. R. 1066.

Upon a similar principle, where the obstruction of the ancient lights of a manufactory or of business premises renders the building to a material extent less suitable for the business carried on in them, it is a case for an injunction, and not merely for compensation by damages. 1b.

The court will restrain the interference with aucient lights, although the plaintiff is not the occupier of the house interfered with, and may have no intention of occapying it. Wilson v. Townend, 1 Drew. & Sm. 324; 30 L. J., Ch. 25; 6 Jur. (N.s.) 1109; 3 L. T. 352; 9 W. R. 30.

Where Owner of Dominant Tenement has not accepted Title.]-An injunction will not be granted to restrain the construction of works obstructing lights where the title to the property sought to be protected has not yet been accepted by the plaintiff. Heath v. Maydew, 13 W. R. 199.

When Dominant Tenement altered.] - The right to obstruct light possessed by an owner of a servient tenement is simply his right of building on his own land, and the opening of new windows by the owner of the dominant tenement neither confers nor enlarges such right. Tapling v. Jones, 11 H. L. Cas. 290; 20 C. B. (N.S.) 166; 34 L. J., C. P. 342; 11 Jur. (N.S.) 309; 12 L. T. 555; 13 W. R. 617.

When the owner of a building having ancient lights replaces them by new larger windows, the court will not interfere by injunction to restrain the owner of the servient tenement from obstructing them. Heath v. Buchnall, 38 L. J., Ch. 372; L. R. 8 Eq. 1; 20 L. T. 549; 17 W. R. 755. The case of Tapling v. Jones (11 H. L. Cas. 290)

applies only to the right of the owner of the dominant tenement in such a case to recover damages at law, and is not to be extended to establish his which would occasion such an obstruction of his right to relief in equity. Ib.

When a dominant tenement is altered, without losing the easement, its owner has the same right of applying for an injunction as if there had been on alterntion. Straight or Staight v. Burn, 39 L. J., Ch. 289; L. R. 5 Ch. 163: 22 L. T. 831; 18 W. R. 243.

Where Owner has himself contributed to Diminution of Light. - When ancient lights are obstructed, the fact that the owner of the building to which the ancient lights belong has himself contributed to the diminution of the light will not in itself preclude him from obtaining an injunction against the person causing the obstruction. 1b.

The defendant built a wall to the north of the windows of the plaintiff's house by which his ancient lights were interfered with. The plaintiff was at the same time enlarging his own premises. whereby he diminished the light coming to his own windows by shutting off some of the light from the south and south-west :- Held, that he

was entitled to an injunction. Ib.

The doctrine of Tapling v. Jones (11 H. L. Cas. 290) applies to the equitable as well as to the

legal remedy. Ih.

A partial interference with lights by the owner is no bar to a suit to prevent a subsequent interference by other persons, Baxter v. Bower, 44 L. J., Ch. 625; 33 L. T. 41; 23 W. R. 805,

It is to be understood that an injunction is not to be used oppressively; but the court will not too carefully limit its orders, but will leave any abuse to be dealt with when it arises. Ib.

A plaintiff, who in an insignificant degree obscured the light and air to his own dwellinghouse, is not thereby disentitled to an injunction to restrain the defendant from creeting a building so as seriously to diminish the supply of light and air. Arcodechne v. Kelk, 2 Giff. 683; 5 Jur., (N.S.) 114; 7 W. R. 194.

Tenant from Year to Year. ]-A tenant from year to year may file a bill for an injunction to protect the right to the access and use of light; but the injunction will be limited to the period of the continuance of his tenancy. Folcy, 2 Johns. & H. 555; 5 L. T. 669. Simper v.

Assuming that cases exist-wherein a tenant from year to year under notice to quit is entitled to an injunction to restrain the erection of buildings which prejudice the access of light and air to which he is entitled, still the nature of his interest, especially when he can obtain damages at law, renders it imperative upon him to make out a very strong ease for the intervention of a court of equity. Jacomb v. Knight, 3 De G. J. & S. 538; 32 L. J., Ch. 601; 8 L. T. 621; 11 W. R. 812.

# ii. When Granted.

Mandatory Injunction, when granted. ]-The Court of Chancery has never assumed or exercised jurisdiction to order a building, which so far as it can impede the progress of light and air has been actually completed, to be pulled down. Curriers' Co. v. Curbett, 4 De G. J. & S. 76\frac{1}{2}; 11 Jur. (x.s.) 719; 13 L. T. 15\frac{1}{2}; 18 W. R. 588.

A mandatory injunction was granted on an interlocutory application, the defendant against whom it was sought failing to shew that the

It is not to be laid down as a general rule that, where a building injuriously affecting ancient lights has been completed before the bill is filed, the court is unable to give damages unless the one cour is unison to give annuges unioss the injury is such as would justify a mandatory injunction. City of Landon Browery Co. v. Traunt, 43 L. J., Ch. 457; L. R. 9 Ch. 212; 29 L. T. 755; 22 W. R. 172.

A court of equity will not interfere by mandatory injunction to preserve a right to light and air, unless there has been a substantial, material, or serious infringement of such right. Bradel v. Perry, L. R. 3 Eq. 465; 19 L. T. 760; 17 W. R. 185.

Where, pending the litigation, the defendant continued the building complained of a mandatory injunction was granted on motion. Ib.

In cases of obstruction of ancient lights, where the court is called upon to exercise its power of mandatory injunction, ordering the defendant to restore things to the condition in which they were before the old building was removed, each case must be decided upon its own peculiar circumstances. Lsenberg v. East India House Estate Co., 33 L. J., Ch., 392; 10 Jur. (8.8.) 221; 9 L. T. 625; 12 W. R. 456. And see Jacomb v. Knight, 3 De G. J. & 8.533; 32 L. J., Ch. 601; 8 L. T. 621: 11 W. R. 812.

The exercise of the power of the court by mandatory injunction should be exercised with great caution, and, semble, should be confined to cases where the injury cannot be estimated and sufficiently compensated by a pecuniary

payment. Ib.
Where a plaintiff insisted on the right to the mandatory injunction, and the defendant admitted that some damage had been done to the plaintiff by obstructing his light and air, but said that the amount of injury was exaggerated, the court directed that, instead of an injunction, an inquiry should take place before itself to ascertain the amount of pecuniary damage.

Sufficiency of Interference-Evidence. The fact that the height of a building above an sucient light is not greater than its distance is not conclusive evidence that the light is not injurionsly affected, but is prima facie evidence of there being no such interference with the light as the court will restrain, and requires to be rebutted by special evidence of injury. London Brewery Co. v. Tenant, supra.
In a suit by the owner and occupier of a house

and workshop complaining of the observation of his ancient lights by the defendant raising a low party-wall distant only eight feet from his. windows to a height of twenty-six feet:—Held, that as the plaintiff had not lost his right to relief by delay or acquiescence, he was entitled to a mandatory injunction for the removal of the additional building. Smith v. Smith, 44 L. J., Ch. 630; L. R. 20 Eq. 500; 32 L. T. 787; 23 W. R. 771.

When Building almost completed. ]-()n a bill for an injunction to restrain the completion and continuance of a building seriously obstructing ancient lights, it appeared that the building was almost completed before the bill was filed; that the plaintiff had, before the commencement of the works, information that some building was proposed, and that she was buildings which he was erecting would not abroad during the actual building, and had done materially interfere with the plaintiff's ancient nothing amounting to acquiescence:—Held, that lights. Foungev. Shaper, 27 L. T. 643; 21 W. R. 135. | a mandatory injunction could not be granted, and an inquiry as to damages was directed, though not prayed by the bill. Stanley of Alderley (Lady) v. Shrewshury (Earl), 44 L. J., Ch. 389; L. R. 19 Eq. 616; 32 L. T. 248; 23 W. R. 678.

When Building completed. -When the walls of a building which interfered with ancient lights were complete at the filing of the bill, and the roof was on at the hearing of the cause, the court did not grant a mandatory injunction to pull down any part of the building, but ordered an inquiry as to the damage sustained in respect of the loss of light. Mott v. Shoothred, 44 L. J., Ch. 380; L. R. 20 Eq. 22; 23 W. R. 545. And see Gort (Viscountess) v. Clark, 18 L. T. 343; 16 W. R. 569.

—— Plaintiff having Life Interest only.]— Mandatory injunction refused, and nominal damages, without costs on either side, granted in a case where the plaintiff had only a life interest, subject to an existing lease, and where, though there was a substantial interference with present comfort in respect of light, there was no prospective injury or diminution in the salable value of the property. There being no case as to air, the plaintiff's case as to light was made less strong by its being addressed conjointly to air and light. Perkins v. Sluter, 35 L. T. 356.

- Executor. ]-See Jones v. Simes, post, col.

a mandatory injunction will be granted to compel the removal of the obstruction depends on whether the damages which would be granted in lieu of injunction would, or would not, be sub-stantial. Where, therefore, the total damages recoverable for such an obstruction, coupled with two other causes of complaint, amounted to less than 201. :- Held, that the damages were not substantial, and that no injunction could be granted, but only damages. Webster v. Whewall, 42 L. T. 868.

proceeding with certain buildings, he appealed, offering an undertaking to abide by any order the court might make at the hearing as to pulling down or altering any buildings creeted by him. The Court of Appeal being of opinion that the right to an interlocutory injunction was not established, discharged the order, taking from the defendant an undertaking in the terms of his offer :- But held, that, without any undertaking, the court would have jurisdiction at the trial to order the pulling down of any building erected after the commencement of the action, or after notice had been given to the defendant that the plaintiff objected to the building. Swith v. Dan 18 Ch. D. 651: 28 W. R. 712-C. A. Day, 13 Ch. D. 651; 28 W. R. 712-

Railway Company—Sale of Surplus Land with House thereon—Implied Obligation to Purchaser .- See Myers v. Cutterson, ante, col. 1142.

Infringement of Ancient Lights though Building pulled down.]—Under the statute 23 & 24 Viet. c. 142, and an Order in Conneil, an ancient church in the city of London was vested in the Ecclesiastical Commissioners, upon trust to pull down the building, dispose of the materials, and down the building, dispose of the materials, and Clearing Committee of Railway Clearingsell the site. They pulled down the church, and House. By the Railway Clearing House Exten-

the site was still vacant. The defendant, who had become the owner of land, formerly part of the glebe of the church, on which some low buildings had stood, commenced the erection of buildings which, if completed, would have materially obstructed the access of light to windows occupying the same position as those of the late church. The Ecclesiastical Commissioners commenced an action to restrain the erection of the proposed buildings:-Held, by the Court of Appeal, that the fact of there being no existing windows, the access of light to which would be interfered with, was no objection to the granting of an injunction if the right to access of light had not been abandoned. Ecclesiastical Commissioners v. Kino, 49 L. J., Ch. 529; 14 Ch. D. 213; 42 L. T. 201; 28 W. R. 544—C. A.

- In the Case of a Church-Rights of Purchaser. ]-Held, also, that the Ecclesiastical Commissioners had power to sell the site, with all the casements which had been enjoyed by the church, so that if the church had ancient lights the purchaser would have the benefit of them. Ib

Right of Church to Access of Light over Glebe.]
-Held, also, that although the freehold of both the church and the glebe had throughout been vested in the rector, there was no such manifest impossibility for the church to have a title by prescription or grant to access of light over the glebe as to induce the court to refuse an interim injunction till the trial, Ib.

And, semble, that such an easement might be effectually created. Ib.

Party Wall-Right to build Windows in. ]-The Bristol Improvement Act, 1840, enacts, that no opening shall be made in any party-wall except for communication from one building to another. The plaintiff had a house, one wall of which was to the height of the first storey a party-wall between his house and a building belonging to the defendant, but above that height had ancient windows opening to the external air. The plaintiff pulled down his house and proposed to rebuild it with windows in the same position as before. Before doing this, he gave notice to the defendant, under the act, that the wall, which he described as a party-wall, was out of repair, and a certificate of two surveyors was given, directing the party-wall to be built at the joint expense of the plaintiff and of the defendant. The defendant afterwards proceeded to creet a building which would obstruct the light coming to the ancient windows of the plaintiff :- Held, that the wall above the defendant's building was not a party-wall; and that the plaintiff was not precluded from making windows in it; and an injunction was granted restraining the defendant from obstructing his ancient lights. Weston v. Arnold, 43 L. J., Ch. 123; L. R. 8 Ch. 1084; 22 W. R. 284.

The plaintiff obtained an ex parte injunction upon filing the bill; but no mention was made in the bill, or in the affidavit in support of the motion, of the notice to pull down the wall, or the certificate of the surveyors :- Held, that inasmuch as these facts were only important as raising a point of law, based on an unreasonable construction of the act, they were not material facts, and the plaintiff was justified in omitting them. Ib.

sion Act (37 Viet.c. xvi.), which incorporated the | 160; 31 L. J., Ch. 123; 7 Jur. (N.S.) 457; 9 W. R. Lands Clauses Act, 1845, the railway clearing 352, committee was empowered to take lands, and to erect thereon any buildings and works for the purpose of the clearing system. The owners of a neighbouring house filed a bill to restrain the erection of a building on land acquired under the act, on the ground that it interfered with their ancient lights :- Held, that the clearing committee could not be restrained by injunction. and that the plaintiff's remedy was under the Lands Clauses Act, 1845, s. 68. Bedford (Duke) v. Dawson, 44 L. J., Ch. 549; L. R. 20 Eq. 353; 33 L. T. 156.

Angle of Forty-five Degrees-Narrow Street. -As a general rule, in the absence of special circumstances, the owner of a house in a narrow street in London will be restrained from raising it to a height which will obstruct the access of light below the angle of forty-five degrees to ancient windows opposite. Hackett v. Baiss, 45 L. J., Ch. 13: L. R. 20 Eq. 494.

In a street varying from thirty-seven feet six inches to thirty-four feet in width, and having ancient houses on its eastern side of the average height of forty-four feet, a building owner was restrained from raising a building on the opposite side to a greater height in front than forty-six feet, without prejudice to his putting on a sloping roof higher, so long as the angle of incidence of light over it did not exceed forty-five degrees. Ib.

There is no conclusion of law that a building will not obstruct the light coming to a window if it permits the light to fall on the window at an angle of not less than forty-five degrees from the vertical. The question of the amount of obstruction is always a question of fact, which depends on the evidence in each case. Therefore a plaintiff whose ancient light is obstructed is entitled to a judgment in general terms, without referring to the angle of incidence of the light. unless there is some special evidence in eight, unless there is some special evidence justifying the insertion of such a clause. Hachett v. Buiss (L. R. 20 Eq. 494), considered. Parker v. First Arenne Hotel Co., 24 Ch. D. 282; 49 L. T. 318; 32 W. R. 105—C. A.

The doctrine as to the angle of forty-five degrees discussed and dissented from. Ecclesiastical Commissioners v. Kino, 49 L. J., Ch. 529; 14 Ch. D. 213; 42 L. T. 201; 28 W. R. 544—C. A. An ancient light of the plaintiff, a sculptor,

had a north aspect, in a street thirty-one feet wide. The defendant's buildings on the opposite side of the street were, as to part, exactly thirtyone feet high, and as to other part, a little less than that height. He claimed to have a statutory right to raise his buildings to a height which would subtend an angle of forty-five degrees measured from a base line level with the centre of the plaintiff's light :-Held, that the statutory regulation as to the height of buildings in streets is not to be taken as limiting the right by prescription to ancient lights, but that such right depends upon the degree and amount of obscuration in each particular case. Thred v. Debenham, 2 Ch. D. 165; 24 W. R. 775.

Windows enlarged. ] - If ancient windows which look over the land or upon the premises of another are enlarged, and are complained of, the court, upon their being restored to their original dimensions, will restrain the owner of original dimensions, will restrain the owner of Rule at Common Law.]—The courts of common taw is the adjoining property from obscuring such law, in deciding cases of light and air within the restored windows. Copper v. Hubbuch, 30 Beav. metropolitan district, require possons erecting

The fact that some of the windows had been considerably enlarged does not take away the right to an injunction; and the plaintiff ought not to be put upon the terms of restoring the windows to their former size. Aynsley v. Glorer, 44 L. J., Ch. 523; L. R. 10 Ch. 283; 32 L. T. 345; 23 W. R. 459.

Identity of Windows—Interim Injunction—Balance of Convenience.]—The plaintiffs being the owners of an ancient building which had numerous windows, pulled it down and rebuilt it. A few of the windows in the new house included the space occupied by ancient windows, but were of larger dimensions; several others included some portion of the space occupied by ancient windows; and in some cases the spaces occupied by ancient windows were entirely built up in the new house. The defendants commenced to build a house on the opposite side of the street, which, if completed according to the plans, would materially interfere with the light coming to the plaintiffs windows. On a motion for an interim injunction the court, holding that the plaintiffs had shewn an intention to preserve, and not to abandon, their ancient lights, and that there was a fair question of right to be tried at the hearing, and considering that the balance of convenience was in favour of granting an injunction rather than of allowing the defendants to complete their building with an undertaking to pull it down if required to do so, granted an injunction till the hearing. Newson v. Pender, 27 Ch. D. 43; 52 L. T. 9; 33 W. R. 243—C. A.

On a motion for an interlocutory injunction to restrain the erection of proposed buildings in course of construction, upon the ground that they will materially obstruct the access of light to ancient windows, if the scientific evidence as to the probable effect of the erection is evenly balanced, the court will have regard to the relative convenience of the parties; and where the stoppage of such buildings would manifestly occasion serious loss to one side, largely in excess of any inconvenience which could be caused to the other by their temporary progress, the court refused to grant an interlocutory injunction, and directed the motion to stand for the hearing, upon the terms that any portions of the buildings should be removed which the court might then consider to be an obstruction. Mackey v. Scottish Widows' Fund Assurance Society, Ir. R. 10 Eq. 114. Sec S. C., Ir. R. 11 Eq. 541.

Glass Screen.]-Where an occupier of a house and grounds in London erected a translacent screen of glass thirty-five feet high, and thirty feet distant from the plaintiff's dwelling, having louvres to admit air, the court refused to grant au injunction, Rudgliffe v. Partland (Duke), 3 (4iff, 702; 8 Jur. (N.S.) 1007; 7 L. T. 126; 10 W. R. 687.

User for Period rendering Right Indefeasible, but still Inchoate. ]—The court will not grant an injunction to restrain interference with the inchoate right to light arising from uninterrupted user for over nineteen years, as the plaintiff's rights would be sufficiently safeguarded when, the right became absolute. Bridewell Hospital v. Ward, 62 L. J., Ch. 270; 3 R. 228; 68 L. T. 212.

additional walls to their premises to carry them  $[Warley\ (26\ Ch.\ D.\ 578)]$ , discussed.  $[Warlin\ v.\ back\ From\ the\ original\ wall\ in\ a\ proportionate <math>[Price, 68\ L\ J_-, Ch.\ 209:\ [1884]\ 1\ Ch.\ 276:\ 7\ R.\ distance to the height they are about to be <math>[90:\ 70\ L\ T.\ 202:\ 42\ W.\ R.\ 382]$ —C. A. distance to the height they are about to be erected. A court of equity, following this rule, restrained a party from building a wall more than ten feet higher than his original wall, this being the distance between the two walls. Beadel v. Perry, 15 L. T. 345; 15 W. R. 120.

Under Common Law Procedure Act-Requiring Party to do an Act.]—Under the Common Law Procedure Act, 1854, the court may grant an injunction, although the effect of restraining the defendant from the continuance of the wrongful act is to compel him to do an act. Where, therefore, the action was for obstructing the plaintiff's ancient lights by the erection of a wall, the court granted an injunction, thereby compelling the defendant to take down the wall. Jessel v. Chaplin, 2 Jur. (N.S.) 931; 4 W. R. 610.

Injunction or Damages-Discretion of Court -Lord Cairns' Act. ]-In exercising the discretion given by s. 2 of Lord Cairns' Act, to award damages in substitution for an injunction, in the case of a substantial interference with a plaintiff's ancient lights, the court will not, when the result of the defendant's buildings would be, if they were allowed to continue, to render the plaintiff's property absolutely useless to him, compel the plaintiff to sell his property out and out to the defendant. But, if the inpury of the plantin would be assertance, and he property will remain substantially useful to him, if the defendant's buildings are permitted to continue, the court may exercise its discretion by awarding the plaintiff damages, in lieu of an injunction, and for the purpose of exercising that discretion the court will take into consideration the nature and situation of the property, e.g. the circumstance that it is situate in the centre of a large city, such as London. Ayysley v. Glover (L. R. 18 Eq. 544), Krehl v. Burrell (7 Ch. D. 551), and Smith v. Smith (L. R. 20 Eq. 500) considered. Holland v. Worley, 54 L. J., Ch. 268; 26 Ch. D. 578; 50 L. T. 526; 32 W. R. 749 ; 49 J. P. 7.

The discretion given to the court by s. 2 of Lord Cairns' Act (21 & 22 Vict. c. 27), to award damages in substitution for an injunction in the ease of a substantial interference with a plaintiff's ancient lights, is a discretion to be exercised according to the facts of each particular case. Where the plaintiff has, at the trial, established his statutory right as against a defendant who has creeted a building causing a substantial interference with that right, the court will not compel him to accept damages or compensation instead of an injunction, especially where the defendant has, during the progress of the action, given an undertaking to pull down, if so ordered at the trial. Holland v. Worley (26 Ch. D. 578) not followed. Greenwood v. Harnsey, supra, col.

Where the plaintiff's ancient lights have been obstructed to a substantial extent by a new building, and will be still further obstructed by the carrying out of the building scheme, the plaintiff prima facie is entitled to an injunction to restrain such further obstruction, the court light and air as to cause material annoyance to having no discretion to award damages in lieu those who occupy the house; and the locality of thereof. The court awarded damages in respect the house, whether in a large town or in the

And see post, cols. 1175, 1176.

Trial of Right at Law. ]-A building is in the course of crection at a distance of thirty feet from the windows of a mansion, and an ininnetion is applied for to restrain the defendant from proceeding with the erection :- Held, no case for an immediate injunction, but the plaintiff is put upon terms to try the legal right, the defendant undertaking to abate if a verdict should go against him. Smith v. Elger, 3 Jur. 790.

Injunction to restrain obstruction of ancient lights refused, the nature of the alleged injury not requiring preventive interposition before the trial at law, and the legal right being doubtful,

Wynstanley v. Lee, 2 Swanst. 333. Injunction granted to prevent the obstruction of ancient lights, against a lessee of an eeclesiastical corporation, subject to the plaintiffs establishing their rights to the casement in an action. Sutton v. Montfort, 4 Sim, 559.

Injunction against stopping lights until trial of the rights, which was directed on the motion. Conrt will never, on motion, make an adverse order to pull down what has been done. Ruder v. Bentham, 1 Ves. 543. See also Injunction.

### iii. Nature of Interference or Obstruction.

Substantial Damage must be Proved.]—Since the Judicature Act, as before it, a plaintiff in an action to restrain an alleged obstruction to ancient lights cannot obtain an injunction unless he proves substantial damage. Rudhin, 46 L. J., Ch. 807; 6 Ch. D. 160.

The court will not grant an injunction to restrain the erection of a building on account of its obstructing the plaintiff's light, unless the plaintiff can show that he will sustain substantial damage. Robinson v. Whittingham, 35 L. J., Ch. 227; L. R. 1 Ch. 442; 12 Jur. (N.S.) 40; 13 L. T. 730; 14 W. R. 291.

Where there is, substantially, interference with comfort, and diminution of light for carrying on business, so that substantial damages would be given at law, a court of equity will restrain injury to ancient lights; and the fact that the amount of compensation is capable of being ascertained by a jury does not prevent the court from acting on the ground of irreparable mischief. Dent v. Auction Mart Co., 35 L. J., Ch. 555; L. R. 2 Eq. 288; 12 Jur. (N.S.) 447; 14 L. T. 827; 14 W. R. 709.

A plaintiff coming to the court for an injunetion to restrain the erection of new buildings by his neighbour, on the ground of interference with his light and air, must shew that his own residence will be rendered substantially less comfortable for purposes of occupation. Johnson Wyatt, 8, N. R. 270; 33 L. J., Ch. 394; 9 Jur. (N.S.) 1333; 9 L. T. 618; 12 W. R. 234—L.J.J.

In order to entitle a plaintiff to an injunction against a defendant obstructing the access of light and air to his house, the obstruction complained of must be such an interference with the of the obstruction caused by the part of the country, is to be taken into consideration in building already creeted. Dreafins v. Terucian estimating the amount of obstruction necessing fluence (b. (43 Ch. D. 316) and Molland v. to justify the interference of the court. In a large city the mere obstruction of the direct J. & S. 764; 11 Jur. (N.S.) 719; 13 L. T. 154; rays of the sun for two hours in the day, during 13 W. R. 538. the winter months, is not a sufficient ground for granting an injunction. Clarke v. Clark, 35 L. J., Ch. 151; L. R. 1 Ch. 16; 11 Jur. (N.S.) 914; 13 L. T. 482; 14 W. R. 115.

An injunction against darkening ancient windows is not granted in every case affecting the value of premises in a sufficient degree to support an action; the effect must be that material injury amounting to nuisance, which should not only be redressed by damages but upon equitable principles prevented. Att.-Gen. v. Nichol, 16

Ves. 338; 10 R. R. 186.

An injunction granted to restrain a defendant from erecting buildings so as to darken ancient lights, but with liberty to apply at chambers with respect to the erection of buildings on his property :- Held, that the foundation of the jurisdiction in equity to interfere is the existence of an injury to property of such a nature as to render the property in a material degree unsuitable for the purposes to which it is applied, or to lessen considerably the enjoyment of it. Yates v. Jack, 13 L. T. 17. See S. C. 14 L. T. 151.

Material Interference. ]-The question to be determined in a suit for an injunction to restrain an interference with light and air is still, as it was before the 2 & 3 Will, 4, c. 71, whether the acts of the defendant will materially interfere with the access of light and air to the plaintiff's house, so as substantially to affect the comfortable occupation of the honse. Kelk v. Pearson, L. R. 6 Ch. 809; 24 L. T. 890; 19 W. R. 665.

The defendant was erecting a row of houses running east and west. The western wall of the house at the west end of the row immediately adjoined the eastern boundary of the plaintiff's garden, which was on the north side of his house. The south frontage line of the row of honses was almost in a line with the north side of this house. The defendant's houses when completed were intended to be about thirty-two feet deep, and forty-five feet high, which height would exceed by a few feet that of the plaintiff's house. The evidence shewed that the nearest house to the plaintiff's house would interfere with the access of light and air thereto, to such an extent as substantially to affect the comfortable enjoyment of his honse :- Held, that he was entitled to a pernetual injunction to restrain the building of

the house nearest to his own, Ib.

The right of an owner of ancient lights is to prevent his neighbour from obstructing the access of sufficient light and air to such an extent as to render his house substantially less comfortable and enjoyable, and the Prescription Act (2 & 3 Will, 4, c. 71) has not altered the nature of the right or the principle on which it is to be determined whether it has been infringed. but has merely substituted a statutory title for an assumed grant. City of London Brewery Co. v. Tenant, 43 L. J., Ch. 457; L. R. 9 Ch. 212; 29 L. T. 755; 22 W. R. 172.

It is not every impediment to the access of light or of air which will warrant the interference of the Court of Chancery by way of injunc-tion, or even entitle the person alleging himself to be injured to damages at law. In order to found a title to relief in equity, or even at law, the onus of proving the injury rests with the B. for a mandatory injunction, or (alternatively) plaintiff. Curriers' Co. v. Corbett, 4 De G. for damages for the obstruction of light and air:

The reversioners in fee of houses on both sides of a court in the city of London sold their reversion of a house on one side of the court to a person who at the same time obtained from the termor an assignment of his interest. The purchaser cleared the site so obtained by him, and on it, and on adjoining land, commenced building in such a way as to interfere with the access of light and air to the vendor's houses on the opposite side of the court, and the latter filed a bill for an injunction to restrain him from proeceding with or completing his buildings, and for a preventive and mandatory injunction against any building to a greater height than that of the buildings pulled down, or so as to obstruct the light and air to a greater extent than had been the case prior to the clearance of the site :- Held, that there was no such material injury done or occasioned, or likely to be done or occasioned, to the vendors by the acts of the purchaser as would warrant the interference of a court of equity, and the bill was dismissed without costs, but without prejudice to any remedy at law. Ih.

The plaintiff was in the enjoyment of ancient lights. There had been a building adjoining his, with a wall alleged to have been twelve feet high, and not interfering with his light. defendant was about to pull down the rains of this wall, and rebuild it thirty feet high, which he alleged was the original height. The plaintiff's evidence as to the original height was more The defendant precise than the defendant's. said he never intended to build beyond the original height. The plaintiff proved that he threatened to build much beyond twelve feet. An injunction had been obtained, and the defendant never moved to dissolve it. At the hearing, a decree for a perpetual injunction was granted

without requiring the plaintiff to try his right at law. Potts v. Lery, 2 Drew. 272.

The windows of the back return of M.'s house looked into a passage or yard nine feet wide. The opposite wall of G.'s house was thirty feet high. G. proposed to take down the existing wall of his house, and rebuild it at a height of sixty feet; but with a recess of eight feet opposite one-half the frontage of M.'s wall. The rooms, the light of which was interfered with, were small and low. The evidence as to the amount of light of which the windows would be deprived, and the extent to which M.'s premises would be diminished in value, was conflicting. The court, being of opinion that the windows would be deprived of a considerable amount of sky area, granted a prohibitory injunction, and declined to give an issue. Magnire v. Grattan, Ir. R. 2 Eq. 246; 16 W. R. 1189.

A. and B. were two houses, separated from each other by a gullet two feet wide. In house A, there was a window a foot square, five feet above the ground, on one side of the gullet, the window being the only window of the pantry of house A. The owner of house B., in the lifetime of a tenant for life of A., and with her approval, pulled down house B., and built a new house in such a manner as to encroach upon the gullet, and to exclude the light and air from the pantry of house A. After the in respect of such an impediment, some material death of the tenant for life of A., the reveror substantial injury must be established, and sioners filed a bill against the owner of house

-Held, under the circumstances, that the incon- injunction he must shew a material diminution venience was not sufficiently serious to entitle in the quantity of air and light required for the plaintiffs to relief, either by mandatory the ordinary purposes of the room. the plaintnis to rener, entirer by manuatory injunction, or by an inquiry to assess damages. Sparling v. Clarson, 17 W. R. 518.

A bill stated that the erection of a proposed

building would materially affect the comfort and enjoyment, in respect of light and air, of the inhabitants of an adjoining house, of which there had been uninterrupted enjoyment for twenty years and upwards; and the court granted an injunction to restrain the erection of such building, the plaintiff undertaking to bring an action within one mouth. Are Kelk, 5 Jur. (N.S.) 114; 7 W. R. 194. Arcedeckne v.

Injunction to restrain building in London seventeen feet off plaintiff's house, refused. Fishmangers' Co. v. East India Co., Dick. 164.

When Right arises from Contract. -The question of substantial injury is not material for the purpose of an injunction, when the right established arises under a contract. Allen v. Seekhum, 47 L. J. Ch. 742. See S. C. in C. A., 48 L. J., Ch. 611; 11 Ch. D. 790; 41 L. T. 260; 28 W. R. 26.

The owner of two leasehold messnages, held on a term for ninety-nine years, demised one for the residue of the term, less one day, to L., he himself occupying the other, in which he carried on the trade of a jeweller. L., on entering, paid a premium of 300l., and a reut of 7l. 10s. was reserved. Subsequently the owner became, by the completion of twenty years' uninterrupted enjoyment, entitled to the use of windows in the rear of his house, looking into a yard upon which the house demised by him also looked, as ancient lights. In the demise there was a covenant restraining each party from building on the space between the backs of the houses so as to obstruct the light and air between certain points marked in an annexed plan. L. pulled down his house and commenced building nearer and higher than the former creetions :-Held, that there was a violation of the covenant, a material injury in the obstruction of light and air, and a clear right to the ancient lights; and a perpetual injunction granted with costs. Rolason v. Levy, 17 L. T. 641.

- Interference with Personal Comfort or Business. |-The court will interfere to protect a plaintiff whose personal comfort and enjoy-ment, and a fortiori, one whose trade or business is prejudicially affected by the diminution of light, and if the obstruction has been completed since the filing of the bill, will assess damages by way of compensation. Martin v. Headon, 35 L. J., Ch. 602; L. R. 2 Eq. 425; 12 Jur. (N.s.) 387; 14 L. T. 585; 14 W. R. 723.

- When special Purpose of Room not used for long Period. ]—The plaintiff had for fifteen years used an upper room in his house for the special purpose of drying tobacco. There was a free flow of light and air through this room by means of two windows, one at each end of the room, both of them ancient lights. On motion for an injunction to restrain the defendant from raising the roof of his house to a height which would occasion some, but not a material diminution of light to one of these windows :- Held, that as the plaintiff had not used the room for the special purpose for twenty years, he could claim no so as to interrupt his landlord's prospect. special right on that account; that to obtain an Hathurst v. Burden, 2 Bro. C. C. 64.

v. Harbottle, 28 L. T. 186.

A man is entitled to the preservation of his ancient lights, even though, at the time, he is not using them for purposes requiring the amount of light laid claim to. Younge v. Shaper,

27 L, T. 643; 21 W. R, 135.

— When Damages granted instead of Injunction.] — Wherever a plaintiff would recover substantial damages at law he has a right to sue in a court of equity, but there may be cases where the court of e juity will exercise the power conferred on it by 21 & 22 Viet. c. 27, and give damages instead of an injunction. But the court will not let the defendant gain an advantage in this respect by refusing an interlocutory injunction, and merely putting him on an undertaking to merery putting mm on an undertunning to pull down if ordered at the hearing. Appalog v. Glorer, 43 L. J., Ch. 777; L. R. 18 Eq. 544; 31 L. T. 219; 23 W. R. 147. Affirmed, 44 L. J., Ch. 523; L. R. 10 Ch. 283; 32 L. T. 345; 23 W. R. 459.

- Future as well as Present Use of Premises regarded. ]-In considering the amount of injury caused to a party by the obstruction of ancient lights, the court will have regard, not merely to the present, but also to the possible future use of the property. Ib.

Observations on the quantum of injury to ancient lights necessary before the court will interfere by granting relief generally. Culoraft

v. Thompson, 15 W. R. 387.

This quantum of injury is not to be estimated by limiting it with reference to any particular use to which the premises are put at the date of

the obstruction complained of. Ib.

In order to justify the interference of a court of equity by injunction, the obstruction of the ancient lights of a manufactory or of business premises must be such as to render the buildings to a material extent less suitable for the business to a material extent less sintance for the business carried on in them. *Jackson* v. *Nonceastle* (*Duke*), 3 De G. J. & S. 275; 33 L. J., Ch. 698; 10 Jur. (N.S.) 688, 810; 10 L. T. 685, 802; 12 W. R. 1066

Such obstruction must be one which diminishes the value of the premises for the purposes for which they are used at the time; and the fact that the obstruction may render the premises less fit for some other purposes to which they may by possibility be applied at a future time. cannot be taken into consideration. Ib.

It is not in every case in which an action can be maintained for the obstruction of ancient lights that an injunction will be granted by a court of equity, but the standard of the amount of damage that calls for the exercise of the jurisdiction has not been defined with any certainty. Ib.

Obstruction of View.]-If there is no inter-ference with the access of light and air, the fact that a shop window is obstructed in such a way that it cannot be seen from so great a distance down the street as formerly, affords no ground for the interference of a court of equity. Smith v. Owen, 14 W. R. 422.

The court restrained a tenant from building

Intrusion on Privacy.]—The intrusion upon a neighbour's privacy, even by opening a new window to overlook adjoining premises, is not a ground for interference either at law or equity. Turner v. Spouner, 1 Drew & Sun. 467; 30 L. J., Ch. 801; 7 Jur. (x.s.) 1068; 4 L. T. 732; 9 W. R. 684.

Duration of Obstruction.]—Where an obstruction to an ancient light had existed more than twelve months, but a promise had been given to remove the obstruction, and twelve months had not elapsed from the date of that promise before proceedings were taken:—Held, that there had not been such an interruption of the enjoyment as would deprive the owner of the light of his remedy. Galev. Albud; 8 Jur. (X.S.) 987; 6 L. T. 852; 10 W. R. 748.

Special Use of Premises for less than Twenty Years. ]-A bill was filed by a seed merchant, carrying on business in Dubliu, to restrain the defendants, who occupied adjacent offices, from erecting a new building then in progress, which he alleged would obstruct the access of light to an ancient window of the room in which he had sifted his seeds for the previous seventeen years; the plaintiff's interlocutory motion for an injunction was ordered to stand over till the hearing, the defendants being at liberty in the meantime to complete their works, on their undertaking to abide any order to be eventually made by the court as to the removal of the new building: on the hearing the vice-chancellor dismissed the bill with costs, and the plaintiff having appealed :-Held, that the defendants having caused such a diminution of light as, notwithstanding certain compensative illumination afforded by them, prevented the plaintiff from earrying on the delicate operation of sifting seeds in the room, he was entitled to relief, although he had so used the room for less than twenty years, and sufficient light remained in it for the ordinary purposes of a dwelling-house; and that the defendants should be restrained from erecting, or (on account of their undertaking) permitting to remain erected, any building obstructing the access of light as previously enjoyed by the plaintiff, and be directed to remove such portions of the newly-erected edifice as would constitute a breach of the foregoing injunction. Mackey v. Scottish Widows Fund Life Assurance Society, Ir. R. 11

A plaintiff who has acquired a prescriptive right to the access of light to his ancient windows, but who has only used such light for an extraordinary or special purpose for a period less than twenty years, is nevertheless entitled to a mandatory injunction to prevent any serious interference with the access of light as enjoyed for the special purpose. Lanfounchi v. Machiel (36 L. J., Ch. 518; L. R. 4 Eq. 421) not followed. Latturus v. Artistic Photographic Cu., 66 L. J., Ch. 522; [1897] 2 Ch. 214; 76 L. T. 457; 45 W. R. 614.

In Town or Gountry.]—There is no essential difference in the amount of light and air that may be claimed in town and country, and the court will interfere, though the amount of sky area abstracted is small, if its proportion to the previous amount of sky is such that the abstraction causes inconvenience. Martin v. Headon, 35 LJJ, Ch. 602; L. R. 2 Eq. 425; 12 Jur. (N.S.) 387; 14 L. T. 585; 14 W. R. 728.

In a case of interference with light there is no difference between the rights of a plaintiff in respect of a house in town or in the country. Deut v. Auction Mart Co., 35 L. J., Ch. 555; L. R. 2 Eq. 28; 12 Jur. (x.s.) 447; 14 L. T. 827; 14 W. R. 709.

Interference with Light of Chapel and School.]—Ou a bill filed to compel the removal of somuch of a large shed as interfered with the lights of a chapel and school-room below it, and to restrain the carrying on of the bushness of the defendants as bodier-unkers so as to interfere with the user of the chapel:—Held, that having regard to the nature of the building, relief as puryed would be granted at the heaving, though the shed was allowed to be erected and completed and the works carried on for some mouths without complaint. Buster v. Bower, 44 L. J., Ch. 625; 33 L. T. 41; 23 W. R. 805—LJJ.

Difference between Interference with Rights to Light and Water.]—The distinction explanned between an obstruction to ancient lights and an interference with the water rights of a riparian reporter with reference to the question whether damages should be awarded in hen of an injunction. Penniquon v. Brinop Intil Cod. 46. L. J., Ch. 773; 5 Ch. D. 769; 37 L. T. 149; 25 W. R. 874.

## iv. Defences.

To establish a sufficient defence to an action or m injunction for alleged injury to light, the defendant must shew, that for whatever purpose the plaintiff may wish to employ the light whilst the house rotains its original character there will be no material interference with it. Dent v. Juction Mart Co., 35 L. J. Ch. 5.55; L. R. 2. Eq. 288; 12 Jur. (N.S.) 447; 14 L. T. 827; 14 W. R. 700; 14 June 14 June 15 Ju

The following grounds of defence—first, that the plaintiff will have, when his hippy is complete, as much light and air as other persons have for the same purposes; secondly, that the plaintiff might avoid the injury by calarging his windows; thirdly, that the plaintiff has been accustomed to use blinds for his windows; fourthly and fiftbly, that a room next for a special purpose is not well adapted to that purpose, and that it has been so used without the knowledge of the defendant; and, sixthly, that the defendant intends to one the ceil by building with glazed tiles, or other means for improving the light—are insufficient. If

#### v. Form of Injunction.

Form of order taken by consent upon a motion for an injunction to restrain the erection of a public building in such a way as to obstruct the plaintiff's ancient lights. Ford v. Gyr., 6 W. R. 935

Terms not to be taken Strictly, —The terms of an injunction restraining a party from creeting and building, so as to darken, hinder or obstruct the free access to light and air, as such access as previously enjoyed, are not to be taken strictly. Beadel v. Perry, 19 L. T. 760; 17 W. R. 185.

Air.]—"Air" is not to be coupled with "light" in an injunction as a matter of common form. Baster v. Bower, supra.

Reference to Chambers.]—The court, though it will grant a perpetual injunction to restrain the darkening of ancient lights, will yet in a proper case retain the power of sanctioning any proper scheme, which may be proposed by the defendant, and will for this purpose give liberty to apply to the judge in chambers with reference to any such the judge in chambers with reference to any such scheme, and will not require the payment of sexts as a condition precedent to such application. Stokes V. City Offices Co. 2 Hem. & M. 650; 11 Jun. (N.S.) 360: 12 L. T. 602; 13 W. R. 537.

Where an injunction was granted to restrain the interruption of an ancient light, the court gave the defended leave to apply in order to ascertain whether any building which he might propose to erect world cause such an interruption. *Tatae v. Juch.* 35 I. a.J., Ch. 539; L. R. I. Ch. 295; 12 Jur. (N.8.) 306; 14 L. T. 151; 14 W. R.

Narrowing Declaration.]—Where an injunction is granted against obstructing the ancient lights of business premises, the count ought not to make any declaration narrowing, or appearing to narrow, the right of the plaintiff to the quantity of light therefore used by him for the purpose of his business. If

# vi. Inspection of Premises.

By Judge.]—A judge of the Court of Chancery ought not to make a personal inspection of buildings in order to ascertain whether a material diministion of light and air is caused in any case. Level v. Schweder, 43 L. J., Ch. 232; 22 W. R. 202.

A judge sitting in equity is bound to pronounce his judgment according to the evidence. Hence, to decide a case relating to light and air upon conclusions of fact derived from ocular inspection is a course which a judge in equity cannot, in ordinary cases, be recommended to adopt. Judesson v. Neucoustle (Duke), 10 Jur. (N.S.) 688; 10 L. T. 685.

Appointment of Surveyor to report.]—When the court was not satisfied from the evidence whether the wall proposed to be built by the defendant would or would not be a material obscruction to the plaintiffs lights, the court directed a temporary sercen to be erected to the height of the proposed wall, and appointed a surveyor to report on the effect. Levech v. Schweder, 43 L. J., Ch. 487; L. R. 9 Ch. 463; 30 L. T. 586; 22 W. R. 633.

The court ought not under 15 & 16 Vict. c. 80, s. 42, to make an order before the trial, appointing a scientific person to report upon the question of fact. Ballie Co. v. Simpson, 24 W. R. 300.

Therefore, in a light and air suit, in which an interlocutory injunction had been granted, a motion by the defendant for the appointment of a surveyor to view the premises and plans and report thereon as to the injury to the plaintiffs, was refused with costs.

was refused with costs. Tb.

In a case of darkening ancient lights, the
Lift a case of darkening ancient lights, the
court withself an application by the defendants
before the hearing, for the appointment of a
performance of the property,
and the property,
and to be the part of the plaintiff,
being given only on the part of the plaintiff,
Stokes v. City Liftees (b., 11 Jur. (N.S.) 560; 12
L. T. 669; 13 W. L. 537; 2 Hem. & M. 560.

# vii. Application.

Time for—Completion of Obstruction.]—A party coming to the court to prevent an obstruction of ancient lights, must take proceedings before the obstruction complained of is completed, otherwise his remedy is by action, and it is immaterial whether he knew of the obstruction before it was completed. Lewrence v. Austin, 34 L. J., Ch. 598; 11 Jur. (N.S.) 576; 12 L. T. 757; 13 W. R. 981.

The mere fact that the damage created by obstruction of light is completed before bill filed, is not of itself a sufficient ground for refusing a mandatory injunction. Durall v. Pritchard, 35 L. J. Ch. 223; L. R. 1 Ch. 244; 12 Jar. (N.S.) 16; 13 L. T. 545; 14 W. R. 212.

— Effect of Delay.]—Injunction to restrain the obstruction of ancient lights refused on the ground of delay, the bill being retained with liberty to proceed at law. Capper v. Hubbuck, 30 Beav. 160; 31 L. J., Ch. 123; 7 Jur. (8.8.) 457; 9 W. R. 332.

A delay of five weeks after knowledge of an intention to build, so as to obstruct ancient lights:—Held, under the circumstances, not such acquiescence as to discuritle a plaintiff to relief, Johnson v. Wyatt, 33 L. J., Ch. 394; 9 Jur. (x.S.) 1333; 9 L. T. 618; 11 W. R. 852.

relief. Johann v. Wyatt, 33 L. J., Ch. 394; 9 Jur. (X.S.) 1333; 9 L. T. 618; 11 W. R. 852. In order to justify the court in not interfering at the hearing, there must be a much stronger case of acquiescence than is required upon an interlocutory application. Ib.

Three weeks before a defendant began to erect certain buildings, afterwards complained of as obstructing the plantiffs' light and air, the plaintiffs when the plantiffs with the intended to build, and that not obtained plans from, and made a contract with object. The plaintiffs did not also gained to be proper or the plantiffs of the plantiffs of the plantiffs when the plantiffs of the plantiffs of the plantiffs of the plantiffs of the plantiff of the plantiffs of the plantiff of the plantiffs of the plantiffs

and Mutual Recrimination.]—Where, in an injunction suit to restrain a defendant from obstructing the plaintiff's light and aft, a motion for a decree was made nearly three years after filing the original bill and other proceedings in the suit, and after various acts on the part of both plaintiff and defendant, whereby it appeared to the court that each party had to some considerable extent injured the other :—Held, that although the plaintiff sought the injunction and changes against the defendant, and the defendant was to some extent to blame, still that, upon the evidence, the proper course was simply to dismiss the bill without costs. Cocks v. Hometine, 14 L. T. 390.

Ex Parte.]—Injunction granted ex parte to restrain the owner of a house from making any erections or improvements so as to darken or obstruct the ancient lights or windows of an adjoining house. Back. v. Stacy. 2 Russ. 121.

#### d. Action.

Who may be joined as Defendant.]—In an action for obstructing the plaintiff's lights, a celerk who superintended the erection of the building by which they were darkened, and who

alone directed the workmen, may be joined as a co-defendant with the original contractor. W7son v. Peto, 6 Moore, 47.

By Reversioner. -A reversioner recovered in an action for obstructing an ancient light to the injury of his reversionary interest. The obstruction was not removed :-Held, that he might maintain a second action for the continuation of the injury to his reversionary interest. Shadwell v. Hutchinson, 2 B. & Ad. 97; 4 Car. & P. 333; M. & M. 350; 9 L. J. (0.8.) K. B. 142.

A declaration for an injury to the reversionary interest of the plaintiff by obstructing ancient lights is sufficient if it shews an obstruction which may operate injuriously to the reversion, either by its being of a permanent character or by its operating in denial of the right. Metropolitan Association for Improving Ducklings v. Petch, 5 C. B. (N.S.) 504; 27 L. J., C. P. 330; 4 Jur. (N.S.) 1000.

Whether abated by Death. ]-The plaintiff in an action for a mandatory injunction and damages for obstruction of light to freehold property died more than six months after action brought, and three months after her death B., her executor and devisee, obtained the common order, under Ord. XVII. r. 2, to carry on proceedings against the defendant. The defendant moved to discharge the order on the ground that the cause of action did not survive :- Held, that plaintiff's equitable right to a mandatory injunction devolved to B., as her devisee, and that B., as her executor, was at least entitled to continue the action for recovery of damages for injury committed during a period of six months prior to plaintiff's death. Jones v. Simes, 59 L. J., Ch. 351; 48 Ch. D. 607; 62 L. T. 447.

Evidence.]—In an action for the obstruction of light to the windows of an hotel, the summons and plaint containing no allegation of special damage, witnesses deposed that guests coming to the hotel had refused to take the rooms which were alleged to be darkened, and had stated the darkness of the rooms as a ground for their refusal :- Held, that this evidence of the statements made by the guests was not admissible.

## e. Damages.

Consequential-Admissibility of Evidence. ]-In an action for the obstruction of light and air by a hoarding erected before the defendant's house next door to that of the plaintiff, the not himself in possession or occupation of it. Ib. caused divers persons to commit nuisances, and place rubbish against the hoarding, from which nuisances the plaintiff was injured :—Held, that evidence of these nuisances was not admissible, as the defendant could not be liable for their existence. Steele v. Warne, 23 L. T. 394.

Inquiry as to—Where Injunction would be dismissed.]—When an unlawful obstruction of an ancient light had existed for nearly six years, the court being of opinion that before the passing of the 21 & 22 Viet. c. 27, a bill for an injunction would have been dismissed, refused to direct an inquiry as to damages under that act, Gaunt v. Fynney, 42 L. J., Ch. 122; L. R. 8 Ch. 8; 27 L. T. 569; 21 W. R. 129.

A plaintiff coming to the court for an injunction to restrain the erection of new buildings by his neighbour, on the ground of interference with his light and air, must shew that his own residence will be rendered substantially less comfortable for purposes of occupation. Though an injunction be refused in such a case, the court, if it appear that damages have been sustained, may, if it think fit, exercise the jurisdiction conferred by 21 & 22 Viet. c. 27, and Hecton contents by 2 to 2 to 2, and direct an inquiry as to damages. Johnson v. Wyatt, 33 L. J., Ch. 394; 9 Jur. (N.S.) 1383; 9 L. T. 618; 11 W. R. 852. And see Sication v. G. X. Ry., 33 L. J., Ch. 399; 10 Jur. (N.S.) 191; 9 L. T. 745; 12 W. R. 891.

An inquiry as to damages will not be directed where a plaintiff has opened a case of substantial damage and failed to prove it. Kino v. Rudhin, 46 L. J., Ch. 807; 6 Ch. D. 160.

 Where Jurisdiction to grant Injunction. -Where the circumstances justified the court in granting a mandatory injunction at the hearing, to compel a defendant to pull down newlyerected buildings to the height of the former ones, on the ground of obstruction to the plainfiff's light and air; but where the plaintiff, having heard of the intended structure in April, did not complain till the November following during which time the defendants had laid out large sums; and where the plaintiff had also, since bill filed, made an offer to take a money compensation for the injury to her rights; and, thirdly, where very great damage would be caused to the defendant by an injunction:— The court, instead of an injunction, directed an inquiry as to the amount of damages sustained by the plaintiff. Senior v. Pawson, L. R. 3 Eq. 330: 15 W. R. 220.

When on the site of old buildings the erection of new buildings of much greater height, materially obstructing the access of light and of air to adjoining property, has been completed before complaints made or bill filed, the court, although it has jurisdiction to grant a mandatory injunction, will not do so where the owner of such property has himself treated the case as one for compensation by damages. But, having Greeham Hotel Ch. v. Manning, Ir. R. 1 C. L. 125. assess damages and will not leave the plaintiff to his remedy by action. Gart (Viscountess) v. Clark, 18 L. T. 343: 16 W. R. 569.

Although a month should clapse between the completion of the building and any objection thereto, the court will not consider that there was laches or acquiescence on the part of the owner of the adjoining property when he was

Implied Covenant not to obstruct. ]-Damages were given in respect of an obstruction of access of air to a slaughter-house which had been used for upwards of thirty years, on the ground of implied covenant. Hall v. Lichfield Brewery Co., 49 L. J., Ch. 655; 43 L. T. 380.

Measure of-For Obstruction.]-In an action for the obstruction of ancient lights, the judge directed the jury that they were to consider whether there had been a sensible diminution of light, so as to make the plaintiff's premises less available for the purposes of occupation or business, to which they were then, or might thereafter be made, applicable, and that the damages were to be estimated according to the diminution

of value of the premises for such purposes: into an archway and a passage passing nuder—Held, a right direction, on the ground that part of his house towards the rear and also a the purposes for which the premises had actually been used while the light had been enjoyed were not the proper measure of the right, building intended to be very lefty, immediately Moore v. Hall, 47 L. J., Q. B. 334; 3 Q. B. D. facing the end of the archway passage. On a 178; 38 L. T. 419; 26 W. R. 401. Compare written notice from W. they desisted, but seven Dickinson v. Harbattle, and Ayastey v. Glacer, months after, when the courts were not stituted.

prevent access of light and air to the plaintiff's windows was granted ex parte on the 4th of November, 1879, and on the 27th of November his ancient lights, and for damages:—Held, on Court of Appeal discharged the order. On the 14 W. R. 725. 11th of November, 1880, a perpetual injunction as to access of air was granted; but on the 21st of June, 1881, the Court of Appeal dismissed the action with costs. On the 16th of February, 1882, the defendant gave notice of motion for an inquiry as to damages, which was refused by Bacon, V.-C. The only damage alleged was that the defendant had agreed to let part of the property with the new buildings to a tenant, and was prevented from carrying this out by the injunction preventing his building. It was not proved, however, that there was any binding agreement to take a lease, nor did it appear that the injunction interfered with the erection of the buildings to such an extent as would have entitled the intended tenant to throw up the agreement if binding :-Held, by the Court of Appeal, that an inquiry as to damages ought not to be granted. Smith v. Day, 21 Ch. D. 421; 31 W. R. 187—C. A.

Whether where an interlocatory injunction has been wrongfully granted, owing to a mistake of law by the judge, without any misrepresentation, suppression or other default on the part of the plaintiff, an inquiry as to damages can be directed under the undertaking, quere. Jessel, M.R., and Cotton, L.J., differed, and Brett, L.J., gave no opinion. *Th.* 

The court is not bound to grant an inquiry as to damages whenever the defendant has sustained some damage by the granting the injunction; but it has a discretion, and may refuse an inquiry if the damage restrained is trivial or remote, or if there has been great delay

in making the application. Ib.

The question considered at what time the application for an inquiry as to damages ought to be made :-Held, that, even if there had been a binding agreement by the proposed tenant to take a lease, and the injunction had so interfered with the building as to entitle the tenant to be off the bargain, damages ought not to be granted in respect of it, for that damages must be confined to the immediate natural consequences of the injunction, under the circumstances which were within the knowledge of the party obtaining the injunction. Ih,

Where Injunction refused. ]-A suit cannot be sustained for the purpose of recovering damages for an invasion of ancient lights when the injunetion is refused. Calcraft v. Thompson, 35 Beav. 559.

Evidence.] - W., residing near Fenchurch

skylight near a cottage belonging to Messrs, H., who pulled down the cottage, and commenced a building intended to be very lofty, immediately suddenly recommenced, and carried up the wall to a great height before a bill could be filed, or Undertaking as to Damages.]—An injunction in interim order for an injunction obtained to restrain the defendant from building so as to which was done as soon as possible, to restrain which was done as soon as possible, to restrain raising any buildings so as to obstruct the plaintiff's light and air, and the enjoyment of was continued until the trial or further order, the evidence at the hearing, and measurement of the plaintiff giving the usual undertaking as to sky area, that the plaintiff was entitled to-damages. On the 18th of February, 1880, the damages. Webb v. Hunt, 12 Jur. (X.S.) 558;

## D. RIGHT OF SUPPORT. 1. From Adjoining Land.

Nature of Right. ]-The right of a person tothe support of the land immediately around his house is not in the nature of an easement, but is the ordinary right of enjoyment of property, and till that is interfered with he has no legal ground of complaint, although in fact something may have been done which (without his knowledge).
has occasioned results that will afterwards affect his property. Buckhouse v. Bonomi, 9 H. L. Cas. 503; 34 L. J., Q. B. 181; 7 Jur. (N.s.) 809; 4 L. T. 754; 9 W. R. 769.

A laudowner has a right independently of prescription to the lateral support of his neighbour's land, so far as that is necessary to sustain his soil in its natural state, and also to compensation, for damage caused either to the land or tosupport. Hunt v. Peakv. 1 Johns. 705; 29 L. J., Ch. 785; 6 Jur. (N.S.) 107.

The right of the owner of land to the lateral support of his neighbour's land is not an absolute right, and the infringement of it is not a cause of The first and the infragement of this into a cause of action without appreciable damage. Smith v. Thuckeruh, 35 L. J., C. P. 276; L. R. I. C. P. 504; 12 Jur. (8.8.) 545; 14 L. T. 761; 14 W. R. 832; 1 H. & R. 615.

Therefore, where A. dug a well near B.'s land, which sank in consequence, and a building erected on it within twenty years fell, and it was proved that if the building had not been on B.'s land, the land would still have sunk, but the damage to B. would have been inappreciable :-Held, that B. had no right of action against A. Ib.

The court will interfere to restrain excavations which threaten danger to adjoining houses, though the actual resulting damage may be small, Dent v. Auction Mart Co., 35 L. J., Ch., 555.

Lateral support of House by Soil and Building not contiguous. ]-A., B. and C. were the owners of three consecutively adjoining houses in a street; B.'s house intervened between those of A. and C. A.'s premises were destroyed by fire and rebuilt. After rebuilding, B.'s side wall separated from C.'s premises, the adjacent wall in which became cracked. In an action by C. against A. for damages, evidence of architects was given to shew that the crack was caused by the settling down of A.'s new building on soft. clay, and drawing over with it B.'s premises; Street, London, had ancient windows looking and on the other hands architects were produced

on behalf of A, who proved that the rebuilding plaintiff's house:—Held, that the plaintiff was properly executed, and attributed the entitled to restrain the defendant from executating separation to a did settlement increasing gradually. The jury, upon the question being that there was not enough in the special circumstantial to them. negligence; but the learned judge at the trial directed a verdict for A., being of opinion that there was no evidence of negligence :-Held, that as the evidence shewed that the injury was caused by the rebuilding of A.'s premises, C. was entitled to maintain the action, even assuming the rebuilding to have been performed with nig the redunding to have usen performed with due skill. The principle of Dallon v. Angus (6 App. Cas. 740) applied: Solomon v. Vintuers' Co. (4 H. & N. 585) distinguished. Latimer v. Official Co-operative Society, 16 L. R., Ir. 305.

Land conveyed for Purpose of Building.]grant made expressly for the purpose of the grantee's building a house creates a legal easement over the adjoining land retained by the grantor co-extensive with the known uses of the grant; and the circumstance that the grant does not notice the intention of building is immaterial in a case where both granter and grantee are aware of it, affecting at most the grantee's remedy only, not his right also, relative to such an easement. Robinson v. Grave, 27 L. T. 648; 21 W. R. 223. Affirmed, 29 L. T. 7; 21 W. R.

Statutory Purchase of Land for Building— Leave and Licence by Corporation.]—Where by an act of parliament certain commissioners were empowered to purchase land for building a bridge, which became subsequently vested in the corporation of a borough. Held, that the corcorporation of a borough. Held, that the cor-poration could not be said to have acquired under the act a right to support of the bridge by way of easement over adjoining land for which they had not paid. Sunderland Corpora-tion v. Horne, 3 W. R. 508.

Held, also, that no easement had been acquired by lapse of time. Ib.

Held, also, that the corporation being also the local board of health for the borough, leave to erect certain buildings according to plans being given must be taken to be a leave granted by the

Implied Grant-Sale of Plots of Land. ]-The corporation of L. put up a piece of land for sale in lots, the interest acquired by each purchaser being a right to a lease of the lot purchased by him, and he being bound to build upon the lot according to plans to be approved by the corporation. None of the lots were sold, and in July, 1868, the plaintiff agreed for the purchase of one of the lots by private contract, subject to the original conditions. He furnished plans shewing a foundation 10 feet 9 inches deep; but finding the subsoil unsafe he laid his foundation at a depth of 8 feet 3 inches to the knowledge of the corporation, whose officer inspected the operations and made no objections. In June, 1869, the plaintiff's house was carried to the joists of the ground floor. In August, 1869, the defendant purchased from the corporation the determined from the corporation and adjoining lot. In October, 1869, when the plaintiffs house was nearly finished, the corporation granted him his lease. After this the defendant got his lease, and, in 1881, wishing to decremant for his case, and, in 1801, wishing to sentine, per Lora Schooling, L.C.,—Such a carry his foundations lower than those of the right of support is an easement within the meaning that the senting of the Prescription Act, 2 & 3 Will. 4, c. 71, and endangered the foundations of the s. 2. Ib.

stances of the case to take away the right of support from the adjoining lands of the grantor which is implied in a grant of land for the purpose of building. How the case would have stood if the grants to the plaintiff and the defendant had been contemporaneous, or if the right of support claimed would have prevented the corporation from building in a reasonable way on the adjoining lot, quere. Righy v. Bennett, 21 Ch. D. 559; 40 L. T. 47; 31 W. R. 222; 47 J. P. 217-C. A.

Agreement to build. ]-An owner of adjoining lots of land, numbered 6 and 7, sold lot 6, to the defendant, and lot 7 to the plaintiff. By the terms of the conveyance to him, the defendant agreed to build on his land according to dant agreed to build on his acid according to a certain elevation. To do this, excavations on lot 6 were necessary, which deprived the buildings on lot 7 (the weight of which had been increased by the plaintiff since the sale to him) of lateral support, and they consequently fell :-Held, that an action would not lie against the defendant for the injury caused to the plaintiff, as the defendant was only carrying out his conas the certacant was only carrying one ins contract with the vendor, in whose place the plaintiff stood. Marchie v. Mack, 19 C. B. (8.8.) 190; 34 L. J., C. P. 337; 11 Jun. (8.8.) 608; 12 L. T. 735; 13 W. R. 896.

Negligence of Adjoining Owner. 111 an action by a reversioner, a count alleged that a messuage and land in fact received lateral support from, and were supported by, the land adjoining, yet the defendant wrongfully and negligently dug and made exervations in the land so adjoining, and without sufficient shoring, propping or otherwise protecting the messnage and land from the effects thereof, and thereby deprived the messuage and land of their support, whereby the land and messuage sank. Another count stated that the plaintiff was, by reason of her interest in the messuage and land, entitled to have the messnage supported laterally by land adjoining, yet the defendant wrongfully and negligently dag and made excavations in the land adjoining, and without sufficiently shoring, propping or otherwise protecting the messaage and land, and thereby deprived the messaage of the support to which the plaintiff was so entitled, whereby the messnage and land sank :- Held, that both counts disclosed a right of action, as well in respect of the injury to the house as to the land. Bibby v. Curter, 4 H. & N. 153; 28 L. J., Ex. 182; 7 W. R. 193.

Alteration of Building-Prescription.]-A right to lateral support from adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been newly built, or altered so as to increase the lateral pressure, at the beginning of that time; and it is so acquired if the enjoyment is peaceable and without deception or concealment, and so open that it must be known that some support is being enjoyed by the bidling. Datton v. Anyns, 50 L. J., Q. B. 689 16 App. Cas. 740; 44 L. T. Sath, 30 W. R. 191; 46 J. P. 132—H. L. (E.) Semble, per Loui Selborne, L.C.—Such a

Two dwelling-houses adjoined, built independently, but each on the extremity of its owner's soil, and having lateral support from the soil on which the other rested. This having continned for much more than twenty years, one of the houses (the plaintiffs') was, in 1849, converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly and without deception or concealment, More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The contractor employed a sub-contractor upon similar terms. The house was pulled down, and the soil under it excavated to a depth of several feet, and the plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory:— Held, that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury. Bower v. Peate (1 Q. B. D. 321) approved. Ib.

Adjoining Owners deriving under Common Grantor-Implied Covenant-Injury following from Acts of Third Party.]—The plaintiffs and the defendants were adjoining owners of land. The plaintiffs derived under a grant, made for building purposes more than twenty years prior to the injuries complained of. The grantors were the predecessors in title of the defendants. Subsequently to the date of the grant, and after the building of a house by the plaintiffs on their land, a railway cutting was made near the locality; but it did not appear that any injury was thereby caused to the plaintiffs' house. The defendants having, however, piled large quantities of stones on their lands, immediately adjoining the plain-tiffs' house, cracks appeared in the walls of the latter, and the plaintiffs brought an action to recover damages caused by the deprivation of the right of support. The judge at the trial left to the jury only the questions :- Whether the plaintiffs' house had been supported by the defendants' land for more than twenty years? and, Whether the injuries complained of had resulted from the deprivation of such support? and his lordship declined to submit to the jury other questions which the defendants' counsel required to be left to them, viz.:-(1) Were the plaintiffs' houses and their foundations constructed with reasonable skill and care, having regard to the nature of the soil, and other surrounding circumstances ! (2) Were due and reasonable precantions taken by the plaintiffs and their predecessors in title to protect and maintain the houses, having regard to the construction and existence of the railway? (3) Were the injuries complained of, or any of them attributable to the want of such due and reasonable precautions! (4) Was the piling of the stones on the defendants' land a reasonable use thereof, under all the surrounding reasonable use increas, index an one surrounding circumstances? (5) Were the injuries complained of caused wholly by the placing of the stones on the defendants land? The jury having found for the plaintiffs, and assessed damages :-Held, that the plaintiffs were entitled to retain the verdict, and that their right to support, whether acquired by grant or prescription, was | 421.

not in any way affected by the alteration of circumstances caused by the making of the railway catting. Green v. Belfast Tramways Co., 20 L. R., Ir. 35. Affirmed in C. A.

House built on Mining Lands, —If a party builds a hone on his own land, which has previously been excavated to its extremity for mining purposes, he does not acquire a right to support for the house from the adjoining land of another, at least not until twenty-one years have clapsed since the house first stood on the exertance hand, and was in part supported by the adjoining land, so that a grant by the owner of the adjoining land of such right to support may be inferred; for rights of this sort can have their origin only in grant. Partridge v. Scott, 3 M. & W. 220; I. H. & H. St. 7. L. J., Ex. 10.

— Right to prevent Working of Mines.]—
A sold land to B. for the purpose of an ironfoundry. Adjoining the land so sold to B., A. had
other land, under which was coul. A. Inflorwards
leased the minerals to C., who commenced working the coal within such a distance from the land
of B. as to be reasonably calculated to endanger
its stability.—Held, ground for an injunction
against A. and C., although no actual damage
had been sustained by B. Südous v. Short, 48
L. J., C. P. 705; 2 C. P. D. 572; 3 T. L. 72, 200.

---- Right to Damages for Subsidence.]-The plaintiff was owner of a house erceted in 1834 on solid ground. Previously to the building of the house, a portion of the minerals had been gotten under a garden which adjoined the house. In 1838, a portion of the minerals was gotten under the defendant's land, which adjoined the garden. In 1855 the defendant commenced getting out the rest of the minerals under his land. In 1857 the plaintiff's land sunk, and the house was injured by the defendant's mining operations. was found by the jury that the sinking of the plaintiff's land was caused by the defendant's workings; that some damage would have happened, but not to the same extent, if the garden ground had been left solid: that the defendant knew of the excavations under the garden; that the land would have sunk in just the same whether there was a house on it or not; and lastly, that the damage to the house by the sinking was 3001.; 2501. occasioned solely by the defendant's workings, and 501, damages caused, in part, by the exeavations under the garden:-Held, first, that inasmuch as the sinking of the land was in no way caused by the weight of the house, he was entitled to recover whether he had acquired a right to support for his foundations by the defendant's soil or not. Browne v. Rubins, 4 H. & N. 186; 28 L. J., Ex. 250. Held, secondly, that although the excavations

Held, secondly, that although the excavations under the garden contributed, to the extent of 504. to cause the damage, the plaintiff was entitled to the whole 8004, because if the defendant had not done the wrongful act complained of, no part of the damage would have occurred.

But see also *Love* v. *Bell*, infra; and *Consett Waterworks Co.* v. *Ritson*, 22 Q. B. D. 318; 60 L. T. 360; 53 J. P. 373.

Continuous Subsidence caused by One Excavation—Accrual of Cause of Action.]—See Crumbie v. Wallsend Local Beart, 60 L. J., Q. B. 392; [1891] 1 Q. B. 503; 64 L. T. 490; 55 J. P.

Exemption by Deed.] -An owner of free-hold land and copyhold land adjacent to each note and and copynoat man atmeent to each other sold the copyhold land, and by a deed of even date with the surrender the purchaser covenanted and granted that the vendor, his heirs and assigns, might work in the adjoining freehold land without being liable to make compensation for any injury caused by such working to certain buildings authorised by the deed to be erected on the copyhold land, and the purchaser, his heirs and assigns, would indennify the vendor, his heirs and assigns, against any claim for such The deed was not entered on the court rolls, nor referred to in the surrender. The copy-hold land was afterwards conveyed enfranchised by the purchaser and the lords of the manor to by the purchaser and the lords of the manor to the church building commissioners, under whom the plaintiff took. Neither the lords of the manor, nor the commissioners, nor the plaintiff, had notice of the deed. The defendant, who took the adjoining freehold land under the original vendor, having by working the mines in it caused ventor, naving by working the innies in it caused the land of the plaintiff to sink, and damaged the buildings thereon —Held, that he was not protected by the deed from liability to make compensation. Richards v. Hurper, 35 L. J., Ex. 130; L. R. I Ex. 169; 12 Jur. (N.S.) 770; 14 W. R. 643; 4 H. & C. 55.

Exemption by Prescription or Custom.] -Semble, that there may be a valid claim by prescription or custom in a manor, for the lord prescription or custom in a manor, for the love or his licentees to work mines so as to destroy the tenant's surface. Wahrfield. v. Bucelengh (Duke), 39 L. J., Ch. 441; L. R. 4 H. L. 377; 23 L. T. 102.

Reservation of Minerals-Manorial Rights.] By an act for inclosing a moor, being the waste of a manor, the commissioners were directed to allot the residue of the moor amongst the owners of every separate ancient dwelling-house within Ib the manor having a right of common thereon, It was also enacted that after the allotments were made all right of common upon the moor should cease, and the allotments should be held by the same temper and estates as the dwellinghouses, and that the lords of the manor and all persons claiming under them should hold and persons chaining under them should hold and enjoy all "mines, power of using or gray" and and way-leave . . . to the owner or owners of the said manor incident, appearant belonging or appertaining . in we full ample and beneficial namner, to all intents and paraness, as they could or might have held and enjoyed the same in case this act had not been made." The act contained a provise, whereby it was enacted that in case the lords of the manor or any person claiming through them should work any mines lying under any of the allotments, or any mines tying under may or the anotherits, or should lay, make or use any way over any of the allotments, "such person or persons so working such mines, or laying, making or using any such way or ways, shall make satisfaction for the damages and spoil of the ground occasioned thereby to the person or persons who shall be in possession of such ground at the time or times of such damage or spoil, such satisfaction to be settled" by arbitration "and not to exceed the sum of 51, yearly during the time of working the mines, or continuing or using such way or ways, for every acre of ground so damaged or spoiled."

house was built upon it before 1826, which was altered and enlarged in 1854 and again in 1877.

The plaintiff S, was the owner of the house and successor in title to P. : the plaintiff B. was the successor in the to 1. ; the plantiff B, was the occupier mider a lease for twenty-one years from the 28th of November, 1876. The defendants were lessess from the lords of the manor of the coal-mines, fire-clay and minerals under por-tions of the waste allotted under the inclosure act above mentioned, and in 1877 began to work the coal in that portion of the mines which the coal in that portion of the names which underlay the plaintiff's house, and removed all the coal from under it without leaving any support for the roof of the mine. port for the roof of the mine. In consequence the surface of the land subsided, and the house was damaged to an amount exceeding the sum was damaged to an amount exceeding the same recoverable under the proviso in the act above mentioned. This mode of working a mine was usual and proper in the district where the mines were situate, and the mines were skilfully worked. The land on which the plaintiff's house stood would have been let down, whether there was any house on it or not:—Held, that the plaintiffs were entitled to have their house supported by the mines and minerals comprised supported by the mines and minerals comprised in the lease to the defendants, and that the defendants were liable to pay to the plantiffs compensation beyond that mentioned in the inclosure act above referred to. Bull v. Luce, 52 L. J., Q. B. 290; 10 Q. B. D. 547; 48 L. T. 592; 47 J. P. 468—C. A. Affirmed, S. M., Lore v. Bell, 53 L. J., Q. B. 257; 9 App. Cas. 286; 51 L. T. 1; 32 W. B. 725; 48 J. P. 516—H. J. CE.

280; 31 L. I. I.; 92 II. L. I.; 93 III. L. II.; 94 III. L. (E.)
Held, further, by Liudley, L.J., that even if
the defendants had, by virtue of the inclosure act, a right to let down the surface, nevertheless the plaintiff's house having stood for more than twenty years, they were, by virtue of the prineiples hid down in *Dalton v. Angus* (6 App. Cas. 740), entitled to a right of support for it.

Land compulsorily taken by Railway Company sold as superfluous Land.]— Under ss. 77, 78 and 79 of the Railway Clauses Consolidation Act, 1845, a railway company have an option to purchase compulsorily land either with or without the minerals, and the owner of the minerals in the innerus, and the owner of the innerus in default of such purchase or of payment of con-pensation may as against the railway company, work the mines to the utmost extent, provided that he works them in a proper manner, and "according to the usual manner of working such mines in the district where the same shall be situate." The purchaser of such land as superfluous land acquires no greater right of support mous and acquires no greater right of support to the surface than the radiway company possessed. Pountacy v. Clayton, 52 L. J., Q. B. 566; 49 L. T. 283; 31 W. R. 664; 47 J. P. 788—

Sale of Land by Ecclesiastical Commissioners. —Clay.]—The 39 Geo. 3, c. 21, s. 12, in effect provides that upon sales of lands by ecclesiastical corporations for redemption of land tax, the minerals shall not pass by the conveyance of the lands, but shall be always absolutely excepted or reserved to such ecclesiastical corporations. A conveyance of prebendal land executed under this statute in 1799 contained a be 5-ry acted a general so changed or sponsor.

But 1772 an allotment was made to P under the except out of such exception the clay under provisions of the above-mentioned act. No house then stood upon the allotment; but a exception out of the exception was not rendered acceptance.

effectual by 57 Geo. 3, c. 100, s. 25, for that Implied Reservation—Necessity—Adjoining and was infended to remedy defects in the mode of conveyance, and not in the subject-matter conveyed, and that the properties of the subject-matter conveyed, and that the presence of the subject-matter in the subject-matter in the subject of the su

Held, also, that, on the evidence, the grantees of the surface were entitled to support as against the grantees of the clay. Ib.

Subterranean Water.]—An owner of land has no right at common law to the support of subterranean water. Popplewell v. Hodkinson, St. J., Ex. 126; L. R. 4 Ex. 248; 20 L. T. 578; 17 W. R. 806—Ex. Ch.

Canal. ]-See WATER.

1185

## 2. FROM ADJOINING BUILDINGS,

Damage—Liability—Employer and Contractors.]—Where ancient buildings belonging to different owners adjoin each other there is a right of support from the building as well as right of support from the building as well as from the land; and this right of support can be claimed under the provisions of the Prescription Act (2 & 3 Will. 4, c. 71). The mere fact that the support is derived from property which belongs to an ecclestastical corporation does not prevent the right of support being acquired under the act. But the enjoyment of the right must have been open, and not surreptitions, to come within the provisions of the act. Damage having been done by the wrongful acts of a contract and specification, to a melghbour's vault, it was held, under the circumstances, that both the employer and contractor were liable for it, and judgment was given for the plaintiff, with costs against both defendants. \*\*Lemaitre V.\*\* Davis, 31 L. J.\*\* Ch. 173; 19 Ch. D. 281; 46 L. T. 407; 30 W. R. 380; 46 J. P. 324.

Contiguous Rooms.]—Defendant stayed by injunction from pulling down his rooms to prejudice of plaintiff's rooms. Bush v. Field, Cary, 90.

House not Contiguous.]—Three contiguous houses in a street visibly leamed out of the perpendicular for upwards of thirty years, A.'s house leaning on B.'s house. On the expiration of a lease to a tenant, B. took down his house, the effect of which, by removing the support, was to cause C.'s house to fall down; and C.'s house falling, A.'s house fell —Held, that the house falling, A.'s house fell —Held, that the fall of A.'s house did not give him a right of action against B, for that A. had not either a natural or an acquired right to have his house supported by B.'s through the intermediate house. Solomom v. Vinters? Co., 4 H. &N, 585; 28 L. J., Ex. 370; 5 Jur. (N.S.) 1177; 7 W. R. 613.

Effect of Sub-division.]—Where an owner of land builds houses upon it adjoining each other, so as to require mutual support, there is either by a presumed grant or by a presumed reservation a right to such mutual support, and such right is not affected by a subsequent sub-division of the property. Richards v. Rose, 9 Ex. 218; 2 C. L. B. 31; 23 L. J., Ex. 3; 17 Jur. 1936.

houses was granted ending in 1895. The houses were afterwards sub-let separately, and in 1864, each was held under a sub-lease, which expired a few days before the head lease, the one by A., and the other by B. Up to that year neither house supported any part of the other. A., with the permission of B., had raised the wall between the gardens of the houses by about two feet, and in October, 1864, B. agreed to let A. maintain the wall during the remainder of the head lease, less the last twenty days thereof, in consideration of 5s. a year. In 1870, B's sub-lease having been assigned to C., he, with A's permission, built with beams into the wall, and A. agreed that C. might maintain and enjoy the wall during the remainder of the head lease, less the last twenty days thereof, in consideration of 5s. a year. In 1871, A., without surrendering his sub-lease, obtained a new lease for 999 years, to be reckoned from that date, but as regarded possession, to take effect from one day after the expiration of the subsisting head lease of 1797that is, 1895. In 1889 C. also obtained a long lease of his house framed in the same way. the lease of 1871 the lessors reserved the mines and minerals under the demised property, but nothing further. A, thereby covenanted to keep up the value of the demised property by maintaining and repairing the then existing house, or by rebuilding or improving it, or by erecting one or more other houses in lieu of it or in addition to it; and that he would not do anything which might tend to the annoyance or damage of the other tenants of adjoining land belonging to the lessors, including that which they afterwards let to C. Subsequently A.'s house became vested in the plaintiffs, and C.'s house in the defendant. It was admitted that the lease of 1871 comprised the whole of the wall referred to in the agreements of 1864 and 1870; and since 1895, when the head lease of 1797 fell in and these agreements came to an end, the wall (treated in 1864 as B.'s) and the crection upon it had been the plaintiffs' for the rest of their present lease :- Held, that the lease of 1871 contained no implied reservation, on the ground of necessity nor upon any other principle, to the lessors of the right to have the adjoining house supported by the plaintiffs' wall; and that, therefore, the defendant had not acquired any right to keep the ends of her beams in the plaintiffs' wall. Richards v. Rose (supra) distinguished. Howarth v. Armstrong, 77 L. T. 62—C. A.

Enjoyment preeario—Deed inconsistent with Enjoyment as of Bight,—On the 1st of January, 1855, T., a builder, agreed to purchase from S. a plot of land, part of an estate then being laid out for building, bounded, according to the construction put on the agreement by the court, by a plot of land intended to be made into a back street, which T. agreed to pays. About the same time, S. employed T. to build a wall upon the other side of the intended street, standing, as the court held, on the property of S. Between 1854 and 1855, while the building scheme was still intended to be carried out, T. built a range of workshops upon the side of the intended street, having a gable resting upon the wall. In 1861 S. conveyed a property on the other side of the wall from the intended street, the other side of the wall from the intended street.

S. executed to T. a conveyance of his piece of land according to the agreement, whereby T. covenanted to pave the intended street. In 1877 S. agreed to convey to T. the site of the intended street. This agreement contained recitals of the intention to make the street and of the conveyance of 1864, and was made subject to any rights of way existing therein. In 1881 the defendant, who had purchased the land on the other side of the wall, pulled down part of the wall, thus destroying the plaintiff's shed. The shed had stood upon the site of the intended street ever since its first erection. The plaintiff brought this action for damages on the ground that he had acquired an easement to rest his shed on the wall :- Held, that the covenant in the deed of 1864, and the recitals in that of 1877, amounted to an acknowledgment by the defendant that up to 1877 he might at any time have been compelled to pull down his shed, and was inconsistent with an enjoyment as of right of an easement of support for it from the wall. Tone v. Preston, 53 L. J., Ch. 50; 24 Ch. D. 739; 49 L. T. 99; 32 W. R. 166.

Inserting Beam or Rafter in Wall-Alleged Trespass.]-The plaintiff and the defendant were in possession of adjoining honses, both of which were ancient messuages. The plaintiff's house was considerably higher than the defendant's house, and was built up against the western wall of the defendant's house, to the height to which such western wall extended. Up to this height there was no other wall between the two houses, but the plaintiff alleged that on the top of the western wall, and above the roof of the defendant's house, an external wall was erected at the time of the building of the plaintiff's house, forming part thereof, and supporting the roof thereof. The western wall, on the top of which the external wall had been erected, was admitted by the plaintiff to be the property of the defendant, subject to all rights and easements over the same in favour of the plaintiff's house. The external wall erected on the top of the defendant's western wall was, the plaintiff alleged, his property. The defendant being desirous of adding to the height of his house, removed some of the stones comprising the external wall, and inserted in the holes thereby made certain beams, for the purpose of supporting a new roof to his house at a greater height than his old roof. The plaintiff claimed an injunction to restrain such acts, on the an injunction to restrain such acis, on the ground 'that the defendant was a respasser. The defendant alleged that the wall was his, but admitted that the plaintiff had certain rights in respect to the wall which he, the defendant, had not in any way interfered with :-Held, that the plaintiff had been in enjoyment of an easement but not in possession; and that nothing had occurred to displace the defendant's original title to the wall, and therefore, that the action failed. Waddington v. Naylor, 60 L. T. 480.

Wall adjoining and supporting Highway.]-Where a servitude of support to a highway by a wall has been acquired, the owner of the highway, and not the owner of the wall, in the absence of express stipulation to that effect in the instrument (if any) creating the easement, is bound to repair the wall when out of repair and insufficient to support and maintain the highway.

Semble, such stipulation, covenant or obligation cannot be inferred merely from the fact that the wall has been on several occasions repaired by the owner of the wall or his predecessors in title. 7h.

Party Wall-Implied Covenant by Lessor, ]-The defendants were owners of two houses in a street, numbered 38 and 40, and of a gateway under 40 and adjoining 38. In 1857 they demised the house No. 38 for a term of 21 years, the lease containing a covenant by the lessee to repair all walls and party walls belonging to the premises. In 1865 they granted a lease to the plaintiff, of the house No. 40 for a term of 11 years, subject. to a similar covenant to repair walls and party The wall on the side of the gateway separating it from No. 38 was a party wall between the gateway and the house No. 38 to the height of the first floor. The house of the plaintiff, No. 40, was built so as to extend in part over the top of the gateway and to rest upon this party wall between the gateway and the house No. 38 and to be supported by it. The plaintiff's covenant to repair did not extend to this wall, and there was no covenant by the defendants to keep it in repair. In 1874 it was discovered that the walls of that part of No. 40 which was above the gateway were giving way. The damage was owing to failure of support. from the party wall, which had bulged in consequence of the pressure upon it from the plaintiff's premises: Held, that there was no implied covenant on the part of the defendants to support the plaintiff's premises, although it might be an answer to an action upon the plaintiff's covenant to repair, that the repair had been rendered impossible, by the neglect of some precedent obligation on the part of the defendants. Colebeck v. Girdlers (b., 45 L. J., Q. B. 225; 1 Q. B. D. 234; 34 L. T. 350; 24 W. R. 577.

# E. WATERCOURSES.

Sec WATER.

## F. OTHER EASEMENTS.

Projecting Room. ]- C., being owner of two adjoining houses, sold one of them to H. "as the same was then in the occupation of the tenant" thereof. At the time of the sale neither C. nor H. knew, what was afterwards discovered to be the fact, that a room on the first-floor level, forming and used as part of the house retained by C., projected into the house purchased by H. H. pulled down the house purchased by him, and erected on its site a building which partly extended over the projecting room of C.'s house, but did not rest upon or otherwise interfere with Upon a bill filed by C. to restrain H. so building above his projecting room :- Held, that the projecting room did not earry anything above or below it; that H. was the owner of the column of air above the room, and entitled to build in manner above mentioned. Curhett v. Hill, 39 L. J., Ch. 547; L. R. 9 Eq. 671; 22 L. T. 263.

Right of Eavesdrop. -A. was the owner of premises, the eaves of which projected over adjoining land of B., and had become entitled by length of user to have the rain-water drop from such caves on to the land. A. in rebuilding his Stookport and trigde Highway Board v. Grant, premises carried the wall abutting on B.'s land 51 L. J., Q. B. 357; 46 L. T. 388; 46 J. P. 437. It is slightly greater height than before, and con-

sequently raised the height of the eaves from the | dwelling-house and a yard, having demised them ground to the same extent:—Held, that, in the | both to a tenant, the latter, for the convenience v. Walters, 42 L. J., C. P. 105; L. R. 8 C. P. 162; 28 L. T. 343,

Semble, that the fresh projection over the land of B, which was made when the caves were raised, was not a new trespass, but only a mere user of the space taken possession of by the trespass occasioned by the original projection. Ib.

Fascia-Division of Tenements.]-The plaintiff was lessee under a lease dated in 1876, of premises in a yard lying back from and numbered 152 in A. street, and reached by a gateway passing under the two adjoining houses. Over this gateway was a fascia plastered to the wall partly of No. 151 and partly of No. 153, A.-street, upon which for more than twenty years had been painted the number and the names of the successive occupiers of the plaintiff's premises. The plaintiff's lease demised the premises "as now or lately in the occupation of B." B. had used the fascia as above mentioned. The defendant was the lessee under a lease dated in 1878, but which was a renewal of one dated, in 1874, of No. 153, A.-street, and in redecorating the front of his house in 1880, defaced or obscured that part of house in 1800, deniced of observed the fascin which rested upon his house. The same landlords owned all three houses. The defendant's lease contained no express reservation of the plaintiff's right to the fascia :- Held, that both by the leases and by their practice the lessors had divided the tenements so that the fascia formed an integral part of the tenement No. 152. Francis v. Hayward, 52 L. J., Ch. 12; 20 Ch. D. 773; 46 L. T. 659; 30 W. R. 744. Affirmed on first ground, 52 L. J., Ch. 291; 22 Ch. D. 177; 48 L. T. 297; 31 W. R. 488; 47 J. P.

Semble, there was sufficient to shew that No. 153 had been demised subject to, and No. 152 with the benefit of, the easement of the plaintiff's using the fascia. Ib.

Sign-board of Public-house.]-The plaintiffs, the owners of a public-house, claimed the right to affix a sign-board to the wall of the defendants' house. The sign-board had been so affixed for upwards of forty years. The two houses had formerly belonged to the same owner, the defendants' house having been granted away by such owner before the plaintiffs' house. When he first became owner of the two houses the plaintiffs' house was not occupied as a public-house. It did not, however, appear whether the signboard was first affixed to the defendants' house during the common ownership :-Held, that it could not be assumed that it was first affixed during the common ownership. Steggles, 48 L. J., Ch. 639; 12 Ch. D. 261; 41

Held, also, that the easement claimed was a legal one, and that a grant of it by the defendants' predecessors in title to the plaintiffs' predecessors in title must be presumed. injunction was granted to restrain the defendants from removing the sign-board. Ib.

was thrown on the servient tenement by the situate on one of the yards, and permitted one alteration, the easement was not thereby portion to be used by the occupants of the destroyed, and A. was entitled to the right of adjoining close. The latter was afterwards conveyed by the owner who had previously obtained possession of both closes, to the plaintiff, with all buildings, privileges, casements and appurtenances whatsoever to the premises belonging, occupied therewith, or reputed to belong, or appurtenant thereto"; and, by the same deed, the grantee covenanted to suffer the tenants of the adjoining close to pass over the premises thereby granted at intervals, in order to clean their part of the ash-pit and privy, described in the covenants as "adjoining those belonging to the premises hereby granted, and used therewith as part, parcel and member thereof" —Held, that the use of the portion of the ash-pit and privy, which, previously to the severance of ownership, had been enjoyed by the occupants of the premises granted to the plaintiff, passed to him under the deed. Geogheyan v. Fegan, Ir. R. 6

Noisy Nuisance.] - A confectioner had for more than twenty years used a pestle and mortar in his back premises, which abutted on the garden of a physician, and the noise and vibration were not felt as a nnisance and were not complained of. But in 1873 the physician erected a consulting-room at the end of his garden, and than the noise and vibration became a nuisance tohim. He accordingly brought an action for an injunction :- Held, that the defendant had not acquired a right to an easement of making a acquired a right to an additional and the injunction was granted. Sturges v. Bridgman, 48 L. J., Ch. 785; 11 Ch. D. 852; 41 L. T. 219; 28 W. R. 200—C. A.

Enjoyment by Customer. \_\_\_\_\_ That kind of understanding by which a customer, as long as he continues such, is allowed an easement, does not confer on him the equitable right. Bunkart. v. Tennant, 39 L. J., Ch. 809; L. R. 10 Eq. 141; 23 L. T. 137; 18 W. R. 639.

He is entitled, however, to reasonable notice before being deprived of his easement. Ib.

But if the customer has been encouraged by the owner of the servient tenement to erect works to which the casement is essential or. nearly so, he will acquire an equitable right to, the easement. Ib.

Recreation—Custom,]—A right of recreation by custom upon the land of another cannot exist as a right to the public generally, but must be confined to the inhabitants of a particular district. Bourke v. Davis, 44 Ch. D. 110; 62 L. T. 34; 38 W. R. 167.

Riparian owners may possibly be able to establish a private right of way, or a right of boating for recreation for themselves and their friends by custom, but the existence of such a right or custom, if established, would not entitle the public to boat on the river or support the claim that it was a highway. Ib.

Breaking up Highways — Presumption of Grant—Prescription.]—The corporation of P., who had no parliamentary powers for the purpose, supplied water to the adjoining urban urban district of F., and claimed the right to enter adjoining closes, each of which consisted of a upon and break up the streets of F. whenever

oecasion should require for the purpose of repairing their water-pipes, relying, as regarded some of the streets, on alleged irrevocable licences granted by the predecessors of the local board of F. (i.e., the surveyors of highways), and as regarded other streets on prescription:—Held, commit a nuisance: (2) that it was not in the commit it musance; (2) that it was not in the power of the surveyors of highways to grant the alleged licenses; (3) that, therefore, as a grant could not be presumed, the corporation could not obtain the right claimed by prescription.

Preston Corporation v. Fulwood Local Board, 53 L. T. 718; 34 W. R. 196; 50 J. P. 228.

Erection of Sign-post on Common.] — The Mctropolitan Commons Act, 1866 (29 & 30 Vict. c. 122), s. 15. enacts that no estate, interest or right of a profitable or beneficial nature in, over, or affecting a common, shall, except with the consent of the person entitled thereto, be taken away or injuriously affected by any scheme under that act without compensation being made or provided for the same. A common within the meaning of the act was placed under the management of the Metropolitan Board of Works by a scheme confirmed by the Metropolitan Commons Supplemental Act, 1871 (34 & 35 Vict. c. lvii.). Paragraph 5 of the scheme gave the board power to make by-laws. Paragraph 13 of the scheme secured to all persons such estates, interest or right as they had before the confirmation of the scheme. The board made a by-law forbidding the erecting on the common of any posts or poles, or any building of any kind. There was a public-house adjoining the common, and near to it upon the conimon had stood for forty years a post bearing the sign of the public-house. The sign-post having been blown down, the mortgagec of the public-honse, at the request of the occupier, crected a new one, He was afterwards convicted under the by-law of unlawfully erceting the new sign-post :-Held, that a sign-post having stood for forty years, an easement had been gained in respect of the public-house; that as an incident to the easement the right existed of reparing the sign-post whenever it was broken; and that the casement was a beneficial right preserved by the Metropolitan Commons Act, 1866, s. 15, and par. 13 of the scheme relating to the common; and that, therefore, the conviction could not be upheld. Hoare v. Metropolitan Board of Works, 43 L. J., M. C. 65; L. R. 9 Q. B. 296; 29 L. T. 804.

Right to cut Wood-Grant from the Crown. ]-Demurrer overruled to a bill by the poor of a parish, claiming right by a grant from the Crown to cut wood on waste lands within a royal forest, for their own use, and for sale to the other inhabitants of the parish. Willingale v. Maitland, 36 L. J., Ch. 64; L. R. 3 Eq. 103; 12 Jur. (N.S.) 932; 15 W. R. 83.

Semble, such a claim would be bad if alleged on the ground of prescription or custom, or of a grant from a private individual. Ib.

Grants which would otherwise be bad may be good if made in derogation of the forestal rights of the Crown. Ib.

Of Commons. ]-See COMMON.

Of Fishing. ] - See FISH AND FISHERY.

# EASTER OFFERINGS.

See ECCLESIASTICAL LAW.

## ECCLESIASTICAL LAW.

[BY A. LAWRENCE.]

- I. GENERALLY, 1195.
- II. CHURCH OF ENGLAND.
- 1. Archbishops, 1196.
  - 2. Bishops, 1197.
  - 3. Deans, 1202.
  - 4. Archdeacons, 1202.
  - 5. Canons and Canonries, 1203.
- 6. Prebendaries, 1205.
- 7. Vicars, Vicars Choral and Lay Rectors, 1206.
- 8. Curates and Lecturers. a. Appointment of, and Licensing, 1207.
- b. Stipend and Dismissal, 1210. 9, Privileges and Disabilities of Clergy,
- 1212
- 10. Discipline. a. Generally, 1214.
  - b. Offenee, 1215.
  - c. Punishment, 1216.
- 11. Resignation, 1219.
- III. CONVOCATION AND CANONS, 1221.
- IV. COLONIAL CHURCH, 1223.
- V. ADVOWSON AND PRESENTATION.
  - Advowson, 1226.
    - 2. Presentation, 1232.
- VI. SIMONY, 1233.
- VII. EXCHANGE OF LIVINGS, 1237.
- VIII, ENDOWMENT AND AUGMENTATION OF LIVINGS, 1238.
- IX. Mode of filling Benefices.
  - 1. Presentation and Nomination.
    - a. By the Crown, 1240.
      - b. By Ecclesiastical Persons, 1240. c. By Parishioners or Public Trustees,
      - 1243
      - d. By Private Persons, 1247.
      - By Pareeners or Joint Tenants, 1250. f. By M 1251. Mortgagors or Mortgagees,
  - 2. Quare Impedit, 1252.
  - 3. Collation, Institution and Induction, 1254
  - 4. Lapse, 1256.
  - 5. Avoidance, 1256.
  - 6. Right to Profits during Vacancy, 1257.

X. UNION OF BENEFICES, 1258.

XI. Non-Residence, 1259.

XII, CHARGES ON BENEFICES, 1263.

XIII. PROPERTY,

1. Advonson and Presentation-See ante,

2. Charges on Benefices-Sec ante, XII. 3. Leases, 1269.

4. Purchases for Public Undertakings,

5. Dilapidations, 1277.

6. Waste, 1281.

7. Repairs, 1285.

XIV. SEQUESTRATION, 1287.

XV. CHURCHES AND CHAPELS.

 Generally, 1295. 2. Consecration, 1297.

Site, 1298.

4. Private Chapels, 1299.

 District Churches and Chapels.
 a. Creation and Formation, 1300. b. Fees and Dues, 1303.

c. Rating, 1305.

6. Chancel, 1305.

7. Gifts for Church Building and Endow- XXVIII. PRACTICE AND PROCEDURE IN ECment, 1308.

Apportionment of Charitable Gifts, 1310.

9. Easter and other Offerings, 1312.

10. Bells, 1313.

11. Keys, 1314.

12. Register Books, 1314.

XVI. DIVINE SERVICE.

1. Generally, 1314.

2. Preaching, 1315.

3. Reredos, Communion Table and Service, Ornaments and Vestments, 1316.

4. Alms, 1322.

XVII. ARTICLES OF RELIGION, 1323.

XVIII. HOMILIES AND DOCTRINE, 1325.

XIX. RUBRICS, 1326.

XX. FACULTIES.

1. Generally, 1328.

2. As to Cathedrals, 1329.

3. As to Churches and Chapels, 1329.

4. As to Churchyards, 1336,

XXI. ECCLESIASTICAL COMMISSIONERS, 1337.

XXII. CHURCHWARDENS.

1. Election and Appointment, 1340.

2. Legal Position, 1345.

3. Swearing in, 1347.

4. Duties, Rights and Liabilities, 1348.

XXIII. PARISH CLERKS, 1353,

XXIV. ORGANIST, 1356.

XXV. SEXTON, 1356.

XXVI. PEWS, 1357.

XXVII. CHURCH AND CHAPEL RATES.

1. Mahing.

a. Generally, 1362.

b. Under Local or Particular Statutes. 1368.

c. Under Church Building Acts, 1366,

d. Notice of holding Vestry to make, 1367.

e. Voting at Vestry, 1367. f. Refusal to make, 1369.

g. Chapel Rates, 1371.

2. Publication of, 1372.

3. Property Rateable, 1372.

4. Appeal against, 1373.

5. Borrowing on Security of, 1374.

6. How Enforced.

a. In Ecclesiastical Court, 1376.
b. In County Court, 1379.
c. By Proceedings before Justices.

i. Generally, 1379.

ii. Jurisdiction of Justices, 1380.
 d. By Distress, 1384.

e. By Indictment, 1385.

CLESIASTICAL MATTERS.

1. Generally, 1386.

Ecclesiastical Officers, 1394.

3. Consistory Court, 1395.

4. Public Worship Regulation Act, 1395.

5. Monition, 1399.

6. Writs De Excommunicato Capiendo, and De Contumace Capiendo.

 De Excommunicato, 1401. b. De Contumace, 1403.

7. Quare Impedit, 1405.

8. Prohibition.

a. Generally, 1406.

b. When the Writ goes, 1407.

c. Practice and Pleading, 1410. 9. Appeal, 1412,

XXIX. GLEBE, 1413.

XXX. TITHE.\*

1. Commutation, 1415.

Merger, 1418.

3. Inclosure Acts, 1418. 4. As between Lundlord and Tenant, 1419.

5. Rates and Taxes, 1421.

6. Extraordinary Tithe, 1423.

7. Prescription Act and Statute of Limitations, 1424.

8. Redemption, 1426.

<sup>\*</sup> Cases relating to questions of tithe prior to the Commutation Act, of 1836, are for the most part not included. The reader is referred for them to Chitty's Equity Index, 4th Ed.

- 9. Remission, 1426.
- 10. Recovery
  - a. By Distress, 1427. b. By Action, 1429.
- 11. In London, 1430.
- 12. Other Matters relating to, 1433.

## XXXI. BURIAL.

- Duties and Rights respecting, 1433.
- 2. Service, 1436.
- 3. Burial Boards, 1437.
- 4. Rates, 1439.
- 5. Churchyards, Cemeterics and Burial Grounds, 1439.
- 6. Fees, 1452
- 7. Mortuaries, 1457.
- 8. Cremation, 1458.

## XXXII, VESTRY.

- 1. Constitution, Powers and Liabilities, 1459.
- 2. Proceedings of.
  - a. Meetings, 1461.
  - b. Presidency, 1462.
     c. Binding Effect of, 1463.
  - d. Voting.
  - i. Qualification, 1463. ii. Mode of, 1465.
  - e. Audit of Accounts, 1467.
- Liability of Vestrymen, 1468.
- 4. Vestry Clerk, 1468.

XXXIII. ROMAN CATHOLICS, DISSENTERS, QUAKERS, JEWS-See RELIGION.

### I. GENERALLY.

Ecclesiastical Law, of what it Consists.]—The ecclesiastical law of England is not a foreign law. It is a part of the general law of England, of the common law - in that wider sense which embraces all the ancient and approved customs of England which form law, including not only that law administered in the Courts of Queen's Bench, Common Pleas and Exchequer, to which the term "common law" is sometimes in a narrower sense confined, but also that law administered in chancery and commonly called equity, and also that law administered in the courts ceclesiastical, that last law consisting of such canons and constitutions ecclesiastical as have been allowed by general consent and custom within the realm-and form, as is laid down, the king's ecclesiastical law. All these laws may be, and are, altered by statutes. When the question arises, What is the English ecclesiastical law? it is not ascertained by calling witnesses to prove L. J., Q. B. 621; 6 App. Cas. 446; 44 L. T. 485; 45 J. P. 586.

Christianity is part of the law of England. De Costa v. De Paz, 2 Swan. 490.

Term "Holy Orders."] — The term "holy orders." used in the will of a member of the Established Church of England, or of the Established Church of Scotland, means "holy right to visit a dean and chapter, the manner

orders by episcopal ordination."

Glasgow College, 10 Jur. 676. Att.-Gen. v.

"Reverend."]—The word "reverend" is not a title of honour or dignity, it is merely a laudatory epithet, or mark of respect; and a person prefixing the word to his name does not thereby claim to be a person in holy orders. Keet v. Smith, 45 L. J., P. C.10; 1 P. D. 73; 33 L. T. 794; 24 W. R. 375

Holy Orders-Forging Letters of. ]-The forging of letters of orders issued by a bishop, certifying that on a day and at a place mentioned therein, A. was admitted into the holy order of deacons, according to the manner prescribed by the Church of England, and rightly and canonically ordained deacon, in testimony whereof the bishop had caused his episcopal seal to be affixed thereunto, is not the feloniously forging of a deed within the 24 & 25 Vict. c. 98, s. 20, although Reg. v. Morton, 42 L. J., M. C. 58; L. R. 2 C. C. 22; 28 L. T. 452; 21 W. R. 629; 12 Cox, C. C. 456.

— Pretence of ]—Where a person is indicted for falsely pretending to be in holy orders and solemnising matrimony according to the rites of the Church of England, the mere licence of the bishop to a curacy, or the institution by him to a benefice, which renders a clergyman compellable to perform the marriage ceremony between competent parties, is no defence if the person charged knows of the invalidity of the letters of orders on which he has been so licensed or instituted. Reg. v. Ellis, 16 Cox, C. C. 469.

It is enough for the presecution to show that the letters of orders, which the person charged has held out to be genuine and put forward as a justification for presenting himself as a person in holy orders, are sparious; it is not incumbent on the prosecution to shew that he had no other valid orders. Ib.

Benefice—How made Spiritual.]—A benefice is not made spiritual because it can only be held by one in holy orders. A hospital for the poor without cure of souls is a lay foundation, although the master is required to be in holy orders. Att.-Gen. v. St. Cross Hospital, 17 Beav. 485; 22 L. J., Ch. 793; 1 W. R. 525,

Documents - Custody - Transfer to Foreign Power.] - The custody of documents in the nature of public or ecclesiastical records belonging to the see of London is vested in the consisterial court of London, and any disposal thereof must be authorised by an order issued by the chancellor of London. The court may, in the exercise of its discretion, on the application of the duly accredited representative of a foreign Power, order the restoration to such Power of original documents of national and historic interest. The Mayflower, In re, [1897] P. 208; 76 L. T. 295.

# II. CHURCH OF ENGLAND.

1. ARCHBISHOPS. Jurisdiction to cite Bishop. —The archbishop has jurisdiction to cite a bishop in respect of

ecclesiastical offences. Read, Ex parte, 58 L. J., P. C. 32; 13 P. D. 221; 59 L. T. 909—P. C. Visitation by.]-Where an archbishop has a

of his visitation is not so material as to lay a pose of vindicating the conduct of the bishop, ground for prohibition; because any error or Langston v. Sodor und. Man (Bishop), 9 Moore, defect in the manner of the visition may be P. O. (8.8.) 3813, 421.d., P. C. (11, I. R. 4 P. O. remedied by appeal. Kildare (Bishop) v. Dublin (Archbishop), 2 Bro. P. C. 179.

#### 2. BISHOPS.

Election and Consecration. ]-Under 25 Hen. 8, c. 20, s. 5, after an election of a bishop by a dean and chapter by virtue of a conge d'élire and letters missive:—Held, by Lord Denman, C.J., and Erle, J., that the archbishop, upon issue of letters patent to confirm the election, is bound, acting merely ministerially, to confirm the bishop elect, and has no authority to hear any opposi-tion advanced against him: by Patterson, J., and Coleridge, J., that confirmation is a judicial act, which the archbishop is to conduct according to the principles of the canon law, and that parties opposing are entitled to appear in his court and enter their objections, and a mandamus will lie for not allowing opposers to appear and be heard. Reg. v. Canterbury (Archbishop.) Hampden, In re, 11 Q. B. 483; 17 L. J., Q. B. 252; 12 Jur. 862.

Jurisdiction and Functions. ]-Bishops may grant ancient offices, with the ancient fees, as they have been usually granted before or since 1 Eliz. c. 19. Trelawney v. Winchester (Bishop), 1 Burr, 219; 1 Ld. Ken. 256.

10 & 11 Vict. c. 98, defines the jurisdiction of bishops in their diocese.

Semble, that this statute does not apply to the act of issuing a sequestration ou a levari facias de bonis ecclesiasticis by a bishop, in which he acts as ecclesiastical sheriff, who is a mere ministerial officer. Phelps v. St. John, 3 C. L. R. 478; 10 Ex. 895; 24 L. J., Ex. 171.

In 1836, the archdeaconry of Dorset was, by an order in council, dissevered from the diocese of Bristol, and annexed to the diocese of Salisbury. After the annexation, S., who had been registrar of the bishop of Bristol, continued to act as registrar under the bishop of Salisbury. In 1840, a writ of sequestration against the rector of a parish within the archdenconry was directed to the then bishop of Salisbury, and delivered to S. Sequestrators were appointed under the seal of the bishop, and the writ remained in the office of S. The bishop of Salisbury having died, and a new bishop having been appointed :- Held, first, that the succeeding bishop was bound to return the writ directed to his predecessor; secondly, that although the writ, if directed to the bishop of Bristol, might have been valid by 6 & 7 Will 4, c. 77, s. 20, yet that, under the above circumstances, it was too late to object to the form of

Temporalities of vacant Bishoprics.]-The temporalities of a vacant bishopric are in the hands of the king, till the bishop sues his writ of restitution of the temporalities; and, if a benefice becomes void in the meantime, the Crown may present to it. Tarrant, Ex parte, Romilly's Notes of Cases, 119.

the writ. Ib.

Charge - Privileged Communication. ] - The charge of a bishop to his clergy in convocation, containing defamatory matter in respect of a layman in the diocese who has publicly attacked the conduct of the bishop, is a privileged comthe conduct of the bishop, is a privileged communication, if made bona fide, and for the purpose and interest in the cause of removal of the

495; 28 L. T. 377; 21 W. R. 204.

Visitation—Authority of Bishop.]—Mandamus to the dean and chapter of R, to restore the prosecutor to the office of head master of the grammar school of the cathedral. Return (after setting out the statutes of the founder of the eathedral church, by which the head master of the grammar school was to be elected by the dean and chapter and the bishop was appointed visitor of the cathedral church), that the prosecutor had not appealed to the bishop. Plea, that writing and publishing a pamphlet was the cause of removal of the prosecutor from his office; that the bishop was formerly the dean of W., and that the matters contained in the pamphlet, which related to the improper application of the funds of the cathedral church of W., were written and published of and concerning the bishop as such former dean; that the prosecutor wrote and published the pamphlet with the intention of attributing to the dean and chapter while the bishop was dean of W., the same indentical neglect and improper conduct with respect to the cathedral church of W. and in and about the application of the funds and endowments relating thereto, as were charged against the dean and chapter of R., with respect to the cathedral church of R., and in and about the misapplica-tion of the funds and endowments relating thereto; that passages in the pamphlet were written and published with the intention of imputing to the bishop, as visitor of the cathedral church of R., a knowledge of the misapplication of the funds, in violation of the statutes of the eathedral church, by the dean and chapter; and that the dean and chapter had declared under their common seal, that they removed the prosecutor from his office in consequence of his having written and published in the pamphlet passages untruly alleged to be libellous and directed as well against the dean and canons of the eathedral church of R. as against the bishop of the diocese, and likewise against the deans and canons of other cathedral churches: that by reason of the premises the bishop had such an interest in the cause of removal of the prosecutor as to disqualify him from acting as visitor. By the 35th statute, De Corrigendis Excessibus, "Si quis minorum canonicorum, clericorum, aut aliorum ministrorum in levi culpa delinquerit arbitrio decani aut eo absente vice-decani corrigatur; sin gravius fuerit delictum (si justum jndicabitur) ab iisdem expellatur a quibus fuit admissus." The 38th statute, De Visitatione Ecclesize, by which the bishop was appointed visitor, contained the following clause: "Omniaque faciat que ad visitatoris officium de jure pertinere denoscuntur." Upon demurrer to the return :-Held, first, that the 35th statute did not give the dean and chapter authority to act as visitor of the grammar school. Reg. v. Rochester (Dean and Chapter), 17 Q. B. I; 20 L. J., Q. B. 467: 15 Jnr. 920.

Held, secondly, that the bishop being constituted visitor of the grammar school by the 38th statute, the cause of removal of the prosecutor from his office was not an excess of jurisdiction by the dean and chapter which could be made the ground of a mandamus. Ib.

prosecutor as disqualified him from acting as

prosection as instantiated in the history of Chichester, who claimed a right to present by lapse, under pretence of his visitatorial authority, to the office of a canon residentiary of his church, it being a freehold office, and the right of election thereto in the dean and chapter. *Chichester (Bishop)* v. *Harvard*, 1 Term Rep. 650; 1 R. R. 339.

Although a benefice is appropriated to a prior, ora dean and chapter, yet the bishop may visit, to see how the church is served, and for contumncy may proceed to suspension. Harrison v. Dublin (Archiishop), 2 Bro. P. C. 199.

The power of an official officer does not extend do deprivation. Reg. v. York (Archbishop), 2 G. & D. 302; 2 Q. B. 2; 6 Jur. 412. According to general ecclesiastical law deans

and chapters are subject to the visitation of the bishop as ordinary, and the Church Discipline Act (8 & 4 Vict. c. 86) leaves untouched all power which the bishop might previously have exercised in his visitations, except that of pro-ceeding against individuals by way of punishment; and, therefore, in the absence of any direct authority to the contrary, he has power, as such visitor, to make orders on some definite legal ground, but not otherwise, with reference to any part of the structure or fabric of the cathedral church. Phillpotts v. Boyd, 44 L. J., Ecc. 44; L. R. 6 P. C. 435; 32 L. T. 73; 23 W. R. 491.

— Authority of Crown.]—The visitatorial power of the Crown does not remove the jurisdiction of the Court of Chancery, or prevent it from exercising its functions in respect of an existing trust. Daugars v. Rivaz, 28 Beav. 233; 29 L. J., Ch. 685; 6 Jnr. (x.s.) 854; 8 W. R.

— What constitutes being Visitor, ]—Where a founder of a hospital directed, that if in making up the accounts of the wardens biennially going out of office, any doubt should arise which could not be decided by the new wardens, &c., the ordinary should decide it; and also gave to him the appointment of a master, upon the default of other persons to appoint, within certain times; and power to correct or amove the master for certain causes; and also power to sequester the profits of the wardens, &c., in case of the improper subtraction of a certain sum directed L. J., Q. B. 485. to be kept in a chest for special purposes, until the money was replaced; and also gave to the ordinary the power of interpreting the statutes in case of any doubt; and the founder also delegated to the dean and chapter of York power to remove the wardens, &c., consenting to mortgage or alienate the lands of the charity :- Held, that none of the powers so delegated constituted a visitor, so as to exclude the application of the powers granted by 43 Eliz. c. 4; and consequently that a commission of charitable uses issued out of the Court of Chancery under that act was valid. Kirkby Ravensworth Hospital, In re, 8 East, 221.

Bishop's Inhibition during.]-By the bishop's inhibition, during his visitation, the jurisdiction of his commissary is superseded; a party resident within the commissary's jurisdic-tion may then be cited before the bishop's official principal. Reg. v. Thorogood, 3 P. & D. 629; 12 A. & E. 183; 9 L. J., Q. B. 211; 4 Jur. 937.

When Mandamus will Lie to a Visitor. -A mandamus does not lie to a visitor who has deprived a prebendary for incontinency. Rex v.

Chester (Bishop), 1 Wils. 206.

Nor to a visitor, to exercise his visitatorial power over the temporalities of a cathedral church, concerning the intermediate profits, during the vacancy of a stall. Rew v. Durham (Bishop), I Burr. 567; 2 Ld. Ken. 296.
A mandamus does not lie to a visitor, where he

is clearly acting under a visitatorial authority, Rew v. Ely (Bishop), 2 Term Rep. 290, 345.

Nor to a visitor, to restore a canon, whom he had expelled. Rew v. Chester (Bishap), 1 W. Bl. 22.

Nor to a visitor to reverse his own sentence.

The court refused to grant a mandamus re-quiring the visitors named in the charter of the College of Doctors' Commons to inquire into the mode in which the college under 20 & 21 Vict, c. 77, ss. 116, 117, had exercised their discretion as to the surrender of their charter, and the disposition of their property. Lee, Ee parte, El. Bl. & El. 863; 28 L. J., Q. B. 114; 5 Jur. (N.S.) 218.

- Removal of Chorister. - Mandamus to restore H, to the freehold office of chorister of a eathedral church. Return stating the foundation of the cathedral church, and some of the rules. ordinances and statutes for the governance of the same, providing for the expulsion of any of the lay clerks skilled in singing at the discretion of the dean and chapter, and appointing the bishop visitor to watch and take special care that the statutes and ordinances were inviolably preserved, and to visit the church, and upon every one of the articles contained in the statutes, and upon every other article whatever that concerns the state. advantage and honour of the church, to interrogate the dean and all other ministers of the whatsoever, and to punish and correct the same, and execute everything necessary to the extirpa-tion of vice, and judged lawfully to belong to the office of visitor:—Held, that the bishop, as ordinary and special visitor, had exclusive juris-diction to inquire into and determine the legality of the removal, and that an appeal to the bishop for that purpose was the only mode by which the party removed could properly proceed. Reg. v. party removed could properly proceed. Reg. v. Chester (Dean and Chapter), 15 Q. B. 513; 19

Removal of Curate—Discretion under 1 & 2 Vict. c. 106, s. 98.]—Under 1 & 2 Vict. c. 106, s. 98, giving a bishop power to revoke, after notice, a curate's licence, and to remove such curate for any cause which shall appear to him to be good and reasonable, the bishop has, subject to appeal, the widest and most unlimited discre-tion, and may remove, not only for an act cognisable under the Church Discipline Act, but also for a cause which would not constitute an ecclesiastical offence so cognisable. No mode of proceeding is directly or indirectly indicated by the act, and the bishop may take his own course. unfetterd by any legal form or restriction provided such course be in accordance with substantial justice; but this requires that the accusation shall be sufficiently definite to enable the accused to defend himself, and an ample intimation of the matter to be inquired into, whether criminal or otherwise, is indispensable.

Poole v. London (Bishop), 5 Jur. (N.S.) 522.

Commission as to Criminous Clerks. ]-A bishop to the fore issuing a commission of inquiry binto charges against a clerk in holy orders, to P., a solicitor, "the office of receiver of all onto canages againse a cierk in holy orders, obliged to hear objections against the person who has made the application to the bishop. *Educards*, *Esparte*, 43 L. J., Ch. 350; L. R. 9 Ch. 138; 29 L. T. 711; 22 W. R. 143.

And the accused is not entitled to a prohibition staying proceedings until the bishop has decided a preliminary objection to the fitness of the pro-

moter. Ih.

Refusal to Institute Cleric for Insufficiency of Learning.]-Where in a suit of duplex querela the bishop justifies his refusal to institute on the ground that the promovent is minns sufficiens in literatura, it is for the court to determine whether the standard up to which the bishop considers the ability of the promovent ought to come is such a standard as is required by law. Willis v. Oxford (Bishop), 2 P. D. 192.

In the affidavit to leave the monition in a suit of duplex querela, it was alleged that the promovent had been refused institution to a benefice by the bishop of the diocese on the ground of insufficiency of learning. On application on behalf of the bishop the court ordered that the suit should be tried, not by act on petition and

answer, but by plea and proof, and that the promovent should bring in his libel. Ib.

The libel of the promovent having been subsequently brought in, a responsive plea was filed on behalf of the bishop, alleging in effect that the promovent on applying to be instituted had been examined by direction of the bishop, and that the result of the examination had conscientionsly satisfied the bishop that the promovent was non idoneus and minus sufficiens in literaturâ. Thereupon the promovent applied to the court to reject the responsive plea. The court directed that the plea should be amended, and that there should be on the face of the amended plea such a statement of the grounds on which institution was refused as would enable the court, assuming the facts to be true, to decide upon the validity of the objection taken to the promovent, and would enable the promovent to take issue on the truth of such facts. Th.

Examination by, and Letters Commendatory.] The space of twenty-eight days specified in the 95th canon, for a bishop to inquire into the suffi-ciency and qualities of every minister after he hath been presented unto him to be instituted into any benefice, is not an absolute limitation rendering an examination after that period void.

A bishop is entitled to a reasonable time for such examination. The canon is directory; there are no prohibitory words to confine a bishop to the space of twenty-eight days. Gorham v. Exeter (Bishop), 2 Rob. Ec. Rep. 1; 13 Jur. 238.

A clerk who has held preferment in one bishopric is not, on being presented to a living in another bishopric, bound, as a condition precedent to his examination on the question of fitness, to produce letters testimonial and commendatory from his former bishop. Exeter (Bishop) v. Marshall, 37 L. J., C. P. 331; L. R., 3 H. L. 17; 18 L. T. 376. Affirming 10 W. R. 390.

Committing Waste on See.]—The court has no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see, at least at the suit of an uninterested person. Jefferson v. Durham (Bishop), 1 Bos. & P. 105.

Action by "Receiver" against succeeding issues, profits, sum and sums of money, arising and issuing" from the possessions of the see to hold to P. by himself, or his sufficient deputy or hold to P. by himseit, or as samcient deputy or deputies, to be approved of by the bishop and his successors for his life. The office of receiver was an ancient office, and had been exercised before the restraining statute of 1 Eliz. c. 19. P. held the office under three successive bishops, during the whole of which time he not only received the rents, but negotiated the renewal of leases, and prepared the leases of the see, and likewise attended all searches for records in the bishop's muniment room, for the performance of which acts he received fees and emoluments. His predecessor in office had done the same. A, having succeeded to the bishopric in 1836, refused to admit P.'s elaim of right to perform these lastmentioned acts. Upon a bill, filed by P. against the bishop :- Held, first, that the plaintiff's claim was not of such a nature as to induce this court to interfere to protect him without being well satisfied (which the court was not) that his legal remedy was insufficient to do him complete justice; and, secondly, that the relief sought being analogous to the specific performance of an agreement, the bill must fail on the ground of want of mutuality; the nature of the duties and services asserted by the plaintiff being such as to preclude the possibility of a decree in this court against him, compelling their specific performance. Pichering v. Ely (Bishop), 2 Y. & Coll. C. C. 249; 12 L. J., Ch. 271; 7 Jur. 479.

Whether Covenant binds Successors.] - A bishop, by covenant to pay all charges, does not subject himself to pay land tax, because he cannot bind his successors. Secus, in the case of an individual who can bind his heirs. Blandford v. Murlborough, 2 Atk. 542, or Owon (Bishop) v. Wise, cited id. 544.

10 Car. 1, sess. 3, c. 1.]—The stat. 10 Car. 1, sess. 3, c. 1, extends only to the archbishops and bishops, and applies only to conveyances other than by will. Att.-Gen. v. Flood, Hayes, 611.

#### S. DEANS.

Rights of Dean and Sub-Dean.]—In the cathedral church of A., from a very early period there has been an officer called the sub-dean, who is not a member of the chapter, and is not inducted into a stall. Except on very rare occasions, the sub-dean has been also viear of the parish in which the cathedral is locally situate:—Held, that the sub-dean, as distinguished from the vicar, had separate rights and duties, namely, the dis-charge of spiritual functions within the close, and the ministerial fees arising from the duties so discharged. Held, also, that the appointment of snb-dean did not legally incapacitate the dean when he thought fit, from personally discharging the spiritual duties in respect of the inhabitants of the close. Braithwaite v. Hook, 8 Jur. (N.S.) 1186 : 7 L. T. 254.

An office held by a person called a sub-dean, but independently of the dean, and not subject to the cathedral authorities, is an anomaly unknown to the law. Ib.

#### 4. ARCHDEACONS.

Visitation of.]—For three centuries the practice of the archdeacons had been, in order to

avoid expense, instead of visiting each parish in confirmation by the bishop. There were then the archdeacoury separately, to divide the arch-twenty-four prebends, all in the bishop's gift. deaconry into districts, and to hold the visitation for all the parishes of that district at some one parish church within the district : a visitation so held is not open to objection in a temporal court. Shephard v. Payne, 12 C. B. (N.S.) 414; 31 L. J., C. P. 297; 9 Jur. (N.S.) 354; 6 L. T. 716.

Visitation Fees-Liability of Churchwardens for.]-See CHURCHWARDENS, post, XXII, 4, col, 1352.

#### 5. CANONS AND CANONRIES.

Rights of Canons.]—A statute made in 1663 by the bishop, with the consent of the chapter of Exeter, conferring upon every canon residentiary who should cease to be such by promotion to a higher degree and dignity in the Church of England (unless by voluntary resignation) the right of receiving to his own use the whole profits and advantages of the canonry for the following year, supposing such a statute to be valid, is at all events contrary to the policy of the eccle-siastical establishment, and to be construed strictly; therefore, where the defendant, who was dean and a canon of that chapter, resigned the same, in order to obtain promotion to another deanery, to which he was shortly afterwards promoted:-Held, that he was not within the statute, not having ceased to be a member of the former church by promotion to the latter, but having ceased to be so before his promotion; and besides, his resignation having been voluntary, he was expressly excluded by the terms of the exception; and a promotion from one deanery to another seems not a promotion to a higher degree. The admission of the plaintiff as canon into plenum jus, although not made until a year after his first admission, related back to the time when his title to the profits accrued, so as to enable him to maintain an action for them. Garnett v. Gordon, 1 M. & S. 205.

Ejectment.]—An ejectment will not lie for a canonry as such. Doe d. Butcher v. Musgrave, 1 Scott (N.R) 451; 1 Man. & G. 625; 9 L. J., C. P. 318.

Grant of Canonry as Security.]—A canon of Windsor granted the canonry and the profits to secure a sum of money. So far as it appeared, the estates were vested in the corporation, and the canon was entitled to an aliquot share of the profits. There was no cure of souls, and the only duties were residence within the castle and attendance in the chapel twenty-one days a year : -Held, that the security was valid. Grenfell v. Windsor (Dean and Canons), 2 Beav. 544. And see Butcher v. Musgrave, id. 550, n.

Suppressed Canonries-Rights of Ecclesiastical Commissioners. ]-The ecclesiastical commissioners are entitled to no greater rights in the suppressed canonries under 3 & 4 Vict, c. 113, than the former canons were, and are subject to the same trusts. Att.-Gen v. Windsor (Deun and Canons), 24 Beav. 679; 27 L. J., Ch. 320; 4 Jur. (N.S.) 818; 6 W. R. 220. Affirmed, 8 H. L. C. 369; 30 L. J., Ch. 529.

Rights of Crown to Recommend. ]-The deanery

twenty-four prebends, all in the bishop's gift. Afterwards the chapter was divided into nine canons residentiary and fifteen prebendaries, the canons residentiary being upon vacancies elected from the prebendaries. After this the practice was, that the bishop issued a licence to the chapter to elect a canon, who in practice was always a canon residentiary, for dean, and the chapter elected accordingly; and the party elected was then presented to the bishop, who confirmed the election, and the party then took the oath of canonical obedience to the bishop, who sent his mandate to the chapter to install him, which they did. About the middle of the sixteenth century the Crown began to recom-mend the party to be elected. The practice prevailed from 1681 to 1840, which comprehended fifteen elections, and the appointments during that period were by royal patent, describing the deanery as a donative in the Crown, granting it to the party, and commanding the chapter to admit him. Whenever the party named by the Crown was not one of the chapter, the bishop collated him to the prebend of the late dcan, and the chapter elected him a canon residentiary, and the other forms of the election, commencing with the bishop's licence, were pursued. In 1839. the deanery being vacant, the Queen recom-mended one of the prebendaries, requiring and commanding the chapter to elect him. chapter having elected another, a canon residentiary, with all the usual forms in other respects, who was installed and acted, a mandamus was applied for, commanding the chapter to admit and elect the party named by the Crown, and, if necessary for that purpose, to elect, collate and admit him to be a canon residentiary, Mandamus refused, because, first, the Crown had not the right to enforce the recommendation either by the general law or by the particular foundation. Reg. v. Exeter (Dean and Chapter), 12 A. & E. 512; 4 P. & D. 252; 9 L. J., Q. B. 809; 4 Jur. 674. See Clarke v. Sarum (Bishop), 2 Str. 1082.

And, secondly, if the Crown had the right to present absolutely, or to nominate a person to be presented by the chapter to the bishop for institution, which, however, did not appear to be the fact, the proper remedy was by quare impedit. Ib.

Close Chapter-3 & 4 Vict. c. 113, s. 25.]-In the cathedral church of Hereford the capitular body consisted at the time of the passing of the 3 & 4 Vict. c. 113, of a dean and five residentiary canons, called the "close chapter," and twentytwo non-residentiary canons, making up the general chapter. One of the officers in the body was the prælector, who by customary right on a vacancy succeeded to one of the residentiary canonries, and a new prælector was appointed out of the non-residentiary canons by the close chapter. The non - residentiary canons were appointed by the bishop. At York the dean alone appointed the residentiary canons from out of the non-residentiaries. Since the passing of the act a prelector had been appointed at Hereford; and the last of those persons who were members of the close chapter at the passing of the statute of Exeter was founded in the reign of Henry the having afterwards died, the bishop claimed to Third by the chapter, with the consent of the appoint directly to the vacant canonry residen-bishop, who endowed it. By the charter of tiary. The predector claimed to succeed to the foundation the dean was to be elected by the vacancy on the ground that several who were chapter from among the prebendaries, subject to members of the general chapter at the passing

of the act were still members:—Held, that are entitled to vote at a meeting of the chapter "chapter," in s. 25, meant the "close chapter"; on the occasion of an election of a proctor to for that it was the intention of the statute to represent the chapter in convocation, such right preserve the vested rights of patronage alone, being being reserved by 3 & 4 Vict. c. 113. preserve the vested rights of patronage alone, being being reserved by 3 & 4 Vict. c. 113. without any regard to the rights of the body out Randolph v. Milman, 38 L. J., C. P. 81; L. R. 4 of which the selection was to be made : and the C. P. 107 : 17 W. R. 262-Ex. Ch. residentiary canonries therefore were in the direct patronage of the bishop. Reg. v. Hereford (Dean and Chapter), 39 L. J., Q. B. 97; L. B. 5 Q. B. 196; 22 L. T. 295; 18 W. R. 666.

Canon's Stipend -- Scotch Episcopal Church.] The rules of a cathedral belonging to the Scottish Episcopal Church provided that the clergy of the cathedral should be appointed by the bishop, and to consist inter alios of three or more canons residentiary; further that temporal affairs of the cathedral should be vested in a board of management with which should rest the administration of the funds and the providing fitting support, "for the provost and canons of the cathedral." Two out of the three canons appointed received from the board respectively 2001, and 1501, per annum. The third canon, the pursner, claimed from the board an allowance, or, if they had not sufficient funds, that they should appropriate the 350% among the three canons:—Held, that the pursuer's action was irrelevant, no contract nor trust of which he was a beneficiary being estab-lished, and that the distribution of the funds was a matter entirely within the discretion of was a matter enterly Winnit the discretion out the defenders, which discretion could not be questioned so long as the funds were administered in good faith and applied to no other cathedral purposes. *Brook v. Kelly*, [1893] A. C. 721—H. L. (Sc.)

Right to Vote.]—When a canon occupies a honse in right of his canonry, the presumption is that he does so in his separate capacity as a corporation sole, and not as a mode of enjoyment by the corporation aggregate of the dean and chapter, of which he is a member, and that therefore his interest in such house is sufficient to entitle him to a borough vote. Ford v. Harring-ton, 39 L. J., C. P. 107; L. R. 5 C. P. 282; 21 L. T. 609; 18 W. R. 289; 1 Hopw. & C. 331.

Practice relating to Mandamus. ]—A man-damus lies for refusing to admit a residentiary canon of a church, who appears to have been duly elected. Webber's Case, Lofft, 254, 266.

So also to compel the dean and chapter to fill up a vacancy among canons residentiary; and on such a mandamus the court will compel an election at the peril of those who resist, "Chichester (Bishop) v. Harward, I Term Rep. 652,

#### 6. PREBENDARIES.

Prebend—What.]—A prebend is a benefice within 43 Geo. 3, c. 84. Catheart v. Hardy, 2 M. & S. 534; 5 Taunt. 2.

Annexation of .] -A prebend being an ecclesiastical benefice, and not a mere office, the Grown may alienate it, or annex it to an archdeaconry, the archdeacon being a corporation sole, and also a spiritual person capable of discharging all the duties and exercising all the functions belonging to a prebend; but an annexation once made cannot be severed. Rex v. Bayley, 1 B. & Ad. 761; 9 L. J. (0.S.) K. B. 131.

Sale for Redemption of Land Tax.]-The tion of the land tax, to authorise all such sales for that purpose to be made by ecclesiastical persons, with the consent thereby required, as could have been made for any purpose with the like consent before the passing of the restraining statutes, and before the restraining statutes a sale might have been made from a probendary in his corporate character to a prebendary in his individual character. Beaden v. King, 9 Hare, 499.

#### 7. VICARS, VICARS CHORAL AND LAY RECTORS

Possession of Church.]-The doctrine that the possession of the church is in the minister and churchwardens, and no person has a right to enter it when it is not open for divine service, except with their permission, and under their authority, holds as well in the temporal as in the ecclesiastical courts. Griffin v. Deighton, 5 B. & S. 930; 33 L. J., Q. B. 181; 9 L. T. 814; 10 L. T. 814; 12 W. R. 441—Ex. Ch.

In a parish where there is both a lay rector and a vicar, the rector has no right to prevent the vicar having access to any part of the parish church by any of its doors. Ib.

Statutory Limited Interest.] - A vicar is a person having a limited interest within the meaning of s. 3 of the Landowners West of England and South Walcs Land Drainage and Inclosures Companies Act. Goodden v. Coles, 59 L. T. 309 ; 36 W. R. 828.

Vicars Choral—Rights of ]—A vicar choral of St. Paul's Cathedral is not entitled during his year of probation to share in a fine paid on the renewal of a lease by the dean and chapter and vicars choral of an estate which is one of the sources of the emoluments enjoyed by such viears choral. Shoubridge v. Clark, 12 C. B. 335.

- Liability of ] - A vicar choral of a cathedral church is a corporation sole, and therefore liable to an action for dilapidation of the house, which he held as vicar choral, at the suit of his successor. Gleaves v. Parfitt, 7 C. B. (N.S.) 838; 29 L. J., C. P. 216; 6 Jur. (N.S.) 805.

- Accepting Benefice with Cure of Souls. -The office of vicar choral is not attended with a cure of souls; and a vicar choral, by accepting a benefice with cure of souls, does not thereby hold benefices in plurality, and such office of vicar choral is not thereby vacated within 13 & 14 Vict. c. 98 (Irish). Shaw v. Wood, 5 Ir. C. L. R. 156.

- Choice of Vicarial House. ]-Where a prescriptive ecclesiastical corporation of vicars choral of the cathedral of Chichester had, besides other estates in common, four vicarial houses, with their appurtenances, which had always been appropriated to the several use and residence of the four vicars : and by ancient custom, upon Right to Yota.]—The non-residentiary probendaries of the cathedral charch of St. Paul one of such vicaria houses, with the appurtenances; of which option an entry was made in | chapel had not been endowed according to option, which was entered in the act book and signed by all, to take one of the vicarial houses with certain appurtenances, then in the possession of S., which were not all the appurtenances formerly annexed to and enjoyed with the same house by his predecessors therein, could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased of by the corporation before his appointment; for supposing him entitled to make an option of the entire premises and to have entered it in the act book, as against the corporation, yet no such option having been made and entered in the act book, according to the custom, he had no separate legal title to the premises in question, on which he could maintain an electment. Goodtitle d. Miller v. Wilson, 11 East, 334.

#### 8. CURATES AND LECTURERS.

#### a. Appointment of and Licensing.

Curates - Who are ] - A spiritual person, who in virtue of his office of chaplain of a college, held a curacy with a dwelling attached to it, and ceasing to hold that office, retained possession of the dwelling, was not a curate within 57 Geo. 3, c. 99, s. 67, and might be ejected by a notice to quit forthwith; and he was not entitled to the three months' notice required to be given by that statute, with the consent of the bishop.

Goodtitle d. Trinity College v. Lee, 2 D. & R.

718. See also Richards v. Fincher, 43 L. J., Ecc. 21 : L. R. 4 Ecc. 255.

- Right to Appoint.] - Semble, an ecclesiastical custom (which is not immemorial) will not, though acted on for a long time, deprive a rector of his common-law right to appoint his currete. Arnold v. Bath (Bishop), 5 Bing. 316; 2 M. & P. 550; 7 L. J. (O.S.) C. P. 120; 30 R. R. 613.

An allegation of a custom for parishioners to elect a curate, is not supported by proof of such a custom confined to parishoners paying churchrates. Ib.

- Requisition of Bishop to compel Vicar to Appoint.]—A bishop issued a requisition under 57 Geo. 3, c. 99, s. 50, requiring a vicar to nominate a curate with a stipend, on the ground that it appeared to the bishop, of his own knowledge, that the ecclesiastical duties of the vicarage and parish church were inadequately performed, by reason of the vicar's negligence. The vicar appointed no curate, and did not appeal to the archbishop. The bishop, after three months, licensed A., clerk, as curate, with a stipend. The vicar refused to allow A. to officiate, upon which the bishop issued a mandate or summons to shew cause why the vicar should not pay the stipend due, and ultimately proceeded to sequestration: -Held, that the requisition, upon which the whole of the proceedings were founded, was in the nature of a judgment, and void, as the party had had no opportunity of being heard. Cupel v. Child, 2 C. & J. 558; 2 Tyr. 689; 1 L. J., Ex. 205.

Licensing of ]-Where a licensed minister, appointed by the trustees of a chapel, had been carried on in the mode prescribed by the Church restrained from preaching by a decree of the Discipline Act (3 & 4 Vict. c. 86), s. 23. Richards Ecclesiastical Court, upon the ground that the v. Fincher, L. R. 4 Ecc. 107.

the corporation act book, and signed by the I & 2 will 4, 0.88, whereupon the incumbent of vicars:—Held, that a new vicar having made an the parish appointed a minister, but the bishon refused to license him, the court granted a mandamus, requiring the bishop to license the minister so appointed by the incumbent. Reg. v. London (Bishop), 1 W. W. & H. 151.

Where a mandamus to the ordinary, to license a curate, only stated that he had been duly nominated and appointed by the inhabitants of a township to be curate of the church of P., without stating either the consent of the rector, or any endowment or custom for the inhabitants to make such nomination and appointment, the court quashed the writ, upon the ground that the writ should have stated those facts which are necessary to shew that the party applying for it is entitled to the relief prayed. Rox v. Oxford (Bishop), 7 East, 345; 3 Smith, 341; S R. R. 696.

\_\_\_\_Licensed Curate, who.]—A duly ordained clergyman licensed by the bishop to perform divine service in an unconsecrated church built by subscription, having no nomination or stipend, the church having no district assigned to it :-Held, not to be a licensed curate within 36 Geo. 3. c. 83, s. 6, or 1 & 2 Vict. c. 106, s. 98. Sedgwick v. Manchester (Bishop), 38 L. J., Ecc. 30.

His licence having been revoked by the bishop, no appeal lay to the archbishop. Ib.

- Revoking Licence.]-Semble, the rule prohibiting ecclesiastical courts from taking cognizance of matters triable at common law does not apply to the statutory powers of the bishops and archbishops over curates' licences under 1 & 2 Vict. c. 106, s. 28. Sinyanhi, In re, 12 W. R. 825.

Quære, whether, on appeal to the archbishop, a charge can be investigated different from that on which the bishop proceeded. Ib.

Upon an appeal to the archbishop under 1 & 2 Vict. c. 106, s. 98, against the revocation by the bishop of a curate's licence, the curate has a right to be heard if he wishes for a hearing. Reg. v. Casterbury (Archbishop), 1 El. & El. 545; 28 L. J., Q. B. 154; 5 Jur. (N.S.) 958; 7 W. R. 212. But no appeal lies to the privy council from a decision of the Archbishop of Canterbury, con-

firming the revocation of the licence of a stipendiary curate. Poole v. London (Bishop), 14 Moore, P. C. 262; 7 Jur. (N.S.) 347; 4 L. T. 224; 9 W. R. 485.

The consent of the incumbent to a licence to a clergyman to officiate in a proprietary chapel or in an unconsecrated building in the parish is revocable at the will of his successor, and when revoked the licence ceases. Richards v. Fincher, 43 L. J., Ecc. 21; L. R. 4 Ecc. 255.

— Notice to revoke. ]—A notice under 1 & 2 Vict. c. 106, s. 98, from a bishop that he intends to revoke a curate's licence, and appointing a time for the curate to attend and shew cause, is not a notice falling within the provisions of the 112th section, which requires the service of certain documents to be effected in a particular manner. Poole v. London (Bishop), 5 Jur. (N.S.) 522.

- Officiating without Licence-Action by Vicar.]-A suit promoted by the vicar of the parish against a clerk for officiating without leave in a chapel in such parish can only be carried on in the mode prescribed by the Church Court to entertain such a suit held to be invalid. Ib.

Legal Remedies of - Mandamus. -A mandanus is the proper remedy to restore a curate to his chapel. Rew v. Burker, 1 W. BI. 300 : 3 Burr. 1265,

So to restore a curate to a chapel, being a donative endowed with lands. Rew v. Blower, 2 Page 1048

But not to compel a dean to license a second

curate. Anon., 2 Chit. 253.

Or a bishop to license a curate of an angmented enracy, where there was a cross-nomination, because the party has another specific legal remedy by quare impedit. Rev. Chester (Bishop), 1 Term Rep. 396; 1 R. R. 237.

Perpetual Curates. 1-The perpetual curate of a benefice has a right to the possession of the church and the churchyard so far as is necessary for the performance of his sacred functions, but no farther, and therefore has no right to prevent the lay rector or the persons claiming under him from depasting by sheep the grass in the churchyard; and the law in this respect is not affected by 1 Geo. 1, st. 2, c. 10. Greenslade v. Darby, 9 B. & S. 428; 37 L. J., Q. B. 137; L. R. 3 Q. B. 421; 18 L. T. 463; 16 W. R. 898.

Lecturers-Licence to Preach. |- The court will not grant a licence to a clergyman to preach as lecturer of a parish. Rev v. London (Bishop), 1 Wils. 11; 2 Str. 1192.

So the court will refuse to grant a mandamus to a bishop to licence a lecturer without the consent

of the rector, where such lecturer is supported by voluntary contributions, unless an immenorial custom to elect without such consent is shewn. Rew v. London (Bishop), 1 Term Rep. 331; 1 R. R. 213.

\_\_\_\_ Fitness of.]—Where no immemorial custom appeared to appoint a feeturer in a parish church, and, on the contrary, it appeared that the lectureship was founded in 1658, when the episcopal constitution was suspended, and conse-quently there could not be the joint assent of the bishop, the rector and the vicar to the endowment; a mandamus to the bishop to licence a lecturer, without the assent of the vicar, was denied; though it appeared that the lectureship was originally endowed by the rector, with an annual stipend payable out of the impropriate rectory, and that several lecturers had from time to time been accepted by the bishop and vicars for the time being. Rew v. Exeter (Bishop), 2 East, 462 : 6 R. R. 473.

The court discharged a rule for a mandamus to the bishop of Loudon, to licence a clerk chosen by the inhabitants of St. Bartholomew, Exchange, London, to an endowed lectureship in the parish church there, upon affidavit made by the bishop, that the party elected had been admitted before him, with a view to his being "approved and licensed"; (which are the words of the 13 & 14 Car. 2, c. 4, s. 19, imposing that function upon the archbishop or bishop before any lecturer may lawfully preach); and that he had made diligent inquiry concerning his conduct and ministry, and being convinced from such inquiry that he was not a fit person to be allowed to lecture, had conscientiously determined, after having heard

Letters of request signed by the chancellor of Canterbury, as well as the bishop, in the alternathe diocese calling upon the judge of the Arches tive, was also discharged as against the former (against whom it was not pressed), though it was considered to be equally open to the party to make a substantive application against the archbishop, if he declined to inquire as to his fitness, with a view to approve or disapprove of him as a fit person to be lieenced. Rew v. Canterbury (Archbishop) and London (Bishop), 15 East, 117; 13 R. R. 409.

The 13 & 14 Car. 2, c. 4, s. 19, having enacted that no person shall be allowed to preach as a lecturer, in any church, &c., "unless he be first approved and thereunto licensed by the arch-bishop of the province, or bishop of the diocese," the court will not entertain a motion for a mandamus to the bishop to licence a lecturer appointed by the parish upon the previous refusal of the bishop to do so, upon the alleged ground of unfitness in the party elected, unless it is shewn that the like application had also been made to the archbishop, and rejected by him. Rex v. London (Bishop), 13 East, 419; 12 R. R. 393, 399.

---- Certificate of Rector.]-A mandamns to the rector to certify to the bishop the election of a lecturer was refused, there being no immemorial custom for the lecturer to use the pulpit without the rector's consent, and the lecturer being paid out of the poor-rates. Rew v. Field, 4 Term Rep. 125.

Rights of Trustees of a Lecture, ]-Trustees of a lecture, to be preached at a convenient hour, may appoint any hour they please, and vary their appointment. Rev v. Bathurst, 1 W. Bl. 210.

#### b. Stipend and Dismissal.

Stipend-Contract as to. ]-A certificate by a rector to the bishop, appointing a person curate of his church, and promising him to allow him a salary until preferred, is no contract with the bishop, but merely information to him of a matter of fact; the contract is with the curate. Martyn v. Hind, Cowp. 443; 1 Doug, 142.

\_\_\_\_ Right to Recover. \_\_ The 28 Hen. 8, c. 11, ss. 5, 10, is not repealed by 1 & 2 Vict. c. 106. Dakins v. Seaman or Searman, 9 M. & W. 777; 11 L. J., Ex. 274; 6 Jur. 783.

Therefore, where, in an action against an incumbent of a living, by a curate, to recover compensation for having discharged the parochial duty during the vacancy, the declaration stated, that the plaintiff during the vacancy duly served and kept the cure, at the request of the special sequestrators thereof, appointed by the bishop of the diocese:—Held, that he was entitled to recover. Ib.

Semble, that the want of the licence required by the 36th and 48th canous of 1603 will not oust a clergyman, entitled to sue in a court of common law, of his right of action. Ib.

Such licence is only necessary in case of a permanent cure, and not for a clergyman who officiates for an occasion at the request of a sequestrator. Ib.

A curate cannot have the benefit of a proceeding by monition for the recovery of a salary assigned by the bishop without the consent of the incumbent, the incumbent being resident on his him, that he could not approve or licence him. benefice, and discharging the duties generally, And the rule which included the archbishop of but desirous of the assistance of a curate. Rex benefice, and discharging the duties generally, v. Peterborough (Bishop), 4 D. & R. 720; 3 takes to continue him and pay him a salary till B. & C. 47; 2 L. J. (O.S.) K. B. 199. he is otherwise provided with some ecclesiastical

How Recovered. ]—Under 57 Geo. 3, c. 99, ss. 53 (1 & 2 Vict. c. 106, s. 83, similar), and 74 (enacting that differences as to stipend are to be determined by the bishop only):-Held, in an action by a curate against his rector for arrears of salary, first, that these provisions of the statute were properly pleaded in bar, and not to the jurisdiction. West v. Turner, 1 N. & P. 612; 3 A. & E. 614; 6 L. J., K. B. 153.

Held, secondly, that it was not necessary to state in the plea the nature of the differences which arose. Ĩb.

— Differences as to.]—The 83rd section of 1 & 2 Vict. c. 106, provides that differences between the incumbent of a benefice and his curate touching the curate's stipend shall be decided summarily by the bishop of the diocese on com-plaint to him made. The defendant agreed to employ the plaintiff as his curate at an annual stipend of 110L, besides board and lodging in the vicarage house. These terms were set out in the nomination of the curate to the bishop. Differences having arisen relative to the board and lodging, the plaintiff brought an action in the High Court against the defendant to recover damages in lieu of board and lodging :- Held, upon the defendant's motion to stay, that the action would lie, and that the High Court had jurisdiction to try it, since it was neither within the language nor spirit of the above enactment that the bishop should be constituted a judge without a jury to assess damages, or that the plaintiff should be deprived of the ordinary means of recovering them. Fraser v. Denison, 57 L. J., Q. B. 550; 52 J. P. 678.

Refusal to Pay-Issue of Sequestration-Effect of.]-A monition was issued, under 1 & 2 Vict. c. 106, s. 83, by a bishop, which recited that a complaint had been made by the curate that arrears of stipend were due to him, which A. had wilfully neglected and refused to pay, and that A. and the curate having appeared before him, the bishop heard summarily the differences, and that the complaint was duly proved before him, and that he adjudged the same to be true; it then admonished and required A. to pay the arrears. Default being made in payment, the sequestration issued, under which the fruits of the benefice were seized to satisfy the arrears of the stipend : -Held, that A. could not, after the sequestra-tion issued, object that he had not been guilty of a refusal to pay the stipend, or that he had no notice of the curate being appointed by the bishop. Daniel v. Morton, 16 Q. B. 198; 20 L. J., Q. B. 98; 15 Jur. 699.

Workhouse Chaplaincy-Charge of Stipend in Favour of Creditor. ]—A charge by a work-house chaplain, appointed by the guardians, of his stipend or salary, which is paid out of the rates, to a creditor, is not invalid on the ground of public policy. In order to made the office or chaplaincy a public office the pay must come out of national and not out of local funds. Official Receiver, Ex parte, Mirams, In re, 60 L. J., Q. B. 397; [1891] 1 Q. B. 594; 64 L. T. 117; 39 W. R. 464; 8 Morrell, 59.

During Rector's Continuance in Office—
After Preferment of Rector,—If a rector gives within the above enactment. Th. as person a title to the bishop, by which he sppoints him curate of his church, and underparts him curate of his church, and him

preferment, or for fault by him committed, or he is lawfully removed, he cannot remove him without cause, while he continues rector of that parish, and during that time the curate may recover the salary in an action ; but if the rector is bona fide preferred to another living, the obligation ceases. Rex v. Peterborough (Bishop), supra.

Of Reader.]-A readership is not an ecclesiastical preferment within the meaning of such a title. Th.

Dismissal-Notice to quit Cure. ]-A notice by an incumbent to a curate to quit his curacy, given under 1 & 2 Vict. c. 106, s. 95, is not a notice within or subject to the regulations prescribed by s 112 of the same statute. Tanner v. Serivener, 13 P. D. 128.

A clerk, to whom a licence to officiate as minister in an unconsecrated chapel in a parish has been granted by the bishop without the consent of the incumbent, cannot, as against a succeeding incumbent, be considered as a curate, and is not entitled to the benefit of the provisions of the 1 & 2 Vict. c. 106, s. 95. Richards v. of the 1 & 2 Vict. c. 106, s. 95. Richard Fincher, 43 L. J., Ecc. 21; L. R. 4 Ecc. 255.

— Of Chaplains to Unions.]—The poor-law board may order the dismissal of the chaplain of a union. Molineum, En parte, 7 L. T. 599; 11 W. R. 233.

9. PRIVILEGES AND DISABILITIES OF CLERGY. Privileges-From Arrest. - A clergyman duly cited to attend a visitation by the ordinary is privileged from arrest, eundo, redeundo et morando. Af Geath v. Geraghty, 13 W. R. 127. S. P., Blane v. Geraghty, 15 W. R. 133. A priest in ordinary in one of her majesty's

chapels royal is privileged from arrest on process of the county court for non-attendance on a judgment summons, such process being in the nature of execution and not merely process of contempt. The proper mode of obtaining his discharge in such case is not by writ of privilege, but by habeas corpus from one of the superior ourts, upon affidavits showing his privilege, or by an application to the judge of the county-court. Dakins, Exparts, 16 C. B. 77; 24 L. J., C. P. 131; 1 Jur. (N.S.) 378.

From Payment of Toll on Turnpike Road. -The 3 Geo. 4, c. 126, s. 32, enacts, that no toll shall be demanded, or taken, by virtue of any act, on any turnpike road, "from any rector, vicar or curate going to or returning from visiting any sick parishioner, or on other his paro-chial duty within his parish":—Held, that this exempts a curate who, in going to perform duty in a parish, passes through a turnpike gate in another parish from payment of toll at such gate. Temple v. Dickinson, 1 El. & El. 34; 28 L. J., M. C. 10; 5 Jur. (N.S.) 363. A clergyman of the Established Church who,

during the vacancy, by resignation of the living of a parish, has been requested by the churchwardens to perform the duty of curate, and has been authorised by a letter sent by the bishop's direction, but without licence, under the bishop's

16 L. T. 896.

A clergyman of the Church of England, a A ciergyman of the Church of Engund, a curate of parish A., while officiating temporarily in a neighbouring parish B., without the permission or licence of the bishop, during the absence of the rector of the latter parish, is not, when riding to perform clerical duty in parish B., entitled to exemption from turnpike toll under 3 Geo. 4, c. 126, s. 32, which exempts from toll "any curate going to or returning from on "any curace going to or returning from visiting any sick parishioner or on other his parochial duty within his parish." Branskill v. Wratzan, 37 L. J., M. C. 103; L. R. 3 Q. B. 418; 18 L. T. 432; 16 W. R. 1009.

Right of Voting.]—Land of the value of 40s. per annum was conveyed in 1856 "to the use of C. and his successors, vicars of the vicarage of Holy Trinity, Cambridge, for the time being, for ever." The incumbency was only a perpetual for ever." The incumbency was only a perpetual enracy; and the incumbent became, in 1866, perpetual curate, and claimed to be entitled to vote for the county in respect of the land so conveyed:—Held, that he was entitled to vote for the county, as he had at least an equitable here county, as he had at least an equitable freehold in the land. Wallis v. Birks, 39 L. J., C. P. 106; L. R. 5 C. P. 222; 22 L. T. 268; 18 W. R. 734; 1 Hopw. & C. 365.

A clergyman claimed a vote for a county in respect of the incumbency of a district church.

As incumbent he had the freehold of the church and was entitled to annual stipends of 150%, and 507 from the ecclesiastical commissioners and governors of Queen Anne's bounty, respectively, paid out of funds which did not arise from land within the parish in which he claimed to be registered; to fees on the burial in a cemetery, also out of the parish, of persons dying within the district attached to the church; and to fees for marriages, baptisms and churchings, per-formed within the church; each of which amounted to more than 40s. a year :- Held, that 39 L. J., C. P. 36; L. R. 5 C. P. 217; 22 L. T. 268; 18 W. R. 144; 1 Hopw. & C. 349.

Relinquishment of Profession.]—33 & 34 Vict. c. 91 (The Clerical Disabilities Act, 1870). enables deacons and priests of the Church of England to relinquish their clerical profession. A clergyman of the Church of England, with

a view of relinquishing his office, executed a deed in the form prescribed by 33 & 34 Viet. e. 91, and caused it to be incolled, but did not take any of the further steps required by the act. He subsequently abandoned the intention of relinquishing his office:—Held, that the involment might be vacated. Clergyman, In re, 42 L. J., Ch. 260; L. R. 15 Eq. 154; 21 W. R. 241.

Liability to Bankruptey.]—If a elergyman trade, though illegal, he is liable to be made a bankrupt. Meymot, Ex parte, 1 Atk. 196.

Disabilities-Trading previous to 4 Vict. c. 14.] Spiritual persons holding benefices could not legally be members of a joint stock banking company. Hall v. Franklin, 3 M. & W. 259; 1 H. & H. 8; 7 L. J., Ex. 110; 12 Jur. 97.

persons in the carriage with him, disentitled to provisions, and makes a contract in the course of persons in the carriage with min, descinded to provisions, and makes a contract in the course of the exemption from turnpike tolds given by such trade, such contract may, under the provisions of Geo. 4, c. 126, s. 32. Laquard v. Oreg, 37 L. J., in s. 31, be enforced either against or by the M. C. 148; L. R. 3 Q. B. 415; 18 L. T. 632; clergyman, though both parties contract with knowledge of the facts constituting the illegality. Lewis v. Bright, 4 El. & Bl. 917; 24 L. J., Q. B. 191; 1 Jur. (N.S.) 757; 3 W. R. 400.

#### 10. DISCIPLINE.

#### a. Generally.

Clergy Discipline Act, 1892-Purview of Act. 7 The complaint in a criminal suit tried before the Chancellor of the diocese of Rochester sitting with assessors, under the Clergy Discipline Act, 1892, after charging the defendant, a clergyman holding preferment within the diocese of Rochester, with certain specified offences againstmorality, further charged him with "occasioning grave scandal and offence in the parish of which he was incumbent by his scandalous conduct in the several preceding charges set forth" :--Held, that the ecclesiastical offence of "occasioning scandal and evil report" was not an offence which could be legally tried under the Clergy Discipline Act, 1892, and that all reference to any such charge must be struck out of the complaint. Rochester (Bishop) v. Harris, [1893]

Jurisdiction to depose, when to beexercised.]-The jurisdiction conferred upon a bishop of a diocese by s. S of the Clergy Discipline Act, 1892, to depose from holy orders. a clergyman whose preferment within the diocese becomes vacant by virtue of the act or of any sentence passed in pursuance of the act, need not be exercised at the time when the preferment is. declared to be vacant or sentence of deprivation is passed, but may be exercised after the lapse of an interval of time. Reg. v. Durham (Bishop), 66 L. J., Q. B. 826; [1897] 2 Q. B. 414; 77 L. T. 190; 46 W. R. 36—C. A.

Practice of Court.]-Practice of the Consistory Court of Rochester as to admitting to proof in a eriminal suit charges of habitual drunkenness. and of acts of drunkenness, the precise date of which the prosecutor cannot specify. Ib.

After the institution of an appeal from the Arches Court, in a suit against a clergyman for adultery, fornication or incontinence, this court refused to receive additional articles chargi acts of adultery, alleged to have been committed subsequently to the close of the case in the Arches Court, or to examine vivâ voce the witnesses examined in the court below, upon the allegation that they had been tampered with previously to their examination. Craig v. Farnell, 6 Moore, P. C. 446: 13 Jur. 217.

Church Discipline Act, 1840 .- Promotion of suitby Bishop.]-Under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), which empowers a bishop to hear and determine a charge against a clerk in orders of having committed an ecclesiastical offence, if the bishop be not patron of any preferment held by the party accused, the mere fact that the bishop is, by his secretary, promoter of the suit does not, in the absence of any — Under 1 & 2 Vict. c. 106.]—Where a clergyman engages in trade contrary to these (Eshep), 9 Q. B. D. 454; 46 L. T. 692,

Place of Hearing.]-The judge of the chancery court of York has power under the bishop by 1 & 2 Vict. c. 106, s. 109, has reference Church Discipline Act to make a rule that the hearing of cases in that court shall take place The without the local limits of the court. chancery court of York has jurisdiction to hear a suit against a clergyman beneficed in the province of York in respect of offences alleged to have been committed by him without the limits of the province. Noble v. Ahier, 11 P. D.

Letters of Request - Criminal Offence. ]-Letters of request were presented to the official principal of the chancery court of York, requesting that a clerk might be cited before him to answer a charge that he had been guilty of a criminal offence, viz., of sodomy:—Held, that the letters ought not to be accepted, for a charge of so grave a character ought not to be investigated by an ecclesiastical court, until the person charged had been tried and convicted by a criminal court of competent jurisdiction. A. B., In re. 11 P. D. 56.

Criminal Suit - Particulars. ]-In a criminal suit containing charges of misconduct against a clerk in holy orders, an order was made after the close of the pleadings that the promoter should give particulars of the charges. Such particulars should as a rule be applied for on the admission of articles. Salisbury (Bishop) v. Ottley, 10 P. D. 20.

Suspension ab officio - Conviction before Justices. ]-In a suit instituted in the Court of Arches against a clerk in orders, the articles alleged that he had been convicted before justices in petty sessions of having been drunk and riotous in a public place, and prayed that he might be punished for the scaudal caused thereby. The respondent, by his plea, denied that he had been drunk and riotous, or that the conviction had caused scandal, alleged that it had been obtained by perjured evidence, and demanded a full inquiry into the facts. On motion to strike out this plea: —Held, that the plea was no answer to the articles and could not be admitted, for the court had jurisdiction to suspend a clerk ab officio on account of the scandal caused by the conviction without considering whether the offence charged had been actually committed. Borough v. Collins, 15 P. D. 81.

See further cases, sub tit. PRACTICE AND PROCEDURE IN ECCLESIASTICAL MATTERS, post, XXVIII., col. 1386, foll.

# b. Offence.

Neglect to perform Divine Service. - The shutting up and refusing to perform divine service in one of two churches forming together a distinct parish and benefice under an order in council made pursuant to 1 & 2 Vict. c. 106, and 2 & 3 Vict. c. 49, is an ecclesiastical offence cognisable under 3 & 4 Vict. c. 86, and the incumbent persisting in such a course, after notice from the ordinary, may be proceeded against under that act for having offended against the ecclesiastical law of the realin, by a contumacious refused to obey the lawful order of the bishop. Ringy v. Winchester (Bishop), 38 L. J., Ecc. 23; 1. R. 2 P. C. 223; 19 L. T. 578; 17 W. R. 235.

The Act of Uniformity (13 & 14 Car. 2, c. 4)

cannot apply to such a case. Ib.

The jurisdiction given exclusively to the only to proceedings taken under that act, and does not oust the general jurisdiction of the Ecclesiastical Court for an offence committed against the common ecclesiastical law. Ib.

Reading Prayers after Prohibition.]—A. was appointed chaplain to a union, and his appointment was confirmed by the bishop of the diocese, in which the workhouse is situate. By the directions of the guardians of the union, but after a prohibition from the incumbent of the parish in which the workhouse is situate, he, on several Sundays, read the prayers of the Church of England in the chapel of the union work-house:—Held, that he had not committed an ecclesiastical offence. Malyneux v. Bayshaw, 9 Jur. (x.s.) 553; 8 L. T. 331; 11 W. R. 687.

Brawling.]-Sect. 2 of the Ecclesiastical Courts Jurisdiction Act, 1860, which enacts that "any person who shall be guilty of riotous, violent, person who shall be guilty of riotous, violent, or indecent behaviour ... in any churchyard or burial-ground" is liable to a penalty, applies to a person in holy orders. Valuacey v. Fletcher, 66 L. J., Q. B., 297; [1897] 1 Q. B., 265; 76 L. T., 201; 45 W. R. 367; 18 Cox, C. C. 512; 61 J. P.

Fornication of Clergyman, ]-The 27 Geo. 3. c. 44, applies to proceedings against fornicators; whether laymen or elergymen, pro salute anime. Free v. Burgayne, 2 Bligh (8.8.) 65; 1 Dow & Cl. 115; 6 B. & C. 27, 598; 9 D. & R. 14; 31 R. R. 2. But a proceeding in the Ecclesiastical Court

against a clergyman on the ground of fornication. for the purpose of deprivation, suspension or other punishment, merely clerical, is not within the statute. Ib.

A charge of having committed adultery or A charge of naving commuter anthrery of fornication with A. B. is sufficiently definite to sustain a sentence of suspension. Marris v. Ogden, 38 L. J., C. P. 329; L. R. 4 C. P. 687; 20 L. T. 978; 17 W. R. 1103.

A beneficed clergyman, found guilty of solicitation of chastity, suspended for two years ab officio et beneficio, and condemned in costs.

Norotch (Bishop) v. Berney, 14 1. T. 528.

Forgery.]—A clergyman convicted of forging a transfer of 3L per cent. consols, and sentenced to penal servitude for ten years, has been guilty of an offence against the laws ecclesiastical, within 3 & 4 Vict. c. 86, s. 3; and he was deprived of his living, and inhibited from all future performance of divino offices. Hussey v. Radeliffe, 5 Jur. (N.S.) 1014.

#### c. Punishment.

In Discretion of Court. ]-Under the general coclesiastical law the punishment of a beneficed clergyman who is found to have published doctrine contrary to any of the Thirty-nine Articles is in the judicial discretion of the court. Williams v. Salisbury, 7 L. T. 472; 11 W. R. 211.

Jurisdiction of Arches Court. - The dean of the Court of Arches has power by the practice of the court to pronounce sentence of deprivation. In proceedings for the correction and reformation of manners, the ground of the sentence is the public scandal to the church, and the nature and severity of the sentence will depend upon the gravity of the scandal. Bonwell v. London (Bishop), 14 Moore, P. C. 395; 7 Jur. (N.S.) 1001; 4 L. T. 813; 9 W. R. 874.

Suspension Ab officio et beneficio.]—A clerk pleaded guilty to gross acts of intoxication and the use of profane and indecent language. He had already been suspended for a similar official and reinstated. The court refused to deprive him of his cure, but suspended him ab officio et beneficio for five years. Burder v. Puyhe, 1 Jur. (X.s.) 1178.

Prohibition. -In 1874 a suit was instituted by letters of request in the Arches Court, according to the provisions of the 3 & 4 Vict. c. 86 (the Church Discipline Act), against a clerk for unlawful practices in the performance of divine service. A sentence of suspension ab officio for six weeks was pronounced against him, and he was "monished" not to repeat the practices. He did repeat them, and was again admonished. He continued to repeat them, was twice summoned before the court to answer, but did not appear; and in June, 1878, the Dean of Arches "pronomiced decreed and declared" that the acts alleged to have been done by the clerk had been fully proved, "and that in so doing he had repeated the offences alleged against him in the articles exhibited against him in this suit," and had thereby disobeyed and con-travened the monitions served upon him. "For which disobedience the judge did pronounce him to have been guilty of contumacy. And for the conduct aforesaid the judge did further decree and declare" that he should be suspended ab officio et beneficio for three years :-Held, that this was a matter of ecclesiastical procedure alone, and was not, therefore, the subject of a proceeding in prohibition. Muchanochie v. Pen-zance (Lard), 50 L. J., Q. B. 611; 6 App. Cas. 424; 44 L. T. 479; 29 W. R. 633; 45 J. P. 584 -H. L. (E.)

The suspension was only a step in the proceedings which had been regularly instituted in 1874, and was in itself perfectly regular. Ib.

1874, and was in itself perfectly regular. Ib.

Martin v. Mackomochie (L. R. 3 P. C. 409)
and Hebbert v. Purchas (L. R. 4. P. C. 301) approved. Ib.

Interlocutory Order-Jurisdiction.]-A suit having been brought against a clerk in the Court of Arches, under the Church Discipline Act, a sentence of suspension for six months was pronounced against him on the 9th of March, 1878, but was made conditional on an affidavit being filed. Afterwards the affidavit was filed, and an unconditional sentence was pronounced on the 23rd of March, and served on the defendant. A fresh suit was instituted in 1880 for fresh offences, and also for contumacious disobedience to the sentence of the 23rd of March, 1878. These offences being proved, the defendant was sentenced to be deprived of his bene-This sentence was pronounced by the Dean of Arches in committee room E. of the House of Lords, A motion for a prohibition having been brought to restrain the Court of Arches from enforcing the sentence :- Hold, first, that the sentence of the 9th of March was an interlocutory order which did not end the suit, and therefore the court was not functus officio when it pronounced the unconditional sentence of suspension. Coombe v. De lu Bere, 22 Ch. D. 316; 48 L. T. 298; 31 W. R. 258—C. A. Affirming, 47 L. T. 185; 31 W. R. 24.

Secondly. That even if the unconditional sentence had been void, the court would not have exceeded its jurisdiction in passing the sentence of deprivation, as there were other offences proved which would have supported it.

Thirdly. That the site of the old palace of Westminster is no longer a peculiar, but is within the diocese of London and the jurisdiction of the Court of Arches. 1h.

Fourthly. That the new palace of Westminster is not exempt from the jurisdiction of the ordinary civil and ecclesiastical courts on the ground of privilege, inasmuch as it has ceased to be a royal residence. Ib.

Whether committee room E. of the House of Lords is within the precincts of the old palace of Westminster, quare. Ib.

— Operation of ]—A decree of suspension pronounced in the Arches Court, and regularly enforced, against a clergyman, operates for the time of its endurance in the same manner as if he was dead or absolutely removed from his benefice. Bunter or Fisher v. Cresswell, 14 Q. B. 28.5; 19 L. J., Q. B. 35.7; 14 Jun 53.7.

When a clergyman has been suspended a officio et a beneficio, he is not entitleit to any of the profits of the benefice, and cannot recover them by action during the continuance of the suspension, although no sequestration may have issued. Marris v. Ogdon. 38 L. J., C. P. 329; L. R. 4. C. P. 687; 20 L. T. 978; 17 W. E. 1103.

— What Sentence must Show.]—When a seutence of suspension is pronounced under 3 k 4 Vict. c. 88, the sentence need not show on its face that seven days' notice of the execution of the commission was given, as required by s. 4, or that the inquiry was in public, or that the other provisions of the statute as to the preliminary proceedings, with which the bishop pronouncing the sentence has not been personally concerned, have been strictly observed. Ib.

Certificate of Conduct of Clergyman during.] — Where a beneficial clergyman, charged with an offence by the report of commissioners under 3 & 4 Vict. a. 88, s. 5 consists to abide the judgment of the bishop without further proceedings, and is thereingon sentenced to suspension from the functions and emoluments of his office for a term of years, the bishop may lawfully make it a part of such sentence that, when the term expires, the sispended party shall produce a certificate of his good behaviour during such term, under the haulsof three beneficed clergymen in his vicinity, such certificate to be approved of by the bishop before the suspension be taken off, and that the suspension shall continue, notwithstanding the expiration of the term, until such approval. Hose, Exparte, 18 Q. B. 751; 21 L. J., Q. B. 839; 17 Jur. 180.

Sentence Obligatory on Court—Contumacy.]—
A judge has no discretion while finding a defendant guilty of ecclesiastical offences, to absolve him from all ecclesiastical censure or punishment for those offences, but should pronounce that which he considers to be an appropriate sentence. Oase remitted to the court below for that purpose, as except under peculiar circumstances, a court of final appeal ought not to decide any cause in the first instance. An

which cannot lawfully be inflicted for more contumery or the first property of the contumery of contempt. Martin v. Mackons—McBenn v. Denn, 65 L. J., Ch. 19; 30 Ch. D. chie, 51 L. J., P. C. 88; 7 P. D. 94; 46 L. T. 699; [520; 33 L. T. 701; 33 W. R. 92] 31 W. R. 1; 46 J. P. 213-P. C.

- Suit for Fresh Offences whilst Sentence in a former Suit not enforced. ]-Although it may not be proper to institute a new suit for the mere purpose of punishing contumacy or disobedience to orders passed in a former suit, yet a new suit may be brought for new substanrelied upon as a matter of aggravation. Ib.

Disobedience to Writ de homine replegiando -Committal.]-Clergymen committed for disobedience of writ, de homine replegiando, by marrying man and woman, which writ was intended to prevent. Ashton, Ex parte, Dick.

#### 11. RESIGNATION.

Pension of Retired Clergyman-Under 34 & 35 Vict. c. 44.]—The pension allowed to a retiring clergyman is, under the Incumbents' Resignation Act, 1871 (reversing judgment of Lord Coleridge, C.J.) inalienable, and therefore a judgment debt due from a retired elergyman to his successor cannot, in an action for arrears of pension, be set off against the arrears, and the plaintiff is entitled to a separate and independent judgment for the arrears due. Gathercole v. Smith (No. 2), 50 L. J., Q. B. 681; 7 Q. B. D. 626; 45 L. T. 106; 29 W. R. 577; 45 J. P. 812— C. A.

Per Baggallay, L.J., and Lush, L.J., the judgment debt is, in fact, a set-off. Ib.

Per Bramwell, L.J., dissenting, that the judgment debt is a counterclaim, on which the judgment creditor is entitled to judgment. Ib. 8. P., Gatheroele v. Smith (No. 1), 50 L. J., Ch. 671; 17 Ch. D. 1; 44 L. T. 439; 29 W. R. 434-C. A.

"Net Annual Value" of Benefice. Under ss. S and 11 of the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), the amount of the retiring incumbent's pension is to be fixed with reference to the net annual value of the benefice at the date of the incumbent's resignation; and, having been once fixed, it is not liable to subsequent alteration in consequence of a diminution in the net annual value of the benefice through agricultural depression, or through the formation of a part of the parish into a district chapelry. Robinson v. Dand, 55 L. J., Q. B. 585; 17 Q. B. D. 341; 54 L. T. 871; 34 W. R. 639.

- Under Union of Benefices Act, 1860-Mortgage of Compensation-13 Eliz. c. 20.]-In pursuance of an order in council, under the Union of Benefices Act, 1860, uniting two city benefices, certain annuities were granted to the retiring incumbent and his assigns, out of the annual income of the united benefice, and made a first charge thereon during the joint lives of himself and the incumbent of the united beneby substitute to be approved of by the bishop, the duties of curate of the united benefice under the style of vicar-in-charge, with a provision for

order having the force of a definitive sentence incumbent of the united benefice :- Held, that may inflict canonical punishment (such as de- such annuities were not a benefice with cure privation, degradation, and excommunication) within 13 Eliz. c. 20, and accordingly could be

Deed of Validity.]—It is not essential to the validity of a deed of resignation of an ecclesiastical benefice that it should be made by the clerk before a notary public; the bishop can dispense with that formality and accept a resignation made by a deed duly executed, and sent to him by the clerk. The resignation of a tial offences, and the former disobedience be benefice is not void, because it is made at the request of the bishop in order to avoid scandal and legal proceedings. Reichel v. Ozford. (Bishop), 56 L. J., Ch. 1023; 35 Ch. D. 48; 56 L. T. 539; 36 W. R. 307—C. A. Affirmed, 59 L. J., Ch. 66; 14 App. Cas. 250; 61 L. T. 131; 54 J. P. 101—H. L. (E.)

> Acceptance of Condition. ]-It is not necessary that the bishop's acceptance of a resignation should be in writing, and no particular form is necessary; and if the resignation is sent in at the bishop's request, no further acceptance is required. Though the resignation of a benefice must (except in the case of an exchange) beabsolute, not conditional, it is perfectly legal for the bishop to fix a future time at which the resignation, when accepted by him, shall come into actual operation by his declaring the bene-fice vacant. If the bishop, in accepting the resignation of a benefice, agrees to postpone the declaration of the vacancy in order to enable the clerk to receive the next accruing payment of tithe vent-charge, this does not render the resignation invalid as having been made for a pecuniary consideration. Ib.

> Revocation of, before Acceptance.]-A clerk. who has tendered his resignation to the bishop cannot withdraw it, even before acceptance, it in consequence of the tender, the position of any party has been altered; e.g. if the bishop has been thereby induced to abstain from commencing proceedings in the Ecclesiastical Court for the deprivation of the clerk.—Per North, J. Ib.

> Privity between Incumbent and Patron—Estoppel.]—An incumbent who comes into a beuefice is a privy in law to the patron who appointed him, so as to be entitled to the benefit, and subject to the burden, of the same estoppel as the patron. Where, therefore, the question of the effectuality of a resignation has been raised and disposed of in a former action brought by a clerk, to which the patrons were parties, as he would be estopped from raising that question again in any proceedings between himself and the patrons, he is also estopped from raising the same question as a defence against an incumbent appointed in his place, who, as being a privy in law to the patrons, is entitled to take advantage of the same estoppel, and such a defence may be struck out as frivolous and vexatious. Magrath v. Reichel, 57 L. T. 850.

> Right to Emblements. ]—A parson who resigns his living is not entitled to emblements. Bulwer v. Bulwer, 2 B. & Ald. 470; 21 R. R. 358.
> But his lessee is entitled to them, because the

the retiring incumbent after the death of the tenancy is determined by the act of another. Ib.

Under Glerical Disabilities Act, 1870—nevense in after Innolment of Deed, 1—A clergyman of the Church of England, with a view of relinquishing his office, executed a deed in the form prescribed by 33 & 34 Vict. c. 91, and caused it by 35 & 34 Vict. c. 91, and caused it is a constant of the convection of the convectio to be inrolled, but did not take any of the further steps required by the act. He subsequently abandoned the intention of relinquishing his office:—Held, that the involment might be vacated. Clergyman, In re, 42 L. J., Ch. 260; L. R. 15 Eq. 154; 21 W. R. 241.

Resignation Bonds.] - See post, col. 1233, SIMONY, VI.

#### III. CONVOCATION AND CANONS.

Authority.]-The canons of 1603, not being confirmed by parliament, do not proprio vigore bind the laity, and there is no canon since 1603 which can bind a layman, though made in full convocation. The clergy, however, are bound by canons confirmed by the king only, though the confirmation of parliament is necessary to bind a layman. Yet canons that have been allowed by general consent within the realm, and are not repugnant to the laws, shall still be in force as the king's ecclesiastical laws. parliamentary confirmation to bind the laity has existed ever since the Reformation. Maddictory. Crafts, 2 Atk. 650 (Append.); Ca. t. Hardw. 67; 2 Stra. 1056; 2 Barn. K. B. 361; 2 Kel. 148. No new laws can be made to bind the whole

people but by the king, with the advice and con-sent of both houses of parliament, and by their

united authority. Ib.

Every man may be said to be party to, and the consent of every subject is included in, an act of parliament; but in canons made in convocation, and confirmed by the Crown, all these are wanting except the royal assent. Ib.

In the convocation the whole clergy of the province are either present in person or by repre-

sentation. 1b.

The binding force of aucient canons over laymen was derived from the supreme legislative power being vested in the person of the emperors. In England it is otherwise, where the king has but part of the legislative power. Ib.

Ever since the Reformation the rule has been, that where any ordinances have been made to bind the laity as well as the clergy in matters merely ecclesiastical, they have been either enacted or confirmed by parliament. Ib.

The power of the convocation to ordain eanons co-extensive with the judicial authority of their courts is full of mischief, and cannot be contended for with a shadow of reason or law.

Ib.

The Acts of Uniformity, &c., since the Reformation show that parliament, from that period, has been of opinion that the power of making constitutions in ecclesiastical matters to bind the whole nation, was in them; and it is clear from 25 Hen. 8, c. 19, that both the king and the clergy thought it necessary to have the authority of parliament for abrogating part of authority of parliament for derogating part of the ancient canons, and establishing such part as was to remain in force. Ib.

In the Prior of Leed's Case (20 Hen. 6, c. 12),

Under Clerical Disabilities Act, 1870-Revoca- | be bound, but they cannot do anything which

that which is spiritual, as to ordain fasting days and holidays, and they are only spiritual judges.

That Newton, in the opinion he gave on the That Newton, in the opinion he gave on such power of the convocation, means temporal persons as well as things, is plain by the opposition of it to ceux de Sainte Eglise, which works signify the persons, not the matter or right, of

holy church. Ib.
When the case of the Abbot of Waltham came before all the judges in the exchequer chamber, Vavasor said, the power of convocation does not extend over the temporal rights of the clergy themselves, and the abbot's claim of exemption from collecting tenths being a temporal right, he thought a clerk was not bound. Ib.

At an assembly of Lord Chancellor Ellesmere, the lords of the council and all judges of England, in the Star Chamber, it was held that privations of Puritan ministers by the High Commission Conrt were lawful. *Ib.* In *Davis's Cuse* (5 Geo. 1, C. B.), Lord Chief

Justice King said, it was the prevailing opinion the canons did not bind the laity without an act of parliament, there being none to represent

them in convocation. Ib.

Said at the end of the case Bird v. Smith (Moore, 781), to have been resolved, that the canons of the church made by the convocation and the king, without the parliament, bind in all matters ceclesiastical as well as an act of parliament. But this case is no authority. Ib

No colour of law to say that every bishop in his dioeese, archbishop in his province, and the honse of convocation in the nation, may make canons to bind within their limits. Ib.

Whatever may be the power of convocation to bind the whole realm in matters ecclesiastical, it is nowhere said in this case they can bind the

laity. Ib.

Lord Chief Justice Vaughan of opinion, a lawful canon is a law of the kingdom as much as an act of parliament. In the case of Grove v. Elliot (Vent. 41), Mr. Justice Tyrrell held, the king and convocation, without the parliament, cannot make canons to bind the laity. Lord Chief Justice Vaughan said, in this case, that the convocation, with the assent of the king under the Great Seal, may make canons for the regulation

of the church, as well concerning laicks as ecclesiastics. This difference of opinion, and the other two judges declaring no opinion on the question, greatly weakens the authority. The opinions of Newton, Coke, Tyrrell, Holt, and King, and the answer of the judges in the Star-Chamber, must prepondente against the singleopinion of Vaughan. Ib.

The canons of 1603 have not been allowed and

received so as to form part of the law of England, and bind the laity as well as clergy. (Bishop) v. Marshall, 37 L. J., C. P. 331; L. R. 3 H. L. 17; 18 L. T. 376. Affirming, 10 W. R. 390.—Ex. Ch.

But even if binding on the clergy, then the 39th canon of 1603 applies only to the institution of a presentee to a benefice. Ib.

The 48th canon of 1603 does not apply to a it was laid down that the ordinary, bis con-rocation, had power to make constitutions per person seeking to be admitted as a curate to an vincial, by which ceux de Sainte Egilse shall citating benefice. 10. Canons—Binding Effect.]—The canons which colony which has an established legislature, and have not the authority of an act of parliament are | where no church is established by law. Is that as not binding on laymen. More v. More, 2 Atk. 158.

The canons must be pursued with the utmost exactness by ecclesiastical persons; and a clergyman who presumes to marry a person out of the parishes in which the man and the woman reside is liable to penalties. Ib.

Questions of Tithe.]—The canonical constitutions of ecclesiastical synods have no binding force or authority in this kingdom in questions of tithes between the clergy and laity in courts of law without acquiescence evidenced by usage. Evans v. George, 12 Price, 76. S. C., nom. Erans v. Rove, M'Cle. & Y. 577.

- Dean and Assessors. ]-By the 21st canon it is cnacted, that "the dean, in causes which shall be handled in court, shall ask the advice and opinion of the ministers who shall be prehave no voice in the decision of the court, which rests with the dean or commissary alone. Jersey (Dean) v. Parish of - (Rector), 3 Moore P. C.

Convocation—Mandamus to President.]—The Archbishop of York as president of the convocation of his province having decided that a candidate who had been elected to represent an archdeaconry in the Lower House was disqualified :-Held, that the court had no jurisdiction to grant a mandamus commanding the archbishop to a manusmus communing the arenosnop to admit the candidate to convocation. Reg. v. York (Archbishop), 57 L. J., Q. B. 896; 20 Q. B. D. 740; 59 L. T. 443; 36 W. R. 718; 52 J. P. 709.

## IV. COLONIAL CHURCH.

Position of Church of England. ]-The Church Position of Church of England, —The Church of England, in places where there is no church established by law, is in the same situation as any other religious body, and the members may adopt rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them. Cape Them (Bishop) v. Long, 1 Moore, P. C. (S. 83, 411; 2 N. R. #45; 9 Jur. (S. 8.) 805; 8 L. T. 738; 11 W. R. 900.
Where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a tribunal to

union, but has also constituted a tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation, then the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice. Ib.

That of Voluntary Association.] - The United Church of England and Ireland is no part of the constitution in a colonial settlement, nor can its authorities, or those who bear office in it, claim to be recognised by the law of the colony otherwise than as the members of a voluntary associa-

a voluntary association, Colenso v. Gladstone, 36 a voluntary association. Concessor. Granastone, 36 L. J., Ch. 2; L. R. 3 Eq. 1; 12 Jur. (N.S.) 971; 15 L. T. 465; 15 W. R. 29. In the colonies the Anglican church is purely

a voluntary association. Natal (Bishop) v. Green, 18 L. T. 112.

- South Africa. - The church of the province of South Africa is not a church in connection with the Church of England as by law established. Although there are in the articles of the constitution of the church of the province of South Africa general expressions affirming in the strongest way the connection of the church of the province with the Church of England, yet by the proviso in the said articles to the effect that in the interpretation of such faith and doctrine it is not bound by the decisions of the tribunals of the Church of England, it is practically declared that the connection is not maintained. In a suit by the Bishop of Graham's Town (one of the dioceses of the church of the province) against the officiating minister in possession of the church of St. George in Gra-ham's Town, whereby the defendant, a member of the church of the province, subject to its constitution and canons, and to the episcopal jurisdiction of the plaintiff, had been found guilty of contumacions disobedience, suspended from his ministerial functions until he should engage not to repeat the offence of preventing the bishop from preaching or ministering in the church of St. George, and finally excommunicated; it appeared that the church of St. George had been duly dedicated to ecclesiastical purposes in connection with the Church of England as by law established, and for no other purposes:—Held, that the plaintiff had no right in the said church of St. George, and that his suit must be dismissed. Marriman v. Williams, 51 L. J., P. C. 95; 7 App. Cas. 484; 47 L. T. 51—P. C.

Rights of Crown.]—The prerogative of the Crown to present to a benefice in England, avoided by the promotion of the incumbent to a bishopric in England, does not extend to present to a benefice in England which becomes vacant on the promotion of the incumbent to a colonial bishopric within the Queen's dominions, created solely by the preogative of the Crown. Rey, v. Etcn. College, 8 EL & Bl. 610; 27 L. J., Q. B. 132; 4 Jur. (x.s.) 335; 6 W. R. 72.

After an independent legislature is established

in a colony, the Crown cannot by its prerogative establish a metropolitan see or province, or create an ecclesiastical corporation, whose status, rights, and authority the colony can be required to recognise. Natal (Bishop), In ve. 3 Moore, P. C. (N.S.) 115; 11 Jur. (N.S.) 353; 12 L. T. 188; 13 W. R. 549.

Nor has the Crown in such circumstances

power to confer any jurisdiction, or coercive legal authority, upon the metropolitan over the suffragan bishops, or over any other person. Ib.

Rights of Bishop of. |-When a bishop takes an oath of obedience to another bishop as his metropolitan, thinking erroneously that such latter bishop has been legally invested with the the control of the Church of England in a life position of the Church of England in a receive such a voluntary or consensual jurisdiction. Natal (Bishop), In re. 3 Moore P. C. (N.S.) 115; 11 Jur. (N.S.) 353; 12 L. T. 188; 13 W. R.

The oath of canonical obedience does not mean that the clergyman will obey all the commands of his bishop, against which there is no law, but that he will obey all such commands as the bishop by law is authorised to impose. Cape Town (Hishop) v. Long, 1 Moore, P. C. (N.S.) 411; 2 N. R. 465; 9 Jur. (N.S.) 805; 8 L. T. 738; 11 W. R. 900.

Where a colonial bishop, without the consent either of the Crown or of the colonial legislature, convened an assembly which he alleged to be a synod, and by which acts and constitutions were passed purporting to bind members of the Church of England in the colony, whether they assented to them or not, in respect as well of some temporal as spiritual matters:—Held, that whether the bishop had authority to assemble a synod or not, the meeting convened was in no sense a synod, and the acts which it purported to declare were clearly illegal. Ib.

The bishop of Jamaica is empowered by letters rectors, &c., according to the laws and canons of the Church of England. The rector of a parish in Jamaica having declined to enter a marriage in the registry of his parish because it had been solemnised in a place supposed not within the parish, and being required by the bishop to make the entry, did so; but the bishop, nevertheless, proceeded against him for the former refusal, and The judicial committee held suspended him. this to be irregular, and reversed the sentence. Bowerbank v. Jamaica (Bishop), 2 Moore, P. C.

The jurisdiction of the bishop of a see erected in a colony by letters-patent rests only upon ompact, and is to be enforced through the lay tribunals, from which an appeal lies to the sovereign in council. Natal (Bishop) v. Green, 18 L. T. 118.

- Obedience of Dean to Bishop.]-A colonial bishop was excommunicated by a colonial superior of the Anglican church, which excommunication was held by the privy council to be null and void. A dean, appointed by the bishop so alleged to have been excommunicated, refused to recognise his capacity or anthority :- Held, that he could not so refuse whilst he remained a member of the Anglican church in the diocese of such bishop. Ib.

Salary of Bishop.]-A fund had been formed, and vested in trustees, for the endownment of bishoprics of the Church of England in the colonies. C. had been appointed bishop, and his see created, by letters patent, in a colony possessing at the time a legislative constitution. payment of his salary out of the fund. Colonso Moore, P.C. (N.S.) 250; 36 L. J., P. C. 44; L. R. Jur. (N.S.) 971; 15 L. T. 465; 15 W. R. 29. A coercive jurisdiction is not seen as a construction of the fund. Colonso Moore, P.C. (N.S.) 250; 36 L. J., P. C. 44; L. R. Jur. (N.S.) 971; 15 L. T. 465; 15 W. R. 29.

function of a bishop as that the failure of the letters-patent to create such a jurisdiction will deprive the bishop of his right to receive the income of a trust fund appropriated to the endownment of a bishopric founded by letterspatent, professing to create such a jurisdiction. Natal (Bishop) v. Green, 18 L. T. 112.

Contract to pay Salary to Bishop.]-Specific performance of a contract to pay a salary to a bishop in a colony was enforced, though the contributors to the salary may have intended to support a bishop with coercive jurisdiction over his elergy, and subject to coercive jurisdiction of his metropolitan. Ib.

Division of Diocese-Ejectment.]-In 1850 a piece of land in the colony of Natal was granted by the crown "in freehold to the bishop of Capetown, A., and his successors in the see, in trust for the English church at Pietermasee, in this to the Bigish chirch at Fletchia-ritzburg," in the colony of Natal, and a church was creeted on the land. At the time of the grant, Natal was part of the diocese of Capetown, but was subsequently created a separate see, of which C. was appointed bishop, and the church so erected became the cathedral church of the diocese of Natal. In 1863 A. took possession of the church, and excluded C. from the use of the same :- Held, in an action of ejectment by C. to recover possession of the land, first, that A. had no estate or title in the land so granted. cither as a trustee or otherwise; secondly, that patent to exercise spiritual jurisdiction, to punish C. had a right as against A. to use and have rectors, &c., according to the laws and canons of access to the church; thirdly, that, in an action of ejectment, the supreme court had no power to deal with the actual estate in the land. town (Bishop) v. Natal (Bishop), 38 L. J., P. C. 58; 17 W. R. 1050.

> Practice-Writ De vi laica removenda.]an act of the colony of Bermuda, a court of chancery was established in the islands, with authority to examine, hear, judge, determine and decree all matters, causes and things whatsoever as fully and amply as the High Court of Chancery may and canny astue rigin Courtor Chancery may and can. A clerk in holy orders was pre-sented by the Crown to the rectory of the parishes of H. and S. He was duly inducted into the parish church of H., but his induction into the parish church of F. parish church of S. was obstructed by the laity. He applied to the court of chancery in the colony for a writ de vi laica removenda to remove the obstruction. The court refused the writ :-Held, that the appellant was not entitled to such writ ex debito justitiæ; and that the writ de vi laica removenda is not a necessary incident of chancery jurisdiction. Jenkins, Ex parte, 5 Moore, P. C. (N.S.) 351; 38 L. J., P. C. 6; L. R. 2 P. C. 258: 19 L. T. 583: 17 W. R. 502.

> - Jurisdiction-Dutch Reformed Church, at Cape of Good Hope. - A minister of the Dutch reformed church in the presbytery of Graaffkeinet, at the Cape of Good Hope, was in 1864 suspended from his benefice, on a charge of error in doctrine by the synodical commission, no charge having been first preferred before either the consistory or the presbytery :- Held, that the charge should first have been preferred before the presbytery, and that the synodical commission had no jurisdiction

## V. ADVOWSON AND PRESENTATION.

#### 1 ADVOWSON

Realty.]-An advowson descending to an heir is real assets, and may be sold for the payment of debts. Tonge v. Robinson, 1 Bro. P. C. 144; 2 Stra. 879; 3 P. W. 401. the parishioners: —Held, to be "charity property" within the City of London Parochial Charities Act, 1883. St. Stephen's, Coleman Street, In re, St. Mary's, Aldermanbury, In rc, 57 L. J., Ch. 917; 89 Ch. D. 492; 59 L. T. 393; 36 W. R. 837.

An advowson is no exception to the general law as to the charitable trusts. The dicta in Att. Gen. v. Purker (1 Ves. sen. 43; 3 Atk. 576); Att.-Gen. v. Forster (10 Ves. 335); Att.-Gen. v. Newcombe (14 Ves. 1), and Att.-Gen. v. Webster (L. R. 20 Eq. 483), considered. Ib.

Descent of Right of Donation.]—The right of donation descends to the heir, and the executor has no title when the testator was seised of the advowson of a donation; otherwise if it had been a presentation benefice. Reppington v. Tamworth School, 2 Wils. 158.

Statute of Frauds.]—Advowsons are rents within Statute of Frauds, but an annuity in fee is not a personal inheritance. Stafford (Earl) v. Buckley, 2 Ves. 177.

7 Anne, c. 18.]—The statute 7 Anne, c. 18, enacting that the interest of the patron of an advowson shall not be displaced by usurpation, is not retrospective. Att.-Gen. v. Lichfield (Bishop), 5 Ves. 828.

Limited Owner.]-An advowson is not part of the inheritance, but fruit fallen, which every owner of the estate for life or years is entitled to. Sherrard v. Harborough, Ambl. 165.

Lunatic Tenant in tail—1 Will. 4, c. 65.]—The twenty-eighth section of the Act 1 Will. 4, c. 65, confers no power to sell the right to the next presentation to a rectory of the advowson of which a lunatic is tenant in tail in possession, except for one of the purposes specified in the section. Varasour, In re, 3 Mac. & G. 275; 20 L. J., Ch. 619.

Appendant to Manor. ]-In 1790, an advowson appendant to a manor was sold and assigned for appendint to a major was soft and assigned for the residue of a term of 500 years, created in the manor and advowson in 1745, and which, except as to the advowson, had ceased:—Held, that this did not sever the appendancy, and that the advowson passed by a subsequent release of the manor with general words. Rooper v. Harrisan, 2 Kay & J. 86.

A grant by Edw. 4 of an advowson having, by the effect of the statute of 10 Hen. 7 (Irish), been repealed, it was held to have become reappended to the manor, to which it was appendant before the grant. Meath (Bishop) v. Winchester (Marquis), 4 Cl. & F. 445; 10 Bh. (N.s.) 330.

When Passing.]—An advowson, although it is an hereditament, and, as being the right of presentation to a church at a particular place, "does concern land at a certain place," is but a right collateral to land, and is not aptly described as "being situate at" a particular place. Such a description, however, may pass an advowson under certain circumstances, e.g. when upon an examination of the whole instrument a clear intention is shown that it shall pass, or upon evidence that there is no other property in that

Charity Property.]—An advowson in the city! the instrument. Anon. (3 Dyer, 323, b) and of London was invested in trustees for the benefit Kency v. Langham (Cas. t. Tal. 143) discussed if the parish, the vicar being always chosen by and reconciled. Chempton v. Larvartt, 54 L. J., the parishioners:—Held, to be "charity property" (Ch. 1109, 30 Ch. D. 298; 53 L. T. 603; 38 W. R. 913-C. A.

Having regard to the recitals, the omission of certain other property, and looking to the whole scope of the deed, an advowson was held not by force of the general words "all other heredita-ments situate in the parish of D.," included in a deed of resettlement. 1b.

Advowson does not pass by livery within view of church without deed, there being incumbent. Pannell v. Hodgson, Cary, 52.

An advowson does not pass by the word tenement." Kensey v. Langham, Forrest, 143. An advowson in gross will pass by the words "tenements" and "hereditaments," but not by the word "lands," and it is assets by descent to satisfy bond creditors. Westfaling v. Westfaling, 3 Atk. 460.

The word "living" is sufficient to pass the advowson, but it may be restricted to the next presentation. The context must determine its meaning. Webb v. Bugay, 2 Kay & J. 669; 4 W.R. 657.

Devise to a minor of "the livings of Q. and C.,

should be like the profession and be qualified for them":—Held, to show an intention to confer on the devisee a personal benefit; therefore, that the devise was confined to a single presentation, and did not extend to the advowson. Ib.

The commissioners of woods and forests having no power under the statute 57 Geo. 3, c. 97, to make sale of any royalties, honours, hundreds, manors, lordships, or franchises, "or any rights, members, or appurtenances thereof," belonging to the Crown, within the ordering and survey of the exchequer, contracted for the sale of the Crown manor of E., and all courts baron, courts leet, and all fines, reliefs, rents, profits, waifs, strays, deodands, and "all other rights. members, emoluments, and appurtenances thereto belonging":—Held, that this being in effect a contract for sale by the Crown, the advowson of E., which was appended to the manor, did not pass under the contract, and consequently, that the purchaser was bound to take a conveyance of the manor without the advowson. Att. Gen. v. Sitwell, 1 Y. & Coll. 559; 5 L. J., Ex. Eq. 86. Semble, that if the contract had been between

subject and subject, the advowson would have passed, although, at the time of the contract, it was not known by either party to be appendant to the manor, and, therefore the sale of it was not in contemplation. Ib.

Sale.]-A conveyance of a fourth part of an advowson in 1672 is not to be deemed voluntary, because the only pecuniary consideration expressed in the deed is 20s.; the court will presume that 20s. would be the full value of the fourth part of an advowson at that time. v. Exeter (Bishop), 5 Bing. 171; 2 M. & P. 266; 7 L. J. (o.s.) C. P. 50.

A declaration stated that a deed conveyed the purparty of an advowson. By the deed the whole was conveyed : but it appeared that the person making the conveyance was possessed only of a purparty:—Held, no variance. Gully v. Exeter (Bishop), 4 Bing, 290; 12 Moore, 291; 5 L. J. (o.s.) C. P. 178; 29 R. R. 565.

An advowson was sold. After the sale the purchaser found that there was a mortgage on the living in respect of money advanced to build particular place capable of being disposed of by a new parsonage house :- Held, that this did not

form a ground for rescinding the contract for the advowson, or for allowing to the purchaser a deduction from the amount of the purchasemoney. Edwards-Wood v. Majoribanks, 7 H. L. Cas, 806; 30 L. J., Ch. 176; 6 Jur. (N.S.) 1167; 3 L. T. 222.

— Pur autre via.]—At common law, the purchaser of an estate pur autre vie in an advow-son, may, no less than the purchaser of an advowson, in fee, offer himself to the ordinary, and pray to be admitted on a vacancy occurring; and the bishop, provided only if he is a fit and proper person in holy orders, is bound to institute him, and has no discretion to refuse. Walsh v. Lincoln (Bishop), +4 L. J., C. P. 24+; L. R. 10 C. P. 518; § 2 L. T. 471; 23 W. R. 829.

Purchase in Trust. ]-A father bequeathed 12,000% to trustees to invest the whole or part in the purchase of an advowson; and, until his son should be presented to a benefice producing a net 1,000%, per annum or die, the trustees were to present some fit person to the benefice, the advowson whereof they had purchased, and, subject as aforesaid, were to hold the advowson in trust for the son, his heirs and assigns; and in the meantime, and until such investment, the trustees were to lay out the 12,000l. upon certain securities, and, during twenty-one years from the testator's death, to accumulate the income, and the income of the 12,000l. and the accumulations was, after the twenty-one years (in ease the advowson had not been purchased), to belong to the sou, his executors or administrators; and it the son died or was presented to a benefice of 1,000%, a year before a contract for the purchase of the advowson had been entered into, or if part of the 12,000l, or the accumulations remained after completing such contract, the same was to be paid to the son, his executors or administra-The 12,000%, having been set apart and invested and accumulated, but no advowson having been bought, the son, thirteen years after the testator's death, claimed the entire fund :-Held, that although there was no person who could enforce the trust, yet, as the trustees were willing to carry it out, and could present any fit person they chose to the benefice when they had bought the advowson, the son was not the exclusive object of the trust, and was not entitled to a transfer of the fund. Gott v. Nairne, 3 Ch. D. 278; 35 L. T. 209.

Limitation in Trust.]-By a deed of settlement in 1783, an advowson was limited to Hill and his issue male in strict settlement, "upon this express condition and limitation," that the person who should at any time thereafter be seised of or entitled to the advowson under the deed should from time to time, as the church should become vacant, present a fellow of St. John's College. And on failure of such person presenting as aforesaid, and from and after such failure, the advowson should remain to the use of the master and senior fellows of the college. One of the persons entitled under the deed having suffered a recovery and conveyed the fee simple of the advowson to the defendant's predecessor in title :-Held, that the advowson was limited in trusts, not on condition, and that on failure of the defendant to present a fellow, the gift over took effect in favour of the master and seniors. St. John's College, Cambridge v. Effingham (Earl), 29 L. T. 447; 22 W. R. 125.

Devise.]—Under a devise of manors, lands, &c., to A., his executors, &c., for a term of eleven years, in trust to receive the rents, issues, and profits of the premises that should from the to time accrue and become due, and dispose of the same for the benefit of a certain cestri que trust, A. may, by the directions of the cestni que trust, and for his benefit, assign the advowson of a rectory appendant to a manor, to a purchaser for the said term of eleven years, to intent that purchaser may present for the next turn, in ease of an avoidance before the expiration of term, and in case of such avoidance the purchaser may present accordingly. Albemarle (Lurd) v. Ropers, 7 Bro. P. C. 522.

Devise of lauds, tenements, and hereditaments, subject to a term of cleven years, in trust to receive the rents, issues, and profits of the premises that from time to time should accure and become due, and dispose, &c., an advowson in gross passes, and a sale of the next presentation within term, by direction and for the benefit of the cestri que trust, was established. S. C., 2

Ves. 477.

A. devised her real and personal estate to trustees, and directed her advorson of F. to be sold by them immediately after the death of H., the incumbent F-Hell, that although, on H. death, the living must be filled before there could be a sale, still that the court had no anthority to direct the sale of the next presentation in the lifetime of H., for the benefit of the residuary legatees. Bristow v. Sibrone, 27 Beau, 590.

legatees. Bristow v. Shirmon, 27 Beav. 590. On devise of an advoyan to trustees to be sold on the death of the ineumbent:—Held, that although no sale after his death could be made until the benefice was filled, and a sale in his lifetime would be beneficial to the parties, the court had no jurisdiction to authorise is: Debustone v. Buber, 8 Beav. 293. See also, S. C., 22 Beav. v. Buber, 8 Beav. 293. See also, S. C., 22 Beav. Jur. (v. & J. 195), 4 W. R. 827; post, col. 1150. A. devised real estates (including several

advowsons) to trustees, after payment of certain charges out of the rents, to accumulate the surplus rents by way of compound interest, and apply the accumulated fund as therein mentioned. He further directed that, in the event of the rectory of B. becoming vacant, and of his godson C. being in orders and qualified, the trustees should present him to the living. The testator afterwards sold the living of B., and by a codicil he directed that, in the event of his trustees being unable to make any arrangement for presenting his son to the rectory of B., he should be presented to the first of testator's other livings or rectories which should become vacant after he took holy orders and was qualified to hold the same. C. was six years of age:—Held, that the trustees were bound to sell the next presentations to the respective livings from time to time at their discretion, and that they were not prevented from so doing by the direction in the eodicil. Cust v. Middleton, 9 Jur. (N.S.) 709; 8 L. T. 160; 11 W. R. 456.

By a devise of lands and advowsons to trustees to apply the rents, issues, and annual proceeds as directed by the will, the proceeds of the sale of a next presentation are well given to the trustees, and do not pass to the heir-at-law as undisposed of. Cust v. Midalleton, 3+ L. J., Ch. 185; 11 Jur. (x.s.) 122; 11 L. T. 7. 552; 13

W. R. 249.

A., by will, directed trustees, upon the death of the present incumbent, to present A. to the

should take orders; and after their several deceases, or of such of them as should take orders and be presented, or in the event of neither taking orders, she devised the advowson to C. in fee :- Held, that the gifts in favour of A. and B. were in succession and not alternative, and that on the death of A., B. was entitled to be presented. Hatch v. Hatch, 20 Beav, 105; 3 W. R. 354.

A testator having the power of disposing of an advowson (subject to the existing incumbency of A., and a contingent right of B. to be afterwards presented), devised the next avoidance thereof in favour of C. :-Held, that "the next" meant, the next the testator had power to dispose of; viz. that following the incumbency of A.

and of B. Ib.

H. devises his manors, advowsons, &c., to trustees to pay his son 1.000l. for life, and the rest of the profits to be laid out in land during his son's life, and then settled :-Held, the son had a right to present to the living when vacant, not under the devise, but as heir-at-law, it being a fruit undisposed of. Sherrard v. Harberough, Ambl. 365

A., seised in fee, devises his lands and tenements in B. to trustees, to apply part of rents for charitable uses. The testator dies; the church of B. becomes void; the heir-at-law shall present.

Kensey v. Langham, Forrest, 143.

Evidence.]—Where there is an old endowment of a vicarage, but the modern usage varies from it, there is ground to presume, that the variance has arisen from the act of persons competent to The endowment is not therefore conclusive evidence in favour of the vicar, but his right is properly triable at law, Carr v. Henton, 7 Bro. P. C. 100.

As to evidence to support the existence of an elesiastical rectory. Boulton v. Richards, 6

ecclesiastical rectory. Z Price, 483; 20 R. R. 678.

A grant from the Crown of an advowson (excepted in a former grant under general words) will be presumed after a possession, evidenced by title deeds for 133 years, and three presentations. Gibson v. Clark, 1 Jac. & Walk. 159 ; 20 R. R. 266,

Quære, whether the Nullum Tempus Act, 9 Geo. 3, e. 16, applies to advowsons.

Lay. ]-In 1437, an almshouse or a hospital was founded and endowed by a lord of a manor for thirteen poor men, and two priests for praying for souls and the education of youth; and the right of nominating the master was vested in the lord of the manor for the time vested in the form of the manor nor the same being. Previously to 1513, the manor and the rights of patronage became, on the attainder of the lord, forfeited to the Crown. In 1618, James 1, by letters-patent, granted the right of nomination of the master to the University of Oxford, for the support of the Regius Pro-fessor of Medicine, and in 1818, the manor, with all its advantages and endowments, was duly granted by the Crown to B. :-Held, first, that the rights of nomination and visitation, incidental to the manor, did not, upon the forfeiture by attainder, become merged and extinguished, but vested in the Crown. Gen. v. Ewelme Hospital, 17 Beav. 366; 22 L. J., Ch. 846; 1 W. R. 523.

living of S., in case he should take orders; and if Held, secondly, that the property of the hospital he should not, or taking orders should die in the lifetime of B., then to present B., in case he lifetime of B., then to present B., in case he lifetime of monasteries (27 Hen. 8, c. 28, and 31 Hen. 8, c. 13), but remained vested in the Crown as before. *Ib*.

Held, thirdly, that it was not in any degree

affected by the act respecting chantries (1 Edw. 6, c. 14), so as to vest the property in the Crown as

its quasi private possessions. Ib.

Held, fourthly, that the founder, by annexing the right of nomination to the manor, could not make and had not made them inseparable; but that the right of patronage was in the nature of a lay advowson, which the lord might alien without parting with the manor, and the converse. Ib.

Held, fifthly, that by the grant of James to the University of Oxford, the jus patronatus had,

de facto, been severed from the manor. Ib.

Held, sixthly, that by the common law, the grant of a manor by the king, cum pertinentibus, would pass an advowson appendant to it, and that the 17 Edw. 2, c. 15, created a restriction as to advowsons of churches only, and did not apply to a lay advowson. Ib.

Compensation on Abolition in Ireland. ]testator made a devise of advowsons in Ireland. The Irish Church Act, 1869 (32 & 33 Viet. c. 42), was afterwards passed abolishing advowsons and giving their owners a right to compensation. The testator after the passing of the act made a codicil to his will and then died. Compensation for the advowsons was claimed on behalf of the devisee, and was ascertained and made payable to the executors of the testator :- Held, that the eompensation-money was payable to the executors of the testator, and not to the devisee of the advowsons. Frewen v. Frewen, L. R. 10 Ch. 610; 33 L. T. 43; 23 W. R. 864.

#### 2. Presentation.

Meaning of ]-On the division of an old parish into three by act of parliament, it was provided "that the right of patronage and presentation to the said three churches should belong to a dean and chapter and their snccessors for ever, in such manner as the presentation to the rectory of the old parish did belong to them, and not otherwise." Upon a nomination-by them to one new parish, without a presenta-tion to the ordinary for institution:—Held, that the rectory was presentative, and not a donative, and that the word "presentation" is a known term of law, and when spoken of a benefice with cure, imports the patron's presenting his clerk to the ordinary to be admitted and instituted. Shirt v. Curr, 2 Bro. P. C. 173.

Legal Right.]—The right of a patron to pre-sent to a benefice is a legal right, subject in its exercise to the bishop's right to examine into the fitness of the presentee, and to reject him for sufficient ground. Exeter (Bishop) v. Marshall, 37 L. J., C. P. 331; L. R. 3 H. L. 17; 18 L. T. 376. Affirming, 10 W. R. 390—Ex. Ch.

By Parol.]—Presentation to a church, or commation to a perpetual curacy, may be by nomination to a perpetual curacy, may parol. Att. Gen. v. Brereton. 2 Ves. 425.

When Passing.] — Devise of surplus rents and profits carries a right of presentation. Sherrard v. Harborough, Ambl. 165.

Contract for Purchase as against Devisee.] | full, is not simoniacal by reason of the incum-Party having contracted with person since deceased, for purchase of advowson, but had taken no steps during lifetime of vendor to enforce the contract, and for a considerable time after her death (objecting to title on ground of outstanding judgments, and a creditor's bill pending).—Held, not entitled as against a devisee to present if a vacancy occur in the meantime, though he insists on having contract completed. And if, in consequence of his insisting on such right, a bill becomes necessary to ascertain the true claim to the next presentation, which is thereby put in danger of lapse, a decree in favour of plaintiff will carry costs as far as his claim came in question, although it be part of decree that subject to next presentation he be permitted to complete his contract. Wyrill v. Exeter (Bishap of), 1 Price, 292; 16 R. R. 727.

Sale void as against Remainderman.]—A., tenant for life, and B., a mortgagor (not in possession), sell the next presentation to a church to C., who takes a covenant from A., that if he cannot present, she, her executors, &c., shall repay him the purchase-money. This grant is void as against the remainderman, and the purchaser shall recover his money from the administrators of the tenant for life. Dymoke v. Hobart, 1 Bro. P. C. 108.

Revocation of ]-A. contracts with B. for the purchase of an advowson at a certain price, and a conveyance is accordingly executed. There being afterwards some suspicion of fraud on the part of A., B. files his bill to set aside the conveyance on that ground. Pending the suit, the church becomes vacant, and both parties present, but neither of their clerks is instituted. wards a compromise takes place, and B., consideration of a further snm, executes a deed of confirmation, and also an instrument revoking his presentation; but upon a question between B,'s clerk and A., it was held that the deed and instrument were not in law a good revocation, but that the clerk of B. was entitled to the benefit of his presentation. Rogers v. Holled, 1 Bro. P. C. 117.

Obtaining by Misconduct. ]—Demurrer allowed to a bill to have a presentation to a living upon the next avoidance delivered up, charging the defendant with gross miscondnet in obtaining it, and in other respects, while a private tutor in the family. M'Namara v. —, 5 Ves. 824.

#### VI. SIMONY.

Advowson.] — Party purchasing advowson, knowing incumbent was at the time on his death-bed, is not simony. Barret v. Glubb, Dick, 516.

Sale of an advowson during vacancy is not within the statute of simony, but is void at common law. Grey v. Hesketh, Ambl. 268.

A grant of an advowson after the church is actually vacant is void; but no lapse incurs till after induction to a second benefice. Salisbury (Bishop) v. Wolforston, 3 Burr. 1504; 2 Wils. 174. S. C., nom. Lincoln (Bishop) v. Wollaston, 1 W. Bl. 440.

An agreement for carrying a former simoniacal contract into effect is not necessarily also simoniacal and void. Greenwood v. London (Bishop), 1 Marsh. 292; 5 Taunt. 727; 15 R. B. 627.

bency being at the time of sale voidable at the belto; being at the time of sale voltage at the election of the patron. Alston v. Atlay, 6 N. & M. 686; 2 H. & W. 160; 5 L. J., K. B. 242, See 7 A. & E. 289; 2 N. & P. 492; W. W. & D. 662; 7 L. J., Ex. 392-Ex. Ch.

A contract by the owner of the advowson of a rectory, such owner not being the incumbentof the rectory, for the sale of the advowson, with a stipulation for the payment by him to the purchaser of interest on the purchase-money until Chase of interest of the phromae-money anton a vacancy, is not simoniacal. Sweet v. Meredith, 31 L. J., Ch. 817; 8 Jur. (8.8.) 637; 6 L. T. 413; 10 W. R. 402. S. C., 3 Giff. 610; 32 L. J., Ch. 147; 9 Jur. (N.s.) 569; 7 L. T. 664.

A purchase of an estate for life in an advow-

son is not a purchase of the next avoidance of, or son is not a parenase of the hext avoidance of, or presentation to, any benefice or cure of souls within 12 Anne, stat. 2, c. 12, s. 2, so as to render the presentation of himself by the purchaser (being in other respects idoneus) void by that (Octor of the contract simoniacal. Walsh v. Lincoln (Bishop), 44 L. J., C. P. 244; L. R. 10 C. P. 518; 32 L. T. 471; 23 W. R. 829.

Presentation. ]-The sale of the next presentation, the incumbent being in extrems, within the knowledge of both contracting parties, but without the privity or a view to the nomination of the particular clerk, is not void on the ground or the particular ciers, is not void on the ground of simony. *Pax v. Chester (Bishap)*, 1 Dow & Cl. 416; 3 Bligh (N.S.) 123; 6 Bing, 1; 34 R. R. 23. Overruling S. C., 4 D. & R. 93; 2 B. & C. 635.

In a suit instituted against a clergyman by the secretary to the bishop of the diocese, it was proved that he had been guilty of simony, by reason of his having corruptly and simoniacally obtained presentation and institution to his vicarage, and also of conduct unbecoming a clergyman in unlawfully threatening a certain person to publish a libel upon him with the intent of extorting money. The court founding its sentence, in respect of the offence of simony, upon the general ecclesiastical as well as statute law, pronounced that he was a disabled person in law to have the vicarage, and that the presentation thereto, and his admission and institution thereupon, were void and frustrate, and of no effect in law, and, having regard to all the circumstances of the case, the offence of misconduct as well as that of simony, it further pronounced upon him a sentence of deprivation from the ministry and from the performance of all clerical functions whatsoever in the province of Canterbury, and condemned him in the costs of the suit. And it directed the registrar to apprise the Queen's proeter of the sentence in order that her majesty might exercise her right of presentation to the vacant benefice given by 12 Anne, stat. 2, c. 12. Lee v. Merest. 39 L. J., Eec. 53; 22 L. T. 420.

The patron was called as a witness in the suit, and was required to produce the deed of conveyance to him of the advowson of the vicarage in respect of the presentation to which the simony had been committed. It was admitted, that the deed was in court, but the witness declined to produce it on the ground that it was a title-deed. The court notwithstanding ordered its production. Ib.

An induction upon a simoniacal presentment is void against the presentee of the Crown, who upon being inducted may maintain ejectment il and void. Greenwood v. London (Bishop), Marsh. 292; 5 Taunt. 727; 15 R. R. 627.

The sale of the advowson of a church which is 25; 6 L. J. (o.s.) K. B. 282.

In an action for use and occupation by an entered into when rector was presented, will not incumbent against a tenant of the glebe lands, who has paid him rent, the defendant cannot give evidence of a simoniacal presentation of the plaintiff, in order to avoid his title.

Loxley, 5 Term Rep. 4; 2 R. R. 521.

In an action for penalties under 31 Eliz. c. 6. for a simoniacal contract to present, the declaration alleged a contract by the clerk to buy the advowson, if he was presented to the living, and a presentation in pursuance of such contract : Held, that the proof of presentation was essential to the action, and that for that purpose it was not enough to shew that the defendant prepared a presentation, and tendered it to the bishop's secretary, but which never was in fact used or acted upon, the clerk having been afterwards instituted on his own petition as equitable owner of the advowson. Greenwood v. Woodham, 2 M. & Rob. 363

presentation to A., under a secret condition presentation to A., inder a scere condition beneficial to himself; the presentation was set aside, and he was decreed to present a more proper person. Richardson v. Chapman, 7 Bro.

P. C. 318.

A contract by T., a clerk in holy orders, to indemnify W., who claimed the right of presentation to a living, against the costs of a litigation to establish that right, provided that W., in case of success, should present T. to the living, is a corrupt agreement, and cannot be enforced. Semble, it partakes both of the nature of champerty and maintenance. Littledale v. Thompson,

4 L. R., Ir. 43.

The plaintiff, who was incumbent and patron of a living, put the rectory into repair, and, with the sanction of the bishop of the diocese, let it to a tenant for a certain period. Before the termination of the tenancy the plaintiff resigned the living, and presented the defendant thereto. The presentation was made upon an understanding and agreement between the plaintiff and the defendant that the defendant should, in consideration of having received the benefit of the said repairs, hand over to the plaintiff any rent which he should receive in respect of the said tenancy between the date of the presentation and the termination of the tenancy :- Held, a simoniacal agreement, and the presentation therefore void under 31 Eliz. c. 6. Mosse v. Killich, 50 L. J., Q. B. 300; 44 L. T. 149; 29 W. R. 522.

A lay patron may revoke his presentation, and such revocation cannot be void for simony.

Rogers v. Holled, 2 W. Bl. 1039.

Resignation Bonds.]—Bond to resign in favour of patron's nephew when of age. At that time, instead of insisting on resignation, incumbent agrees to pay 30l, per annun for seven years, and stops. Patron restrained from suing on bond, but incumbent left to his remedy at law to recover

back money paid. Peele v. Cupel, 1 Stra. 534.

Though bonds of resignation are not prohibited by law, yet if they are made use of to extort money from the incumbent, or to turn him out for anything but ill behaviour or immorality, equity will grant an injunction against him. Hawkins v. Turner, Pre. Ch. 513.

Bonds for resignation held good where no improper use was made of them. Steeper v.

Carner, 2 Eq. Abr. 183.

Bill to compel rector to resign in favour of Held, also, that the contract was not simoniacal another in pursuance of contract for that purpose or invalid. Ib.

Newdigate v. Helps, 6 Madd, 133,

Before the 7 & 8 Geo. 4, c. 25, and the 9 Geo. 4. e. 94, a general bond of resignation upon request given previously to presentation, was good; and if unattended with any illegality, which, if it existed, must be plainly alleged and fully proved,

was not sufficient ground for the ordinary to refuse admission. London (Bishop) v. Fytche, 2 Bro. P. C. 211. A bond, reciting that the patron of a rectory

had by an instrument of the same date presented an incumbent, and that he had agreed to resign upon request of the patron, or the owners of the advowson for the time being, for the purpose of enabling him or them to present one of the two vounger brothers of the patron when capable of holding, was simoniacal and void, on the ground that such an agreement was a benefit to the M. & Rob. 363.

Where excentor or trustee, entrusted with the disposition of some church preferments, made at 1 mg/centering to 31 Eliz, c. 6, and, semble, the common law. Fitecher v. Soules (Lord) were constraint of some church preferments, made at 1 mg/centering to 3 mg/centering 5 B. & Ald. 835.

A bond given by an incumbent to the patron, on presentation, to reside on the living, or to resign if he did not return to it after notice, and also not to commit waste on the parsonage house, is good. Bagshaw v. Bossley, 4 Term Rep. 78.

A bond given to an incumbent, securing him an annuity of equal value with the profits of the another may be presented, who might give a general bond of resignation, so that the patron's son, when of proper age, might be presented, was a bond within 31 Eliz. c. 6, s. 8, and void. Young v. Jones, 3 Dougl. 97.

Action on a general bond of resignation; bill for discovery, whether the advowson was not sold with promise to procure an immediate resignation. Demurrer, the discovery overruled. Grey v. Hesketh, Ambl. 268.

Dilapidations.]—An agreement by two incumbents to exchange their livings in their present state, and that one of them shall not call on the state, and that offee of them shall not call on the other to pay for repairs, is not necessarily simoniacal. Goldham v. Edwards, 16 C. B. 437; 24 L. J., C. P. 189; I Jun, (N.S.) 684; 3 W. R. 551, S. P. and S. C., 17 C. B. 141. Affirmed in error 18 C. B. 389; 25 L. J., C. P. 223; 2 Jur. (N.S.) 493; 4 W. R. 550—Ex. Ch.

Semble, if the dilapidations in each living are nearly equal, an agreement mutually to forego the amount would not be simoniacal. Ib. the amount would not be simoniacal.

So, if the dilapidations in one living were of an insignificant amount, an agreement that the incoming incumbent should forego such amount would not be simoniacal. Ib.

If facts are pleaded which show that an agreement relied on must necessarily be simoniaeal, it need not be alleged that the agreement was made corruptly, in order to bring it within 31 Eliz. c. 6, s. 8. Ib.

After the passing of the Ecclesiastical Dilapidations Act of 1871, an agreement was entered into by two incumbents for the exchange of the livings they then held, and one term of such agreement was, that neither party should make any claim upon the other for dilapidations :-Held, that the agreement was not in contravention of the above act. Wright v. Davis, 46 L. J. C. P. 41; 1 C. P. D. 638; 35 L. T. 188; 24 W. R. 841—C. A.

land, 2 Ves. & B. 150.

Bill by an ecclesiastical rector against an occupier for an account of tithes. The defendant by his answer not only insisted on a modus, but alleged that the plaintiff was simoniacally presented, and stated certain facts as evidence thereof. The occupier afterwards filed his cross-bill against the rector, to establish the modus, and for a discovery of various matters with reference to the purchase of the advowson by the rector's father, and the calculations made of the value of the tithes and moduses; a lease alleged to have been granted by the preceding incumbent to the rector's father; and the collection of the tithes and moduses by the plaintiff and his father during the incumbency of the preceding vicar. The rector, by his answer, stated that the matters charged by the occapier's bills, and to which he objected to make answer, would, if confessed, furnish evidence or lead to evidence in support of the charge of simony, or would aid the proof of the charge, and would subject the defendant to the forfeiture and penalties. Exceptions being taken to the answer for insufficiency, they were, on argument, overruled, on the ground that a party protecting himself from a discovery which may subject him to a penalty, is not bound to answer a single link in the chain of evidence. , 1 Younge, 308.

A mortgages a manor (to which an advowson was appendant) in fee to B.; then A. presents C. by simony, and C., being for that reason refused by the bishop, A. presents D., who is admitted, &c., but after resigns, and is again presented by A. and B.; the relator having got an assignment of the king's title for the simony, brings his quare impedit, and a bill, in this court, that the mortgage may not be set up, nor given in evidence

 Jurisdiction — Church Discipline Act, 1840.] - Proceedings against a clerk for the offence of simony cannot be taken under the Clergy Discipline Act, 1892, as the scope of that act is confined to such criminal acts, conduct and habits as are described in the 75th and 109th canons issued by the Convocation of Canterbury in 1603, and are summed up in the 109th canon "as uncleanness and wickedness of life," In order to punish the offence of simony recourse must still be had to the Church Dicipline Act, 1840. Beneficed Clerk v. Lec, 66 L. J., P. C. 8; [1897] A. C. 226; 75 L. T. 461—P. C.

Declaration against Simony - Clerical Subscription Act, 1865. - The charge of a false declaration against simony made under the Clerical Subscription Act, 1865, cannot be isolated from the charge of simony itself, as it would be necessary to determine whether simony had in fact been committed, and thus an offence would be indirectly tried which could not be tried directly. Ib.

## VII. EXCHANGE OF LIVINGS.

**Practice.**]—Plea of simony to bill for tithes, parties, but subsequently fell through. One of ordered to stand for an answer with liberty to the livings was in the meantime filled up by the to accept, as being multifartous. Wood v. Strick-leatron. The late rector brought ejectment against the new rector :-Held, that it would not lie. Rumsey v. Nicholl, 2 C. P. D. 294; 36 L. T. 786; 25 W. R. 614-C. A.

#### VIII. ENDOWMENT AND AUGMENTATION OF LIVINGS.

Presumption of. ] - Where a rectory was granted by the Crown in 22 Edw. 6, with licence to appropriate, and a direction to appoint a vicar, and endow him with a dwelling-house, and, on the appropriation, to endow him also with a specified annual pension or portion for his food and sustentation; and it appeared that there had been a vicar through all subsequent time, and that such vicar had, for a great number of years back, received from the lessees of the rectory for the time being a larger sum than the pension specified in the grant, but no instrument of endowment, nor evidence of the existence of such, was produced:—Held, that after so long a possession, it might be presumed that an endowment had been made according to the terms of the grant, and that the vicarage had been subsequently augmented. Inman v. Whormby, 1 Y. & J. 545.

Charge on Rectory Impropriate. - The augmentation of vicarage by yearly payment of corn and money out of rectory is a charge on rectory impropriate, into whose hands soever it shall Where a vicar brings bill for arrears of certain annual payments, issuing out of an impropriate rectory, he shall recover against the impropriator, though a considerable time had elapsed between the commencement of the arrears and the impropriator's possession. against him at law, and decreed accordingly, a purchaser, with notice pending such suit, shall Att.-Gen. v. Sudell, Pre. Ch. 214; 2 Vern. 549. Cooke v. Smee, 2 Bro. P. C. 184.

> Under 1 & 2 Will. 4, c. 45.]—By a local act the tithes of a parish were extinguished, and in lieu an annuity was seenred to the vicar, and a remedy was given him for recovering arrears. Subsequently, under another local act, a church was built within the parish, and a district assigned to it under 59 Geo. 3, c. 134, and the vicar annexed to this church, under 1 & 2 Will. 4, c. 45, s. 14, one-sixth part of the annuity:-Held that such annexation was valid within that cnactment. Hughes v. Denton, 5 C. B. (N.S.) 765; 28 L. J., M. C. 140; 5 Jur. (N.S.) 575; 7 W. R. 305.

> By the operation of the 19 & 20 Vict. c. 104, passed in 1856, the church has become a "separate and distinct parish for ecclesiastical purposes since that act :- Held, not to prevent it from being capable of an annexation under I & 2 Will. 4, c. 45, it being at the time of the annexation a church to which a district had already been assigned under 59 Geo. 3, c. 134, and there being nothing in 19 & 20 Vict. c. 104, to alter the nature and character of district churches otherwise than for ecclesiastical purposes. Ib.

The Archbishop of Canterbury, being owner of the impropriate rectory and tithe rent-charge Negotiations for Resignation of one Party—
of a parish, granted under the Augmentation
Living subsequently filled up by Patron.]—An
Acts, 29 Car. 2, c. 3, and 1 & 2 Will. 4, c. 45, to
the perpetual curates of a perpetual currey for
execution of a deed of resignation by one of the
ever, an annual rent of 40c, to be charged upon

and yearly issuing out of the rectory. The arch-by the name of the parish of K., and constituted bind patterwards leased the rectory to G. for the district or new parish of K. into a perpendat twenty-one years, yielding and paying yearly to cure, and declared that the curate thereof, and twenty-one years, yielding and paying yearly to the archbishop 9l. 13s. 6d., and also 6l. 16s. for redeemed land-tax, and to the perpetual curate 401. On appeal against a poor-rate for the parish in which G. was assessed as occupier of the tithe rent-charge :-Held, that he was not entitled to deduct the 401. paid to the perpetual curate, inasmuch as he was in occupation of the whole tithe rent-charge, including the 40*l. Reg.* v. *Grores*, 2 El. & El. 793; 29 L. J., M. C. 179; 6 Jur. (N.S.) 1014; 8 W. R. 434.

Evidence. ]-An original ancient book containing, amongst other matters concerning a particular see, the entry of the endowment of a vicarage by a former bishop, to whom the rectory was granted by the Crown, with licence to appropriate, and coming from the registry of the diocese, is evidence of the endowment. v. Brownkill, M'Clel. 321; 13 Price, 500.

Ancient entries made by the monks of an

abbey, relating to an endowment by them of a vicarage (whether perfect or not), are good evidence (quantum valeant) of their subject-matter; although such entries are mixed with extraneous memoranda, and the book is not confined or appropriated to subjects ejusdem generis; and, being admitted they may be read throughout, for the purpose of proving anything which is material to the issue, provided it is relevant. Bullen v. Michel, 2 Price, 399; 16 R. R. 77.

Proof of a curacy augmented is made by shewing an order for the augmentation of it, entered in a book and signed by the governors, according to 1 Geo. 1, stat. 2, c. 10, s. 20, without going on to prove that the money was afterwards laid out in land, and allotted by deed under the corporation seal of the governors of Queen Anne's bounty, to be annexed to the curacy, and that such deed was inrolled within six months after its execu-

tion. Doe d. Graham v. Scott, 11 East, 478.

Book from registry of Lincoln, containing inter alia what were called copies of endowments of certain vicarages, was received as evidence of an endowment of vicarages in Northampton, Leonard v. Franklyn, 4 Price, 264.

Rights of Perpetual Curate.]—A perpetual curate of an augmented parochial chapelry has a sufficient possession whereon to maintain an action for breaking and entering the chapel and destroying the pews. Jones v. Ellis, 2 Y. & J. 265; 31 R. R. 589.

— Union of Parishes.]—James 1, by letters patent, granted the rectorial churches and chapels of T. and K., and two parts of the tithes and altarages of the rectory or chapel of C., parcel of the possession of the abbey or monastery of T., in Ireland, the grantee repairing and maintaining the chancel of the churches, rectory and chapels, at his cost, from time to time, for ever, and supporting annually and from time to time paying the stipend of the curates, and all other the rents and services issuing or payable out of or from the premises. In 1641 the church of K. was destroyed, and was not afterwards rebuilt. By an order of the Lord Deputy and Council, in 1678, the parish of K, was united with the parish of A. In 1855 the bishop of the diocese, by a

his successor, should be perpetual curates, thenceforth and for ever, of the new parish, and appointed a salary for the perpetual curate; and in 1856 a new church was erected, which was situate in the old parish of K. :-Held, that the curate of the new parish of K. was not entitled to any stipend from the owner of the tithes of K. Att.-Gen, v. Ashe, 10 Ir. Ch. R. 309.

Arrears-Recovery of Full Amount. ]-Where an ecclesiastical augmentation by way of rentcharge which has been granted to a vicar and his successors under 29 Car. 2, c. 8, as extended by the Augmentation of Benefices Act, 1831, is in arrear, the whole amount in arrear is recoverable as a clebt for which the assignce of the land so charged is liable, and is not limited to the extent of any profits which he may have received from the land. Pertwee v. Townsend, 65 L. J., Q. B. 659; [1896] 2 Q. B. 129; 75 L. T. 104.

IX. MODE OF FILLING BENEFICES. .

1. PRESENTATION AND NOMINATION.

#### a. By the Crown.

Right of Crown.]—The king, by his prerogative, has a right to present to a church which becomes vacant by his promoting the incumbent to a bishopric; but this right must be exercised in the lifetime of the persons promoted, otherwise the king's turn is lost. Armagh (Archbishop) v. Att.-Gen., 2 Bro. P. C. 514.

If, after a grant of the next presentation to a living, the incumbent is made a bishop, by which the living becomes vacant, and the king is entitled to present, the grant is not defeated, but the grantee may present on the next vacancy occasioned by the death or resignation of the king's presentee. Troward v. Calland, 8 Bro. P. C. 71. S. C., nom, Calland v. Troward, 2 H. Bl. 324;

6 Term Rep. 439, 778; 3 R. R. 389. If a bishop, having an advowson in another diocese, present and die before institution, there can be no institution, but it falls to the Crown. So, where a bishop has a right of collation in his own diocese. Potter v. Chapman, Ambl. 101; Dick. 146.

Injunction on filing of bill to stay induction of defendant to living. Ib.

The right of the Crown to present to an English benefice, upon the appointment of the incumbent by the Crown to a bishopric, is not barred by the Crown having, before such appointment, granted the advowson to a subject. Reg. v. Eton College, 8 El. & Bl. 610; 27 L. J., Q. B. 132; 4 Jur. (N.S.)

 On Promotion to Colonial Bishopric.]-See Reg. v. Eton College, ante, col. 1224.

335; 6 W. R. 72.

#### b. By Ecclesiastical Persons.

By Bishop of Diocese.]-Where the right of presentation or nomination to the office of curate or reader fell within the provisions of the 1 & 2 Vict. c. 31, and consequently such right, in the case of a vacancy before sale, vested in the deed, executed under 14 & 15 Vict. c. 72, erected bishop of the diocese, under the proviso in the first and a part of the parish of A, into a new district or parish, to be called | 2 Scott (Nal) 394; 2 Man. & C. 71.

—Where an advowson belongs to a prebendary in right of his prebend, and the church becoming vacant, the prebendary dies without having presented, the presentation belongs to his personal representative for that turn, according to the opinion of the six judges out of eight delivered in the House of Lords. Mirehouse v. Rennell, m the House of Loyus. Merenomae v. Remete, 8 Bing. 490; 1 M. & Scott, 683; 7 Bligh (N.S.) 241. Affirming Rennell v. Lincoln (Bishop), 7 B. & C. 113; 9 D. & R. 810; 5 L. J. (O.S.) K. B. 320 : 31 R. R. 171.

By Parson Impropriate.]—A parson impropriate shall not have the nomination of the vicar.

Mallet v. Trigg, 1 Vern. 42.

Building and endowing of a church did originally entitle the person to the patronage. Impropriator of a parish has no right to nominate a preacher to every chapel within the parish; it might be a hardship if he should be bound so to do, neither ought it to be at his election. One may build a private chapel for himself and family or for himself and neighbours, or for himself and twenty neighbours, and this will not give the parson a right to nominate a preacher there. Herbert v. Westminster (Dean), 1 P. W. 774.

By Incumbent of Mother Church. ]-The incumbent of the mother church has the right of nominating to chapels of ease, and can only lose that right by agreement between patron, parson and ordinary, and on a compensation made to him. Dixon v. Metcalfe, 2 Eden, 360. S. C. nom. Dixon v. Kershaw, Ambl. 528. S. P., Farnworth v. Chester (Bishop), 7 D. & R. 99; 4 B. & C. 555; 4 L. J. (O.S.) K. B. 14; 28 R. R. 390.

By Archbishop's Trustees.]-Archbishop P. devised his options to trustees regard being had in the disposition of them according to their discretion to his eldest son. Dr. P. the husbands of his daughters, his present and former chaplains, &c. :-Held, a personal trust, and the treasurership of C. being vacant, one of the trustees might present the other, he being within the description Potter v. Chapman, Ambl. 98; in the will. Dick. 146.

Surviving trustee could not present himself.

If the bishop from whom the archbishop takes the option dies or is translated before vacancy, the option is lost, semble. Ib.

The executors of the arehbishop cannot present after the death of the bishop, though the vacancy happened in his lifetime; but the presentation falls to the Crown. Ib.

By University.]—The right of presentation given to the universities by 3 Jac. 1, c. 5, ss. 18, 19, 20; 1 Will. & M. c. 26, s. 2; and 12 Anne, st. 2, 

By Eleemosynary Hospital.]—In pursuance of an act of Elizabeth the Earl of Leicester by deed founded an eleemosynary hospital, and made it a corporation by the name of the master and brethren of the hospital. By ordinances for the constitution and government of it, he fixed the number of the brethren, who were to be chosen by preference from poor persons disabled in the The appointment of master he vested in his heirs, directing them, however, to appoint, if defendants, were done by them, and that they

By Personal Representation of Prebendary.] | fit, the vicar of a neighbouring church. By deed, he gave to the master and brothren to hold to their use and their successors for ever, lands and possessions, amongst which was the advowson of a vicarage. By several ordinances he vested the government and control of the brethren in the master :- Held, that the master had no veto in the election of a presentee to the vicarage by the majority, and that his concurrence was not necessary to the validity of an election by the majority. Reg. v. Kendall, 4 P. & D. 603; 1 O. B. 366: 10 L. J., Q. B. 137.

> Practice-Acquiescence-Estoppel. ] - Claim : That the plaintiff was vicar of a parish; that a chapel was erected within it, and endowed and consecrated for the administration of the sacraments and the performances of all other divine offices according to the rites of the Church of England; that the plaintiff as such vicar was entitled to nominate and present, and had nominated and presented, a clerk to the chaptel, but another clerk had been licensed, instituted and admitted by the defendant bishop on the nomination and presentation of certain other defendants, who thereby hindered the plaintiff in the exercise of his right; and he claimed to have his right established and declared. Defence of the last-mentioned defendants: That certain. freeholders had erected the chapel and conveyed it to the ecclesiastical commissioners, and applied to them under 14 & 15 Viet. c. 97, to declare the right of nomination to be in the defendants, who had endowed the chapel, and that before making such declaration a copy of the application was according to the act sent by the commissioners to the plaintiff, he being both patron and incum-bent of the parish; that if he had ceased to be patron he stood by and knowingly allowed those defendants to endow the chapel and procure the same to be consecrated in the belief entertained by them as he well knew that he was patron, and that the sending of such copy to him was in fact a sending of a copy both to the patron and incumbent, as required by the act, and the plaintiff was therefore stopped from denying that he was patron; and that the right of nomination had been declared to be in those defendants, who afterwards nominated. On demurrer to the allegation of estoppel:—Held, that it was bad, because the rights of the vicar were not merely private but were accompanied by spiritual and other duties in which his parishioners were interested, and he could not therefore waive or divest himself of those rights and duties by the conduct imputed to him. MAllister v. Ruchester (Bishop), 49 L. J., C. P. 114; 5 C. P. D. 194; 42 L. T. 22.

But held, also, that the claim was bad, inasmuch as it did not allege that the chapel was a chapel of ease, or otherwise show any right in the vicar to nominate and present a clerk to it. Ib.

\_\_\_\_ Discovery.] — The defendant claiming relief over against the ecclesiastical commissioners served upon them a notice under Ord. XVI. r. 18. They entered an appearance under r. 20, and an order was afterwards made at chambers under r. 21 that they should be at liberty to appear and defend this action, so far as related to the question whether all things required to be done by them, in order to enable them as against the plaintiff to make a valid declaration of the right of nomination and to vest that right in the should be bound by the finding upon that ques- was not filled up at time of an avoidance, the tion. The plaintiff then obtained an order on the ceclesiastical commissioners for discovery of documents :- Held, that the third parties having appeared in the action to litigate with the plaintiff, he was entitled to discovery from them and the order for it was right. Ib.

#### c. By Parishioners or Public Trustees.

Proxy. ]-Trustees for a parish having the right of electing a viear, cannot vote by proxy, for it is a personal trust. Wilson v. Dennison, Ambl. 82. Also, Att.-Gen. v. Scott, 1 Ves. 413.

Majority.]—Trust of an advowson to present some fit person, such as the inhabitants and parishioners, or the major part of the chiefest and discreetest of them should nominate. The right of election is in the inhabitants, paying the church and poor-rates, above the age of twentyone. A popular election by a majority of such voters, and others not so qualified was established. Fearon v. Webb, 14 Ves. 13.

- Remedy. ]-An advowson was vested in feoffees, in trust upon every avoidance to present to the ordinary such person as should be elected by a majority of the landowners in a parish. On a motion for a mandamus to the trustees to present a clerk on the ground that he had been so elected :- Held, that either the remedy of the landowners against the trustees was in equity for a breach of trust, or if the landowners had a legal right, their remedy was by quare impedit; and that in either case the mandamus would not lie. Rey. v. Orton (Trustees), 14 Q. B. 139; 18 L. J., Q. B. 321.

Held, also, that the remedy, if any, of the clerk was in equity, and that he had no legal right. Ib. See also post, col. 1406.

Right by Virtue of Assessment. ]-Information was filed at the relation of several inhabitants of C., praying that the election of defendant as curate might be declared void, and that another election might be had according to a deed in 1656, and decree in Exchequer, by which it appeared, that the impropriate rectory was pur-chased for the use of the parishioners and inhabitants, and that the nomination of the curate had been declared to be in parishioners and inhabitants paying to church and poor. Lord Chancellor expressed an opinion that assessment gave the right, though no actual payment had been radic, choigh no actual payment nat been made; but the election on that principle was not disturbed on the ground of common consent, no objection having been made to it at a general meeting, and the parish having no representative meeting in vestry for such purpose. And, the court declining to give prospective direction as to the future, the information and bill was dismissed, and with costs, except as to keeping up the number of trustees with reference to the only proper subject of the information, the stipend of the curate, all the rest as to the nomination, &c., being the subject of a private suit. An informality in the bill not stating the plaintiffs as suing on behalf of all the other parishioners, might have been cared by amendment. Att.-Gen. v. Forster, 10 Ves. 335. See also S. C., nom. Att.-Gen. v. Newcombe, 14 Ves. 1.

court would not by injunction prevent the effect of a presentation, under the legal title of the heir of the surviving trustee, without a special ground: but the court will take care as to the future, that the trust shall be properly filled up. Att.-Gen. v. Lichfield (Bishop), 5 Ves. 825.

Custom-Mode of Election. ]-A custom for the parishioners of a parish to elect a curate to the perpetual curacy thereof, will not legalise an election where some of the parishioners were excluded from voting, and the rest voted by ballot. Faulkner v. Elger, 4 B. & C. 449; 6 D. & R. 517; 28 R. R. 317.

An election by ballot of a curate of a parish by the parishioners is illegal and void.

Election by some, of Several ]-Twenty-five inhabitants, as trustees, having right to elect and present, all not joining, the election is void at law and cannot be supported in equity. Trustees cannot make proxies to vote in a personal trust requiring judgment. Disusage evidence of abandonment by consent, as to part of a constitution which arose from consent. Att.-Gen. v. Scott, 1 Ves. 413.

By deed, the advowson of a vicarage was vested in nine trustees, upon trust that they or the major part of them should present such clerk as should e elected by the parties therein mentioned. The be election was to be by parishioners having a certain qualification in land, "or the major part of such parishioners, together with the trustees as aforesaid, or the major part of them." On the occasion of an election in 1840, there were eight trustees, two of whom were out of the jurisdiction; of the remaining six, five attended at the meeting, and four of them voted for the successful These four, and the trustee within candidate. the jurisdiction who was not present at the meeting, joined in the presentation, which was sub-sequently approved of by the trustees out of the jurisdiction. The remaining trustee refused to join in the presentation :- Held, that the election was valid; that the dissentient trustee was bound to give effect to it by joining in the presentation; and that the bishop, subject to any question arising as to professional unfitness in the clerk, or corrupt, simoniacal or scandalous proceedings at the election, was bound to present. Att.-Gen. v. Cuming, 2 Y. & Coll. C. C. 139; 7 Jur. 187.

An informality in the appointment of the trustees, viz. not keeping up the number required by the deed, did not vitiate the election.

Lands and a free chapel were vested in twopersons by grant, and the original grantees vested them in feoffees for ever, with a power to appoint new ones whenever the number should be reduced to four; but there was no provision that a particular number should form a quorum, nor, in terms was there any power to appoint a minister; but the reuts were to be paid to one. Appointments of feoffees and ministers took place until 1823, when a scheme was proposed, a reference directed, and orders made upon it. In 1866 the feofees were reduced to three, one being incapable of acting, and the other two, by deed, to which all three were parties, but which was only executed by two, appointed H. as minister. A bill and information were filed to restrain the appointment against the feoffees, Number of Trustees.]—Where by neglect the vicar and bishop, but a second appointment was number of trustees in a trust to present to a living made after injunction granted:—Held, that the

appointment by the two feoffees was valid, as voting, on the following and two successive days, was the second appointment after injunction at one polling place only, and that the poll granted, and the bill dismissed with costs against would be kept open from eight to eight. Upon the feoffees and bishop, but inasmuch as the vicar had appeared and disclaimed, against him without costs. Att. Gen. v. Larcson, 36 L. J., Ch. 130; 15 W. R. 343.

Governors specially Appointed.]—By a charter of Edw. 6, it was granted that the inhabitants of the village of S., within the parish of C., should have a chapel for all the inhabitants, with a chaplain, to be paid out of the profits of the vicarage of C., and that they should elect chapelwardens. And that certain governors appointed for the village pursuant to that charter, una cum assensu majoris partis inhabitantium eiusdem villate, should nominate and appoint the chaplain. The charter also provided, that the inhabitants of S. should not be charged towards the support of C., otherwise than the other inhabitants of C. In 1836, the governors, having upon a vacancy nominated a chaplain, gave notice to the inhabitants of S, that such nomination had been made, and required them to meet at a time and place named, for the purpose of assenting or dissenting. At such meeting the resident payers of church and poor-rates, and no other persons, were admitted to vote. Some persons, not rated, tendered their votes. majority of ratepayers assented to the nomination :-Held, that the nomination by the gover-nors, with a subscount reference to the inhabitants for their assent, was a compliance with the words una cum assensu. Rew v. Dane, 6 A. & E. 874.

Meaning of word "Inhabitants." -Held, also, that referring to the context of the charter, and the proof given as to use, the word "inhabitants" in this charter might be construed as meaning "inhabitants paying church and poorrates," J. S. P., Rev v. Masterton, 6 A. & E. 153; I N. & P. 314.

Mode of Election. ]-Where the advowson of a parish is vested in trustees for the benefit of the parishioners, an election of a vicar by ballot is not valid. The election must be by voting openly. Edenborough v. Canterbury (Archbishop), 2 Russ. 93.

In such a case, the right of voting at the elec-tion of a vicar may be limited by long usage to parishioners, who pay church-rates and poor-

rates. Ib.

The advowson of a parish church being vested in trustees who were bound to present the nominee of the parishioners and inhabitants, a vacancy occurred, and at a meeting of parish-ioners convened by the churchwardens, and presided over by one of them, the 30th of August was fixed upon for a meeting to proceed to the election of a vicar. Meanwhile, upon the requisition of certain inhabitants, a meeting on the 25th of August, summoned by the churchwardens, but at which they declined to preside, was held, at which resolutious were passed to the effect that the election should be by ballot, on one day only, and at several polling places, and that the poll should be open from nine to nine. On the solth of August the meeting resolved upon was A., seised of the manor and patronage of W., held, candidates were nominated, a shew of by will gives 100\(ldot\) per annum rent-charge, and hands taken, and a poll demanded, and one of the advowson to six trustees, and those trustees, he the only served to the control of the advowson to six trustees, and those trustees.

a parishioner rising to move amendments similar to those of the 25th of August, the chairman left the chair and declared the meeting at an end, After the churchwarden had left the chair another chairman was chosen, and a series of resolutions, similar to those of the 25th of August, were moved and carried. The poll having been taken in the way announced by the chairman of the meeting of the 30th of August :- Held, that the conduct of the churchwardens had been erroneous and illegal; but, there being no evidence of any voter having been deprived of an opportunity of voting, that the election could not opportunity or young, that the election come not be disturbed. Shaw v. Thompson, 45 L. J., Ch. 827; 3 Ch. D. 233; 34 L. T. 721.

Semble, an election by ballot, if duly resolved

upon, is not at the present day an illegal mode of election. Ib.

Nomination, Right of - In whom. ]-Under 5 Geo. 4, c. 103, a church building act, where only one subscriber of 50% is left surviving, and only one trustee by election, the incumbent of the parish becomes trustee ex officio jointly with the surviving trustee by election, and on the death of the latter within forty years, entitled to nominate on the vacancy in the incumbency of the church. Allen v. Gloucester and Bristol (Bishap), 42 L. J., C. P. 299; L. R. 6 H. L. 219; 22 W. R. 198.

For the purpose of election, by subscribers to the building of a church, of three trustees to nominate a spiritual person to serve the church, under 5 Geo. 4, c. 103, s. 6:-Held, that s. 8 applies only to the first election of trustees, and that there could be no subsequent appointment of trustees except in the manner pointed out in s. 7, viz. by the majority at a meeting called by the surviving trustees, even though there was only one 50% subscriber remaining; and that, on the death of one or all of the trustees without any such election having taken place, the sole surviving 50%, subscriber did not by force of the statute become a life trustee. Fowler v. Gloucestru and Bristot (Bishop), 38 L. J., C. P. 341; L. R. 4 C. P. 668; 17 W. R. 1026—Ex. Ch. Affirming, 20 L. T. 706.

A., being impropriator of a parish, demised part of the tithes to certain parishioners as trustees for 1,900 years, who re-demised it tohim for 999 years under the yearly rent of 50%, payable to the trustees as a provision for a preacher, to be nominated by the trustees. The heir of A. afterwards sold the rectory to B., and the representative of the surviving trustee was prevailed upon to assign to B. the right of nominating a preacher. From the date of the atting a presence. From the date of the original demise, and for forty years after the latter transaction, the preacher was constantly nominated by the parishioners —Held, upon a contest between the parishioners and B. it was held that the right of nomination was absolutely in the trustees, and that the assignment of that right was a breach of trust; and directions were given by the House of Lords for the re-establishment of the trust in trustees, to be impartially

chosen. Foley v. Att. Gen., 7 Bro. P. C. 249.

A., seised of the manor and patronage of W.,
by will gives 100*l*. per annum rent-charge, and the churchwardens, who was in the chair, when reduced, to choose others; B., the only surannounced that the poll would be taken by open viving trustee, assigns his trust to others who

1248

nominate to the church, being a donative: mere instrument only, and, as to infants pre-decreed, the assignees of the trust, though the senting to a church, the strong ground the law not the owner of the manor. Att.-Gen. v. Floyer, 2 Vern 748

Presentation, Rights of-In whom.]-Queen Elizabeth, for the advancement and better maintenance of the free grammar school of Shrewsbury, granted to the baliffs and burgesses of Shrewsbury, and their successors, amongst other hereditaments, the advowson of the vicarage of C. By the 38 Gco. 3, c. 68, all the hereditaments and real and personal estates belonging to the school were vested in a corporate body, called "The governors and trustees of the school," who were to hold the same in trust for the benefit and maintenance of the school, except the right of presentation, nomination and appointment, to those ceclesiastical benefices which were thereinafter declared to be in the mayor, aldermen and assistants of the town of Shrewsbury. By a subsequent section of the act, the mayor, aldermen and assistants were directed to fill up vacancies in the vicarage of C., by nominating, appointing or presenting a fit person, provided that such person should be preferred, exteris paribus, who should have been brought up in the school, and a graduate of one or other of the universities, and born within the parish of C., except that it should be lawful to give such benefice to either of the masters of the school, after he should have vacated his office of master, notwithstanding any such claim or preference as last aforesaid:—Held, that the right of presentation to the vicarage of C. was vested in the mayor, aldermen and assistants, as charitable trustees within the meaning of the act 5 & 6 Will. 4, c. 76, for the regulation of municipal corporations. Re Shrewsbury School, 1 Myl. & C. 632.

The words "cæteris paribus" in the statute 38 Geo. 3, c. 68 (see supra), referred to the previously-specified qualification of being fit and proper and duly qualified according to law, and (Earl), 1 Kay, 186, 566.

In the Metropolis.]—Where the right of electing the minister of a parish has been by deed vested in trustees in trust for the parishioners, it is not transferred to the vestry, or otherwise affected by 18 & 19 Vict. c. 120, or by 19 & 20 Vict. c. 112. Carter v. Cropley, 8 De G. M. & G. 680; 26 L. J., Ch. 246; 3 Jur. (N.S.) 171; 5 W. R. 248.

# d. By Private Persons.

By Roman Catholic Patron.]-A presentation to a benefice made by a college, on the nomination of a Roman Catholic patron, and appearing on the face of it to have been made, not in right of the college, but in trust for the Roman Catholic, is absolutely void under 13 Anne, c. 13. Boyer v. Norwick (Bishop), 61 L. J., P. C. 46; [1892] A. C. 417; 67 L. T. 30; 56 J. P. 692 — P. C.

tion by infant to benefice. See Arthington v. Coverley, 2 Eq. Abr. 518.

assignment was made by one only who survived, goes upon is, that there can be no inconvenience, had the right to nominate to the church, and because the bishop is to judge of the qualification of the clerk presented; so, in the case of a fine and recovery suffered by an infant, it is held good; and the law supposes he was of full age, for it will not presume that a judge would take it upon any other terms ; and, a deed to lead the uses being part of the fine, it shall stand. Hearle v. Greenbank, 3 Atk. 710.

> By Devisee. ]-If A., seised of an advowson, be also incumbent and devises it, the devisee, after his death, shall nominate; for, where the ownership and property of an advowson be in the devisee, they, and not the heir, shall nominate in consequence of such ownership, nor will it make any difference, whether the devisee has the advowson in him as a personalty or as a realty. Hawkins v. Chappel, I Atk. 622.

By Heir-at-law. —A testator, who was both patron and incumbent of a living, devised the advowson and all his other real estates, and also his personal estate, to trustees in trust to pay the rents, dividends, interest and annual income of his real estates, until they should be sold as thereinafter directed, and also of his personal estate, to his sister, until she should have a child; and, immediately after her having a child, in trust to stand seised and possessed of his real estates, if not then sold, and of his personal estate, and the rents, dividends, interest and annual income thereof, in trust for her children or child, who should attain twenty-one, their heirs, &c.; and, if she should have no such child. then in trust, after her death, for the trustees, their heirs, &c. The testator then directed his trustees to sell the advowson and his other real estates with all convenient speed after his death, and to stand possessed of the proceeds upon the trusts before declared of his personal estate; and he empowered his trustees to apply the rents, dividends, interest and annual income of the presumptive shares of his sister's children, of not to the general qualifications of a candidate his real estates if not then sold, and if sold then for the duties of a clergyman. Att.-Gen. v. Powis of the money arising therefrom, and of his personal estate, for their maintenance during their minorities; and directed that the surplus rents, dividends, interest and annual income should be invested and accumulated for the benefit of the children, from whose shares the same should be saved. At the testator's death, his sister (who was his heir) had three infant children; and his living having become vacant by his death, the question was, whether the children, their mother or the trustees, were entitled to present to it :- Held, that as the presentation to a living does not produce rents, dividends, interest or annual income, the dispositions of the will were not applicable to that species of property, and, consequently, that the testator's sister was entitled, as his heir-at-law, to present to the living on the existing vacancy. Martin v. Martin, 12 Sim. 579; 11 L. J., Ch. 291; 6 Jur. 360.

Vacancy after Contract for Sale.]—M. D., a married woman, having a separate property, offered, by letter, to give C. M. 1,500*l*. for the By Infant.]—As to presentation and nomina-on by infant to benefice. See Arthington v. v. derverley, 2 Eq. Abr. 518.

An infant may execute a power where he is a large first and a sum of the proposal. "An article, as is usual in such cases, to be drawn up between us to the above effect, in which I will undertake to make out a good title, to the of presenting in B., B. is to judge of the satisfaction of any counsel you may appoint. This preliminary matter, however, cannot be arranged till M. C., my solicitor, returns to Before the article was executed, the living became vacant, upon which C. refused to perform the agreement. M. D. died. A bill was then filed by her heir-at-law against C. M. for a specific execution of the agreement. C. M., however, presented a clerk, E., who was inducted by the bishop; an amended bill was then filed by the heir at-law and the personal representatives of M. D. against the bishop, C. M., and E., for a specific execution of the agreement, and for the removal of E. :- Held, that the contract, although in letters, was final and complete, the thing to be bought, and the sum to be given, being distinctly stated in the proposal, and explicitly accepted in the answer thereto, and ought to be specifically performed. Dowling v. Maguire, Ll. & G. t. Plunk, 1.

Held, also, that a married woman having separate property might, by her contract to pay a specific sum of money for an estate, bind that property, and that it was not necessary she should in such contract expressly refer to it. Ib.

Held, also, that, the plaintiff having only equitable rights, the original bill was an equitable quare impedit, which was sued out within the proper period, i.e. within six months from the vacancy, and was sufficient notice to E.; and that E., who was admitted pending the suit, not having alleged any title in a stranger, must abide the fate of his patron, and be removed. Ib.

By Trustees.]—A. by will directed her trustees to sell an advowson immediately after the death of H., the present incumbent, but on no account to sell it to any member of the family of H.; the proceeds of such sale to fall into her residuary personal estate :- Held, that the next presentation was vested in the trustees, and that they must present. Bristow v. Skirrow, 5 Jur. (N.S. 1379 ; 1 L. T. 180.

Validity of Nomination.]-Lord Fairfax, by codicil in 1671, gave all his tithes of Bilborough in fee (subject to an estate therein for the life of R.) to H., and his heirs and assigns, to the use of a preaching minister, there to be nominated by the said H. and his heirs. The heir of H. conveyed the tithes, with other property, to trustees for sale for payment of his debts, and they were accordingly sold and conveyed by the said trustees in 1716 to F. and J., and their heirs, on trust as to the tithes to the use of a preaching minister to be nominated by F. and his heirs. J. (who was only trustee for F.) surviving F. became seised of the legal estate, and his descendants continued so seised until 1826, when his heir-at-law conveyed the said tithes upon the original trusts to T., the heir of F.; T. had, in 1821, nominated B. the preaching minister of Bilborough :- Held, in suit by T. and B. for an account of tithes, that this was a valid nomination of B. Holdsworth v. Fairfaw, 3 Cl. & F. 115:8 Bligh (N.S.) 882.

Rights of Presentation and Nomination divided.]—If the right of nomination is in one, and of presentation in another, and either impedes the other in his right, a quare impedit lies. Reav. Stafford (Marquis), 3 Term Rep. 646. cestuis que trustent of presentation, and they do

Where the right of nominating is in A., and qualification of the person nominated, in the same manner as a bishop does; but if the person presenting object to the nominee on the ground of immorality, that must be tried by a jury. Ib.

Nomination of Self.]-The patron of a donative benefice, being a qualified clergyman and officiating curate of the church, by deed poll, executed during a vacancy of the benefic, granted the advowson to a trustee in trust to present whomsoever the patron should nominate; he patron then by word of mouth nominated himself, and the trustee by deed poll granted the office of rector to him :-Held, that the transaction was valid, and that he thereupon became rector and entitled to the profits of the benefice. Lowe v. Chester (Bishop), 10 Q. B. D. 407; 48 L. T. 790; 47 J. P. 375.

Nomination, Right of—In whom.]—The owner of an advowson after directing that 13,000L should be invested and the interest paid to his wife for her life for the support of herself and their children, directed his executors when the church was full to sell the advowson, and also certain freehold land, and invest the proceeds for the same purpose as before directed with respect to the 13,000l., and after the death of his wife then for the purposes in the will mentioned. The husband died in September, 1874, the church then being full, and he left his widow and five iufant daughters, his co-heiresses-at-law, him surviving. The executors did not sell the advowson, and on the death of the incumbent in February, 1875, the question arose who was entitled to nominate to the vacant benefice: Held, that the right to nominate was in the widow. Briggs v. Sharp, 44 L. J., Ch. 510; L. R. 20 Eq. 317; 33 L. T. 154; 23 W. R. 806. Followed in Welch v. Peterborough (Bishop), 15 Q. B. D. 432; 1 Cab. & E. 534. See also Hawkins v. Chappel, 1 Atk. 621.

#### e. By Parceners or Joint-tenants.

Priority.] -- Coparceners present in turn to benefice, and the elder has the right of first turn : and this right extends to his assignee. Bullery. Exeter (Bishop), 1 Ves. 340.

— On Partition.]—On partition of coparce-nary of advowson where one has before presented, other shall present the next turn. Matthews v. Bath and Wells (Bishop), Dick. 652.

Decree for partition of advowson by alternate presentations. Bodicoate v. Steers, Dick, 69. A., seised of an advowson, of which his son W. was incumbent, devised it to trustees to sell on his son's death, and divide the produce between his own nine children:—Held, by Romilly, M.R., that the court had authority to make a partition of an advowson, and would follow, by analogy, the rule as to coparceners, and give the right of presentation to the members by seniright of presentation to the members by semi-ority; but Cranworth, C, and Knight Brace, L.J., held, that the right to present was to be deter-mined between the children by lot. Johnstone v. Baben, 28 Beav, 562; 6 De G. M. & G. 439; 25 L. J., Ch. 899; 2 Jur. (N.S.) 1053; 4 W. R. 827.

The court of chancery can make a partition of an advowson, Ib.

not all agree, there can be no nomination. So in the case of joint tenants before severance.

Seymour v. Bennet, 2 Atk. 483.

Where there are pareeners in advowson who cannot agree in one person, court will direct them to draw lots who shall have the first

presentation, Ib.

An advowson descended to four coparceners, A. B. C. and D. who agreed to present in succession, according to their seniority. When the third turn came, C. had died, leaving two cheirs, E. and F., between whom the right to present was disputed. F., however, presented, and on the next avoidance, E. presented:—Held, that the presentations of E. and F. were to be counted, though they were usurpations on the rights of F. and D. respectively, and that on the seventh avoidance F. would be again entitled to present. Richards v. Macelosfield (Earl), 7 Sim. 257; 4 t. J., Ch. 153.

Advowson held in Common.]—A prerogative representation to a church, of which the advowson is held in common, does not pass for the turn of the otherwise rightful patron. Gracers' Co. v. Canterbury (Architshop), 2 Wm. Bl. 770; 3 Wls. K. B. 214, 221.

Where an advowson is held in common, and the rote of presentation not expressly settled, the first and peaceable presentations are evidence of composition between the parties. Ib.

Protestant and Catholic Co-partners.]—When a protestant and a catholic are co-partners in an advovson, the right of presentation is in the protestant alone. Edwards v. Exeter (Bishop), 5 Bing. (N.G.) E6t; 7 Scott, 652; 9 L. J., C. P. 87; 3 Jur. 72.

Presentation by Turns.]—Where the right of presentation is vested in different parties by turn, a presentation made on exchange of benefices counts as a turn. The principle of Richards v. Maccelepted (Earl) (7 Sim. 257) applies between parties to a deed limitage, the turns. There is no equity enabling a party whose turn has been usurped to take turn of the usurping party. Ducues v. Craig (9 M. & W. 166) and dicta in Birch v. Litchrield (Litchup) (8 Bos. & F. 444; see IT R. R. Preface, vii.) followed. Keen v. Denny, 64 L. J., Ch. 55; [1894] 3 Ch. 169; 8 R. 629; 71 L. T. 566; 43 W. R. 39.

### f. By Mortgagors or Mortgagees.

Mortgage Absolute.]—When mortgage of mere advowson is absolute in mortgagee, he may present. Dyer v. Craven (Lord), Dick. 662.

Before Forcelosure, ]—A manor with an advoveson appendant being mortgaged, the church becomes void, the mortgagor shall present, unless forcelosed; and if, pending a suit by the mort agec to forcelose, the churchi becomes vacaut, though the defendant has no bill to redeem, the court will grant an injunction to stay proceedings in a quare impedit brought by the plaintiff. Ambure V. Juaching, 2 Vern. 401.

Mortgagee, till a foreclosure, is but in nature of a trustee for the mortgagor. Ib.

If an advowson only be mortgaged, and becomes void, it seems in this case the mortgage is to present, especially if in the deed the agreement be that the mortgage shall present. Cartiner v. Griffiths, 2 P. Wms. 404; Moseley, 16.

One mortgages a manor, with an advowson appendant, and the church becomes void; mortgage, though in possession, shall not present to the church till the mortgage is foreclosed. *Ib*.

Mortgagee of an advowson presents; bill by mortgagor must be brought within six months, in the same manner as a quare impedit. Ib.

Mortgager manner as a quare impedit. Ib.

Mortgagee cannot, before foreclosure, present to benefice. Hungarford v. Clay, 9 Mod. 1.

Presentation Revoked.]—Decree against a mortgagee in possession to redeem, but, a church becoming void before the account taken, mortgagee presents; yet on petition ordered to revoke his presentation. Jopy v. Cvx, Pre. Ch. 71.

Nominee of Mortgagor.]—Mortgagee cannot present to vacant benefice, but must present nominee of mortgagor as his trustee. Gally v. Selby, 1 Comyns, 343; 1 Str. 403.

A mortgagee must accept of a mortgagor's nominee to an avoidance of an advoson, for, where arrears are great, instead of foreclosure he should have prayed a sale of the advowsom. Machenie v. Robinem 8 Atk. 592

#### 2. QUARE IMPEDIT.

Pleading.]—Sects. 80 and 81 of the Common Law Procedure Act, 1852, applied to pleadings in quare impedit. Marshall v. Electer (Bishup), 6 C. B. (N.S.) 716; 28 L. J., C. P. 800; 7 W. R. 525.

— Bishoy's Plea, ]—In quare impedit, upon a rejection of the patron's presentee, the bishoy's plea must state not only that the presentee is not a fit person, but also in what respect he is not fit, and state it in such a manure as will enable the patron to take issue on the objection, and a proper tribunal to judge of its soundness. Exeter (Bishoy) v. Marvhall, 37 L. J., C. P. 381; L. R. 3 H. L. 17; 18 L. T. 376.

An allegation in the plea that the bishop had good reason to believe that the presentee had been guilty of an attempt to commit simony is

not sufficient. Ib.

Semble, that a plea alleging a presentation by the bishop as on a lapse must allege notice to the patron of the circumstances under which the bishop would so claim to present. *Ib*.

The right of a patron is a temporal right, and the plea to an action to enforce this right must be one upon the sufficiency of which in point of law the court may decide, or which may be traversed and issue joined upon it to be tried, if the cause is spiritual, by the certificate of the archbishop, and if temporal, by a jury.  $I\delta$ .

- Insufficient Declaration.]—A plaintiff claimed the second turn to a living but in list declaration did not lay any presentation made by him, or any of his predecessors, in the second turn ; in ealso acknowledged a title in the defendant to the first turn, but he did not set out the conveyances particularly, by which it was derived down to him: this declaration was held to be insufficient to maintain the plaintiff's action. Skirchurer v. Hitch, 1 Pro. P. C. 110.
- Strength of Title.]—When a church is vacant by the death of the incumbent, and two conflicting claimants allege a right to present, but the bishop refuses to present the clerk of either until the right to present inas been established, and one of them brings his action of

1253

his own is good. Carlisle v. Whaley, L. R. 2 H. L. 391; 16 W. R. 229.

Secus, where the bishop has already instituted the clerk of one of the competing claimants. In this case the plaintiff must succeed by the strength of his own title, and the defendant must prevail if he successfully traverses any material allegation of the declaration. Ib.

- Declaration. ]-Where the founder of a chapel of ease in a township endowed it with lands for the maintenance of a chaplain, and by his will directed that his son should, during his life, have the nomination and election of the minister, and might by will or deed set down the order or course for the nomination and election of the minister after his death; and, in default, then directed that the minister should be nominated and elected by all the householders or heads of families in the township, and the heirs male of the founder's body, and such other of his kindred or blood as should have any land in the township, or the greater number of them; and the son not having set down any order or course for the nomination and election of a minister :- Held, in quare impedit, that the declaration which averred a nomination and election of a minister by the plaintiffs, being the greater number of the householders and the heads of families in the township, to whom the nomination and election of the minister then belonged, was ill, even after verdict, for not showing that the heir male of the founder's body, and such of his kindred or blood as had lands in the township, concurred in the nomination, or that they were in the minority, or that there were no such persons in existence. worth v. Chester (Bishop), 7 D. & R. 96; 4 B. & C. 555; 4 L. J. (o.s.) K. B. 14; 28 R. R. 390.

— Variance.]—In quare impedit, a count alleged an immediate right in the plaintiffs as owners of messuages and lands within a chapelry (which lands were charged with the payment of yearly sums for the repair of the chapel) to nominate a curate, and present him to the bishop, and it was proved that part of the repairs of the chapel was defrayed out of the poor-rates :-Held to be a variance, and that the evidence did not support the allegation. Shepherd v. Chester (Bishop), 4 M. & P. 130; 6 Bing. 435; 8 L. J. (o.s.) C. P. 141.

When will lie.]-On a commission of charitable uses, it was agreed between the lord of the manor of A, and the inhabitants of W. within the manor, that certain copyhold lands should be let for the maintenance of a stipendiary curate of the chapel of W., to be nominated by a majority of the inhabitants, and to be allowed by the lord and by him presented to the ordinary for a licence to preach ; the usage of nominating had been pursuant to the agreement; the lord having refused to allow and present the nominee of a majority of the inhabitants, the latter prayed a mandamus, which the court refused; for their right is either a mere trust. and then their remedy is in equity; or it is a legal right, and then a quare impedit will lie. Rew v. Stafford (Marquis), 3 Term Rep. 646.

Fine, whether a Bar.]—In an action of quare An original collation from the registry of a impedit, it was held, that it ought not be left to bishopric, and appearing on the face of it to be

quare impedit, the defendant must shew not the jury to say, whether a certain fine barred merely that the plaintiffs title is had, but that the action, and that, even if admitted in evilable own is good. \*\*Ciolida v. Whadey, L. R. 2 dence, it was not of itself a conclusive bar. Meath (Bishop) v. Winchester (Marquis), 4 Cl. & F. 445; 10 Bligh (N.S.) 330,

> See also PRACTICE AND PROCEDURE IN ECCLESIASTICAL MATTERS, post, XXVIII. 7,

> 3. COLLATION, INSTITUTION AND INDUCTION.

Effect of. ]-By his induction the parson is put in possession of a part for the whole, and may maintain an action for a trespass on the glebe land, although he has not taken actual possession of it. Bulwer v. Bulwer, 2 B. & Ald. 470; 21 R. R. 358.

Of Archdeacon.] -- An archdeacon of Rochester, when instituted and inducted into that office, is ipso facto inducted into the prebend annexed to it by royal grant, and may claim to be sworn in prebendary without being installed. Rew v. Ruchester (Dean and Chapter), 3 B. & Ad. 95. S. P., Rew v. Bayley, 1 B. & Ad. 761; 9 L. J. (O.S.) K. B. 131.

Practice. ]-The issuing of the writ, de vi laica removenda, from the common law side of the court of chancery has fallen into desuetude, as the same relief can be given by injunction, in a case of obstruction to the induction of a party to. a benefice, to restrain all interference therewith. Jenkins, In re, 5 Moore, P. C. (N.S.) 351; 38 L. J., P. C. 6; L. R. 2 P. C. 258; 19 L. T. 583; 17 W. R. 502.

Evidence.]—Where a blank is left in the register of an institution or collation for the patron's name, pavol evidence of common report is admissible to prove who was the patron. Mea (Bishop) v. Belfield (Lord), 1 Wils. K. B. 215. A copy of the bishop's institution book is not

evidence of a presentation by the patron to a living. Tillard v. Shebbeare, 2 Wils. K. B. 366.

The institution of a party to a living, recitingthe cession of his predecessor, followed by induction, is sufficient evidence to support an ejectment; though the predecessor is shown to have been in possession, and no other evidence of his cession is given. Doe d. Kerby v. Carter, R. & M. 237. And see Cook v. Elphin, 5 Bligh (N.S.) 103.
Parsons need not prove their reading the

articles, &c., till something appears to the con-trary. Powell v. Milbank, 2 Wm. Bl. 852; 3 Wils. K. B. 355.

Where in ejectment the plaintiff gave evidence of some acts of ownership exercised upon the land in dispute by the lessor's ancestor, and of a fine levied by him about the same time, and the defendant proved some acts of ownership by the vicar, and gave evidence which tended to show that the land was formerly part of the churchyard; the judge refused to leave it as a question to the jury whether the parties to the fine had any estate of freehold, but told them that the fine was a conclusive bar to the vicar :- Held, that this was wrong. Runcorn v. Doe d. Cooper, 5 B. & C. 696; 8 D. & R. 450; 4 L. J. (o.s.) K. B. 281.

Fifteen years' possession of a benefice is primâ facie evidence of a regular induction, and of Beard, 3 Anst. 942; 4 R. R. 875.

An original collation from the registry of a

claimed has in fact been exercised. Irish Society v. Derry (Bishop), 12 Cl. & F. 642.

Entries in the book kept at the First Fruits' Office are admissible to show the fact of a collation to a living made by the bishop at a particular

time Th.

Returns made by the bishop in obedience to writs from the Exchequer, requiring him to state the vacancies of, and presentations and collations to, the livings in his diocese, are admissible as statements made by a public officer in the discharge of a public duty. Though some returns may contain statements of a kind unusual in such documents, which statements were in favour of the rights of the bishop who made them, they were, nevertheless, admissible, provided that the statements are within the scope of the inquiry in the writ. Ib.

Act of Uniformity.]—The meaning of the Act of Uniformity is that the party is to subscribe the declaration as soon as it is in his power, semble. Queen's College Case, Jacob, 29.

Restraining.]—Qualification in the grant of a living, that the person to be presented should not, at such time as the church should be void, "be presented, instituted or inducted into any other living," complied with by previous resignation of another living. Resignation of a living, sent by the post to the bishop who indorsed and signed a memorandum of his acceptance, sufficient, though no public act. Heyes v. Excter College, Oxford, 12 Ves. 336; 8 R. R. 327.

Injunction, on filing of bill, to stay induction Potter v. Chapman,

of defendant to living. Dick, 146; Ambl. 98.

On the principle of protecting property pending litigation, the court will, in a suit to impeach a conveyance of an advowson, restrain the institution of a clerk, even as against a defendant claiming to be a purchaser for valuable consideration without notice under it. Greenslade v. Dare, 17 Beav. 502.

Refusal of Bishop to Institute—Grounds of.] -A bishop refused to institute a clerk in holy orders to a benefice on the grounds that he had, whilst acting as curate to a former holder of the benefice, habitually committed offences against ecclesiastical law and failed to observe the book of common prayer, by wearing anlawful vestments and doing unlawful acts in respect of matters of ritual when officiating in the communion service; and that he declined to undertake not to repeat the offences in the future. In an action against the bishop in which the patron claimed a declaration that he was entitled to have the clerk instituted :- Held, that the defendant had acted within his discretion in refusing to institute the clerk upon the grounds stated, and was therefore entitled to judgment. Heywood v. Manchester (Bishop), 53 L. J., Q. B. 196; 12 Q. B. D. 404; 50 L. T. 236; 32 W. R. 567. In 1 & 2 Vict. c. 106, s. 104, under which,

within certain dioceses, the bishop may, if he shall think fit, refuse to institute or license any spiritual person "who, after due examination and inquiry, shall be found unable to preach, administer the sacraments, perform other pastoral duties, and converse in the Welsh language," "due examination and inquiry" means examination and inquiry as to the clergyman's knowledge of the Welsh language, not as to the requirements value of SL, he thereby vacated the former.

pleno jure, is admissible to show that the right of the parish, and the statute gives an absolute discretion to the bishop as to the mode of ascertaining the requirements of the parish, and he is not bound to hold a formal inquiry of a judicial character for that purpose. Abergavenay (Marquis) v. Llandaff (Bishap), 57 L. J., Q. B. 233; 20 Q. B. D. 460; 58 L. T. 812; 36 W. R. 859.

A bishop having commissioned certain persons to hold an inquiry as to whether a parish, to which a clergyman had been presented, required a pastor who could speak Welsh :-Held, that a refusal to hear the patron or his presentee did

not invalidate the inquiry. Ib.

Institution to second Living without deprivation of first.]—After an incumbent of a benefice, under the value of 8l. in the king's books, has been justituted and inducted to another benefice with cure of souls, the right of presentation accrues thereby to the patron, and is not assignable by law to another, and the incumbent not having been deprived, and no new clerk having been presented, remains still the incumbent, and is legally entitled to the tithes. Alston v. Atlay, 7 A. & E. 289; 2 N. & P. 492; W. W. & D. 662; 7 L. J., Ex. 392.

Upon institution to the second living the first is void as to the patron, but not so as to incur lapse without sentence of deprivation and notice by the ordinary, or at least until notice by the

ordinary. Ib.

The right to the fallen presentation having become a personal inalienable right in the patron disannexed from the advowson, the want of knowledge of the vacancy by the patron does not alter the quality of the right so as to make it real, or re-annex it to the advowson. Ib.

#### 4. LAPSE.

Collation pending Suit.]—Injunction granted to restrain an archbishop from collating by way of lapse to a deanery, pending a suit in the Consistorial Court respecting the presentment by the chapter. Daly v. Dublin (Archbishop), Fl. & K. 268

In a suit for the specific performance of an agreement for the sale of the next presentation to a living, the court will restrain the bishop of the diocese from taking advantage of a lapse pending the suit. Nicholson v. Knapp, 9 Sim. 326 : 7 L. J., Ch. 219.

Equity of Redemption.]—The plaintiff claims the advowson of a vicurage as mortgagor, insisting that it was inserted fraudulently in a particular of trust estate directed by decree to be sold for payment of debts :—Held, that the equity of redemption of an advowson lapses, and the plea allowed without prejudice, &c. Mallock v. Salter, 2 Ken. Ch. 49.

### 5. AVOIDANCE.

When.]—If an incumbent, in possession of above 81, per annum in the king's books, accepts a second living under that value, it is absolute avoidance of the first; and, if he possesses one under that value and takes a second without a dispensation, the first is void at the election of the patron. Boteler v. Allington, 3 Atk. 455.

If a clerk, having a benefice with cure of souls took another benefice with cure of souls of the

1258

Where an act of parliament created a new parish church and rectory, and directed that the bishop shall confer a certain prebend on the rector, and that the prebend shall remain united and annexed to the rectory for ever; this was not such an appropriation of the rectory to the prebend, as made it an appropriate benefice within 21 Hen. 8, c. 13, s. 31, and tenable with another benefice having cure of souls. 1b.

By a local act the hamlet of Bethnal Green, in the parish of Stepney, was divided from it, and made a distinct parish under the name of St. Matthew, Bethnal Green, with a parish church, and the advowson was vested in the patrons of the original church; and it was enacted, that the rectory of the new church or parish should not be taken or held in commendam. The rector of St. Matthew, Bethnal Green, while holding that benefice, accepted another :- Held, that the rectory did not thereby and by force of the statute become void, the rectory not being rated in the king's books, and the patrons not making a new presentation. King v. Alston, 12 Q. B. 971; 18 L. J., Q. B. 59.

A clerk in holy orders being in possession of a perpetual curacy, with cure of souls, augmented by the governors of Queen Anne's bounty, and having, without dispensation, been instituted and inducted into another benefice with cure of souls: -Held, to have forfeited the former, which was on sentence declared void. Burder v. Mavor,

1 Rob. Ec. Rep. 614.

Where the incumbent of a parish church presents himself to a district church within the parish created under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, the annual value of the two livings exceeding 1,000%, the parish church becomes, under 1 & 2 Vict. c. 106, ss. 4, 11, ipso facto void. Starie v. Winchester (Bishop), 17 C. B. 653; 9 C. B. 62; 19 L. J., C. P. 217.

### 6. RIGHT TO PROFITS DURING VACANCY.

From what Time Recoverable.]-A patron of a benefice with eure of souls, under the value of 8/. in the king's books, being also incumbent of the same benefice, accepted another with cure, and thereupon presented a clerk to the proper ordinary, who was afterwards admitted, instituted and inducted, on his presentation, to the former living:—Held, that the first benefice thereby became actually void, from the time of presentation, within 28 Hen. 8, c. 11, and the succeeding incumbent entitled to the tithes from such presentation. Betham v. Gregg, 4 M. & Sc. 230; 10 Bing, 352; 3 L. J., C. P. 121.

An incumbent of a living with cure of souls, valued at less than 81. a year in the king's books, accepted another benefice without having a dispensation to hold both, whereby the presentation became void de jure; but he continued in possession. The bishop presented another clerk, and afterwards brought quare impedit, and recovered against the defendant, upon which the new presentee was instituted and inducted. In an action by the latter against the defendant, founded on 28 Hen. 8, c. 11, s. 3, which gives the profits of every benefice during vacation to the next incumbent :- Held, that he could not recover the profits either from the time of his being presented, or from the suing out of the defect of creating a new presentative benefice quare impedit, the vacation contemplated by wholly distinct from the former benefices, and

Bruzennose College v. Salisbury (Bishap), 4 the statute being a vacation de facto. Halton v. Taunt. 831. See also Betham v. Gregg, infra. | Chre, 1 B. & Ad. 538.

From what Source arising.]-The 28 Hen. 8, c. 11, s. 3, gives the tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents and all other whatsoever revenues, casualties or profits, certain and uncertain, affering or belonging to any dignity, prebend or benefice, which shall accrue between the occurrence of a vacancy and a new appointment, to the appointee. The 5 & 6 Will. 4, c. 30, directs the profits of dignitaries or benefices without cure of souls becoming vacant during the existence of an ecclesiastical commission to be paid to the treasurer of Queen Anne's bounty, who is to keep an account of the receipts and expenses, and retain the balance until he shall be otherwise ordered by competent authority. By a subsequent statute, the crown is declared entitled to appoint, notwithstanding the existence of the commission in question, three persons to eertain prebends therein named. One of these appointees, having demanded from the treasurer of Queen Anne's bounty the profits received by him during the vacancy, brought an action to recover them. A special verdict (on a verdict found in his favour) declared these to be the net profits of the prebend :-Held, that a judgmentfor the plaintiff given on this verdict could not be sustained, because it did not distinguish the sources from which these profits might arise, nor show whether they were derived from the corpus of the prebend, to which he was individually entitled, or from sums due to him in respect of his share of the funds of the corporation aggregate, of which as prebend he was a member. Repton v. Hodgson, 3 H. L. Cas. 72. S. C. (in court below), 7 Q. B. 84.

# X. UNION OF BENEFICES.

How Effected.] - The union of two or more: benefices cannot be effected without the assent of the patrons. Daniel v. Morton, 16 Q. B. 198; 20 L. J., Q. B. 98; 15 Jur. 699. Quere, whether a union of two benefices

during the life of the incumbent is valid. Ib. In 1593, the parish church of K. (a rectory) having become rninons, the parishioners of the adjoining parish of W. (a perpetual curacy), entered into an agreement under which the parishioners of K, were admitted to the use of their church and to the benefit of all usual ecclesiastical offices, which were thence-forward performed by the incumbents for the time being of W. for the parishioners of both parishes. From 1605 onwards there was no parishes. separate presentation to the benefice of K., but no formal union of the livings of W. and K. was made, although the holders for the time being of the living of W. were cited, and made official returns and paid charges, as rectors of K. In 1844 the tithe commissioners awarded a tithe rent-charge in respect of lands at K. The holder of the benefice of W. claimed the tithe rentcharge upon the ground that there had been a union of his benefice with that of K.:-Held that there had been no legal or effectual union upon which the claim could be founded. Att .-Gen. v. Durham (Earl), 46 L, T. 16.

of giving the patronage of this new benefice to See Robinson v. Bristol (Marquis), 11 C. B. 241; 22 L. J., C. P. 21; 16 Jur. 889-Ex. Ch.

Where two churches are united by act of parliament after the next avoidance of both, the patron cannot present to the united vicarage upon the next avoidance of one. Hardinge v. Winchester (Bishop), 2 Wm. Bl. 1162.

· Liability to Repair Chancel, |- See Att .-Gen, v. Ashe, 10 Ir. Ch. R. 309.

Presumption.]—The rectory of St. Faith was in 1448 appropriated by the Bishop of Winchester to the hospital of St. Cross for the purpose of endowing a distinct charity intended to be established within the hospital. The hospital, which adjoined the parish of St. Faith, had a chapel, designed for the use of the inmates, and the master of the hospital was an ecclesiastical person, the power of appointing to the mastership being in the bishop. The parish church of St. Faith was destroyed at some time subsequently to this endowment, and never was rebuilt, and the inhabitants during a long period attended divine service at the chapel of the hospital, and their baptisms, burials and marriages were performed there. By an act of Queen Elizabeth, it was enacted that the church and possessions of the hospital should remain the property of the hospital, and be employed for the charitable uses for which the hospital was founded :-Held, that this statute negatived any presumption, which might have arisen from the long use of the chapel, that there had been such a union of the rectory with the mastership of the hospital as to make the chapel of the hospital the parish church of the parish of St. Faith. Att.-Gen. v. St. Cross Hospital, 8 De G. M. & G. 38; 25 L. J., Ch. 202; 2 Jur. (N.s.) 336; 4 W. R. 310,

Semble, that there is no precedent or principle for the union of the mastership of a hospital with the rectory of a parish. It

Semble, that, if such union could be presumed from custom, a custom which was not shown to extend to the interference of the churchwarden of the parish with the chapel would not lead to a presumption of a union authorising such inter-

Practice — Pleading] — Where three parish churches have been united by 22 Car. 2, c. 11, the benefice may be described in pleading as one rectory. Wilson v. Van Mildert, 2 Bos. & P. 394.

#### XI. NON-RESIDENCE

Penalties for-Liability to Pay.]-A curate of an augmented curacy by Queen Anne's bounty was not liable to the penalties of 21 Hen. 8, c. 13, for non-residence. Jenkinson v. Thomas, 4 Term Rep. 665; 2 R. R. 493. But see now 1 & 2 Vict. c. 106, s. 124.

Proceedings to Recover. ]-A proceeding in the Consistorial Court, to recover penalties for non-residence, under 1 & 2 Vict. c. 106, ss. 32, 114, is not a criminal suit, within 3 & 4 Vict. c. 86, s. 23, but a civil suit, and therefore is not to be instituted in the mode pointed out by s. 3 of the latter act. Rackham v. Bluck, 9 Q. B. 691; 16 L. J., Q. B. 82; 11 Jur. 325. S. C., 5 Moore, P. C. 305. S. P. and

Where a sentence of the Consistorial Court in the owners of the former advowsons in turn, such proceeding condemned the party charged in payment of one third part of the annual value of his benefice, with the reasonable expense of the promoter of the suit :- Held, that such sentence was valid, and consistent with 1 & 2 Vict. c. 106, s. 10, though it went on to order that the amount of such third part, and of such expense, should be ascertained in the usual and accustomed manner by the registrar of the court, it appearing that the sentence was conformable to the practice of the Consistorial Court, and that by such practice payment would not be enforced until the bishop had received the registrar's report of the amount and made an order thereon,

> Proceedings to compel Residence. - In proeeedings for the sequestration of a benefice for non-residence, it is not necessary that the bishops' monition, under 1 & 2 Vict. c. 106, s. 54, should be preceded by a citation or other warning to the incumbent. Bartlett v. Kirwood, 2 EL & Bl. 771; 2 C. L. R. 253; 23 L. J., Q. B. 9; 18 Jur. 173; 2 W. R. 17.

Where an incumbent, in answer to such monition, sends a return assigning an excuse for nonresidence, which the bishop considers insufficient, that is a sufficient hearing of the incumbent to authorise the bishop to make an order upon the incumbent to return into residence within thirty

days. Ib.
Where the incumbent, being served with such order, sends to the bishop, upon affidavit, an excuse for not obeying the order which the bishop considers insufficient, that is a sufficient hearing of the incumbent to authorise the bishop to sequestrate the benefice after the lapse of the thirty days. Ib.

Under s. 58, a benefice becomes void if it remains for the space of a year under sequestration for non-residence, the year commencing from the date of the decree of sequestration; the case not falling within s. 120, which provides that for all purposes of the act, except as therein otherwise provided, the year shall commence on 1st January, and be reekoned to 31st December, both inclusive. Ib.

Where an incumbent, having begun to reside upon his benefice in obedience to a monition or an order, afterwards, and before the expiration of twelve months, wilfully absents himself for one month, the bishop is justified in issuing an order on the incumbent to reside; though he might under 1 & 2 Vict. c. 106, s. 56, without issuing such order, sequester the benefice. Bona-ker v. Erans, 16 Q. B. 163; 20 L. J., Q. B. 137; 15 Jur. 460—Ex. Ch.

A sequestration ordered by the bishop, under s. 56, is a penal proceeding, inasmuch as, although one of the objects of it may be to enforce future residence, it operates as a forfeiture of part of the profits of the benefice, under s. 54; and, by s. 58, if it continues for a year the benefice is void; and therefore the bishop ought to give the incumbent an opportunity of being heard before it is issued. Ib.

Fact of-How Ascertained.]-Under 1 & 2 Vict. c. 106, s. 54, the question as to the fact of non-residence, or the sufficiency of the excuse for it, is for the determination of the bishop, and the remedy against his judgment thereon is by appeal to the archbishop. Bartlett, In re, 3 Ex. 28; 18 L. J., Ex. 25; 12 Jur. 940. S. P. and S. C., 12 Q. B. 488; 18 L. J., Q. B. 16; 12 Jur. when it was originally granted.

726.

Lamb, 1 Marshall, 372; 5 Taunt. 807.

Effect of.]—Under 1 & 2 Viet. c. 106, s. 58, if a benefice continues one whole year under sequestration issued, under the provisions of the act, for disobedience of the order requiring residence, the benefice becomes void; the subsequent provision in that section, as to giving notice, is only for the purpose of giving the bishop a right to present by lapse, and not for creating an avoidance. Ib.

The power of the bishop to appoint a stipendiary curate, under 1 & 2 Vict. c. 106, s. 75, is only when the incumbent is absent from his benefice for a period exceeding three months altogether, or to be accounted at several times in the course of any one year; and by s. 121, the year is to be reckoned from the 1st of January to the 31st of December. Sharpe v. Bluck, 10

Q. B. 280; 11 Jur. 328.

A lease of a rectory-house by a rector became yold by 13 Eliz. c. 20, by his non-residence for eighty days, of which a stranger might take advantage. Doe d. Crisp v. Barber, 2 Term Rep. 749. S. P., Doe d. Rogers v. Mears, Cowp.

129; Lofft, 602.

A rector might recover in ejectment against his lessee, on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of 13 Eliz. e. 20; and the lease to him, describing him as a doctor in divinity, produced by him at the trial in support of his title, was prima facie evidence of his being such as he was therein described to be, so as also to avoid the lease under 21 Hen. 8, e. 13, s. 3. Frogmorton d. Fleming v. Scott, 2 East, 467; 6 R. R. 477.

One in possession of glebe land under a lease void by 13 Eliz. c. 20, by reason of the rector's non-residence, might yet maintain trespass upon his possession against a wrong-doer. Graham v. Peate, 1 East, 244; 6 R. R. 268; 11 R. R. Pre-

Although an incumbent of a benefice is bound to reside and perform the duties in his benefice, notwithstanding his living is sequestered; if the bishop, under the sequestration, assigns him the vicarage-house, and a stipend for his services, he receives the stipend not in his right as a viear, but under the bishop's licence; and therefore he cannot calculate the stipend as a freehold qualification under 18 Geo. 2, c. 23, s. 1. Pack v. Tarpley, 1 P. & D. 478; 9 A. & E. 468; 2 W. W. & H. 88; 8 L. J., M. C. 93.

Licence for. ]-The non-residence on one benefice, under a licence from the diocesan, is not equivalent to actual residence thereon, so as to excuse the incumbent's non-residence on another benefice. Wright v. Flamank, 6 Taunt. 52; 1

Marshall, 368.

If a clergyman who has two livings resides within one of the parishes, wherein there is no house of residence, it is a sufficient residence there to exempt him, without licence from the bishop, from penalties for not residing on his other benefice. Wynn v. Smithies, 6 Taunt. 198; 1 Marshall, 547.

Wright v.

Though a licence for non-residence did not cover the whole of the period for which penalties were sought to be recovered; yet, if there was not sufficient time left uncovered to subject the incumbent to a penalty, the court would interfere to stay the proceedings. Wynne v. Kay, 1 Marshall, 387 : 5 Taunt, 843.

Where a private aet united and annexed a rectory in the diocese of O, to a deanery in the dioeese of S., and dispensed with any presentation to the dean, but left institution and induction still necessary :--Held, that a licence from the bishop of O, for non-residence on the rectory was necessary, as well as a licence for non-resi-dence on the deanery from the bishop of S. Wright v. Legge, 6 Taunt. 48.

A licence of non-residence on a benefice within an archbishop's peculiar, locally situated in another diocese, need not to be registered in the registry of the diocese, but ought to be registered in the registry of the archbishop.

Moore, 5 Taunt. 757.

- Revocation of. ]-A license to the incumbent to absent himself from a living might be revoked, under peculiar circumstances, before 1 & 2 Viet. c. 106, s. 49. Bagshaw v. Bossley, 4 Term Rep. 78.

Excuse for. ]-Imprisonment for a crime is no legal cause of exemption for non-residence within 1 & 2 Viet. c. 106, s. 84. Bartlett, In re, 3 Ex. 28; 18 L. J., Ex. 25; 12 Jur. 140. S. C. and S. P., 12 Q. B. 488; 18 L. J., Q. B. 11; 12 Jur. 726. Total want of health is a sufficient excuse for an absence of twenty years. Scammell v. Willett, 3 Esp. 29.

But the want of a parsonage-house is no excuse for the incumbent's residing out of the parish. Wilhinson v. Allott, Cowp. 429.

A sequestration upon a fi. fa. of a benefice with cure is no excuse for the non-residence of the incumbent. Doe d. Rogers v. Mears, Cowp. 129; Lofft, 602.

A private aet annexed the rectory of H. to the deanery of Windsor, and recited that the necessary residence on the deanery, and the dean's attendance on her majesty, as registrar of the Order of the Garter, would oblige him to be often absent from H., and the act compelled him to appoint a stipendiary curate constantly resident at H. Semble, that this, without more, conferred an excuse for non-residence at H., although in 43 Geo. 3, c. 84, imposing residence on all benefices not therein excepted, this was not enumerated as a ground of exemption or of licence. Wright v. Legge, 6 Taunt. 48.

Where two Benefices held together. ] - A bishop within whose diocese were the perpetual curacy of W., and the rectory of C., addressed an instrument to D., the perpetual curate of W., under the episeopal seal, setting forth that he, the bishop, did, by these presents, "unite, annex and incorporate the rectory of C. . . . to and with the perpetual curacy of W. during your incumbency on the same, . . . so that you, the Where a licence for non-residence had been aforesaid rectory of C. with the perpetual curacy obtained previously to the 1st of July, 1814, pur-suant to 54 Geo. 3, e. 54, but the allowance by the archibishop, required by 43 Geo. 3, e. 84, s. 20, the archibishop, required by 43 Geo. 3, e. 84, s. 20, was not obtained till after that period, the locence, when ratified, was valid from the time teach the people of the parish in which you shall patron, that the instrument, on the whole, did not show an intention to effect such a union; and therefore (W. and C. being fifty miles from each other) that D., while residing at C., was non-resident at W., within 1 & 2 Vict. c. 106; and the bishop might, under s. 83, while D. was receiving the profits of both livings, appoint a stipend to the curate of W., and enforce the payment by monition and sequestration of W. Daniel v. Morton, 16 Q. B. 198; 20 L. J., Q. B. 98: 15 Jur. 699.

Held, that the fact of non-payment of the salary must, after the summons and sequestration, be assumed to have been duly proved before the bishop, and it could not be objected that D. had not notice of all the facts. Ib.

#### XII. CHARGES ON BENEFICES.

13 Eliz. c. 20.]—The 13 Eliz. e. 20, avoids the charge upon the benefice only, and not the deed containing it. Sloane v. Packman, 1 D. & L. 382; 11 M. & W. 770; 12 L. J., Ex. 423.

A grant of a rent-charge by a rector or vicar out of his benefice is void by 13 Eliz. c. 20. Mouys v. Leake, 8 Term Rep. 411.

Ejectment may be maintained upon a term duly created, but assigned to the lessor of the plaintiff by a deed defective under 13 Eliz. c. 20. Doe d. Moore v. Ramsden, 1 N. & M. 489. S. C. nom. Doe d. Wilkes v. Ramsden, 4 B. & Ad. 609.

Charge of Retiring Pension. ] - See McBean v. Deane, aute, col. 1220.

10 & 11 Car. 1.]-A grant of an interest in a benefice is binding upon the grantor, the statute 10 & 11 Car. 1, c. 3 (Ir.), extending only to successors of the grantor. Wise v. Beresford, 2 Con. & L. 282; 3 Dr. & War. 270; 5 Ir. Eq. R. 407.

An annuity granted by a rector, and charged upon his benefice, before the repeal of the 10 & 11 Car. 1, c. 2, s. 7, together with a term of years to secure it, is absolutely void, upon the absence of the rector from his benefice for more than eighty days in a year; but the grant would be valid during the incumbency of the grantor. Robinson v. Wynne, Hayes, 336.

Before 57 Geo. 3.]-A term ereated by an incumbent after the 43 Gco. 3, and before the 57 Geo, 3, for the purpose of charging his rectory with an annuity, may be legally assigned, since the latter act, to a person who advances a sum for the redemption of the annuity. So, though the rector was a party to the assignment, and by the instrument attempted to subject the rectory to the repayment not only of that sum, but also of other moneys then and previously advanced to him by the assignee. *Doe* d. *Brumghton* v. *Gully*, 4 M. & Ry. 249; 9 B. & C. 344; 7 L. J. (0.8.) K. B. 201.

For Improvements. - Moneys expended under the statutes for buildings and other improvements upon glebe lands, and duly certified by the bishop, constitute a good legal charge upon a moiety of the benefice. But a court of equity will not cutertain a suit in respect of such a charge unless there be special equitable grounds which call for its interference. Brooke v. Horner, 13 Ir. Eq. R. 272.

not reside" :- Held, assuming that the bishop for glebe improvements, can be recovered only had power to unite the two benefices into one by distress, as pointed out by the 10 Will. 3, c. 6, without the assent of the Crown, chapter, or and no subsequent act according to that statute creates a claim against the benefice, which can be recovered by bill in equity. S. C., 11 Ir. Eq.

> For Repairs. ] -- An incumbent who advances his own money under 17 Geo. 3, c. 53, for repairing and rebuilding a rectory house, may charge the living with the money so advanced. Boyd v. Barker, 4 Drew. 582; 28 L. J., Ch. 445; 5 Jur. (N.S.) 234; 7 W. R. 297.

Warrant of Attorney.]-A warrant of attorney given to confess judgment at the suit of A., reciting a grant of an annuity to A., and that the same was secured by the demise of a rectory, glebe lands, tithes, &c., by the grantor to B., and then declaring that the warrant of attorney was executed for the purpose of securing the annuity, and to the end and intent that a sequestration might be obtained by A., and continued during the continuance of the annuity, for the better securing the same, is a fraud on 13 Eliz. c. 20, as creating a charge on an occlesiastical benefice. Flight v. Salter, 1 B. & Ad. 673; 9 L. J. (O.S.) K. B. 67.

A warrant of attorney given by a clergyman, authorising his creditor to use a sequestration, is void under 13 Eliz. c. 20. Newland v. Watkin, 9 Bing. 113; 2 M. & Sc. 174; 1 L. J., C. P. 177. So is a warrant of attorney, which appears upon the face of it to be to secure the payment of an annuity charged upon an ecclesiastical benefice. Sultmarshe v. Hewitt, 3 N. & M. 656;

1 A. & E. 812; 3 L. J., K. B. 188. The deed by which an annuity was granted contained a charge on a rectory, but a warrant of attorney which accompanied the deed, though it recited the deed, gave no authority to sequester the rectory :- Held, that, although the deed was void so far as it operated as a charge upon the rectory, the warrant of attorney was unimpeachable. Faircloth v. Gurney, 9 Bing. 622; 2 M. & Sc. 822; 1 D. P. C. 724.

A beneficed clergyman granted annuities by three several deeds, and made them chargeable on his living, which he conveyed in trust for the grantee, for the more effectually raising and enforcing payment of the annuities out of the living; and he also gave as a security for the payment of the annuities, three warrants of attorney, with defeasances, to confess judgment at the suit of the grantee. On motion to set aside the warrants of attorney, as being charges upon the living in evasion of the 13 Eliz. c. 20, the court held that this did not appear; that the covenants in the annuity deed for payment of the annuity might be good, though the deeds were void, and that payment of the arrears, under these covenants, might well be enforced by the warrants of attorney. Gibbins v. Hooper, 2 B. & Ad. 734.

C., a rector of a parish, and A. B. his surety, executed a warrant of attorney for 3,000%. reciting that, by indenture of the same date, C. for a pecuniary consideration had granted to D. an annuity of 300%, charged by demise upon the rectory; by the indenture it was declared, that D. should hold the judgment in trust to secure the annuity, but that no execution should be issued, unless the annuity should be in arrear fourteen days; and that, if and as often as one Sums to be repaid by succeeding incumbents year's annuity should be in arrear and not paid for fourteen days after demand, then execution executed a warrant of attorner, which was stated might issue against 0, and his estate for 3007. In the defeasance to be given as a collateral Judgment was accordingly entered up, and, a security with the lease :—Heal, that the warrant year's annuity being in arrear more than fourteen was not a charge on the benefice, within 13 Eliz. days after demand, a sequestration issued, under c. 20, s. 1, but it was an independent security for which the tithes and property of the living were a loan. Bendry v. Price, 7 D. P. C. 753; 3 Jur. sequestered to a greater amount than the arrears. 1150. The court on application set aside the execution, but allowed the warrant of attorney and judgment to stand. Kirlen v. Butts, 2 B. & Ad. 736.

A clergyman granted an annuity, and secured it by a conveyance of his benefice, and by a warrant of attorney :-Held, that the conveyance was void, but the warrant of attorney good.

Aberdeen v. Newland, 4 Sim. 281.

A warrant of attorney, the defeasance to which recites that it is given to secure the payment of an annuity, and authorises the plaintiff to issue a fi. fa, de bonis ecclesiasticis for arrears, but does not state that it is given for the purpose of charging the defendant's ecclesiastical living, is valid, though it refers to the annuity deed of the aune date in which that object is distinctly avowed. Colebrack v. Layton, 1 N. & M. 374; 4 B. & Ad. 578; 2 L. J., K. B. 95.

A beneficed clergyman granted, in 1813, an annuity, which he charged on his rectory, demising it for a term of years to a trustee. In 1825, this and other annuities, with the terms thereby created, were by deed transferred to the plaintiff, on his advancing 4,400l. to take them up, and an annuity of 574l. 9s. granted him. The clergyman, by the same deed, again demised his rectory, and also the vicarage of W., for a term, giving power to the plaintiff to sequester the rectory and vicarage if he should think fit. The deed also stated that he had executed a warrant of attorney, authorising the plaintiff to enter up judgment for 8,800%. (being double the sum advanced), which it was intended should be a collateral security only, and that no execution should issue unless the annuity was in arrear for twenty days. The warrant of attorney recited the deed, which stated the grant of the annuity of 1813, and of the other annuities, and the transfer of them to the plaintiff, and the grant of the annuity of 5741, 9s., and for the further securing the regular payment of this annuity, authorised judgment to be entered up against the defendant. In 1882, the plaintiff brought an ejectment to recover the rectory of S., under the term granted in 1813, and in July, 1833, obtained possession. In June, 1833, the annuity being 8611, in arrear, the plaintiff sued out a levari facias, and sequestered the vicarage. rule nisi having been obtained in 1836, to set aside the warrant of attorney, on the ground of its being a charge on a benefice, and a sequestration, on the ground of its being kept in force to satisfy arrears subsequently accruing, all arrears due at the time of the sequestration issuing having been paid ont of the proceeds of S.:—Held, first, that the warrant of attorney was not void, as it did not, in terms, charge the benefice. Moore v. Rumsden, 3 N. & P. 180;

7 A. & E. 898; 7 L. J., Q. B. 54.
Held, secondly, that the sequestration was valid, as the plaintiff was entitled to approvariety is the plantifit wis content to apply the principle of the planting of the planting that the profits of S. to the new arrears of the ling a new rectory-house, and to charge the same annuity, and to keep the sequestration of foot on the rectory. The bishop binself advanced till the old arrears of Self. were levied out of the money; the annuity was granted, and was W. Ib.

a peppercovn rent, upon trust to secure a prin-

Setting Aside.]—On an application to set aside a warrant of attorney, pursuant to 13 Eliz. e. 20, s. 1, on the ground of its amounting to a charging of a benefice, the court will not look beyond the warrant to ascertain the intention of the parties, and therefore will not read affidavits for that purpose, Bishop v. Hatch, 7 D. P. C. 763; purpose. 4 Jur. 318.

Where the defeasance of a warrant of attorney to confess judgment, executed by A., a beneficed clergyman, stated that it was given to seeme to B. the payment of an annuity granted by A. to B. for his life, described in a certain indenture of even date between A. and B., in which indenture it was agreed that judgment should be entered no on the warrant of attorney, but that no execution should issue until the annuity should have been in arrear fourteen days after any of the days for payment expressed in the indeuture; but that, if the aunuity should be so in arrear, B. might sue out such execution upon or by virtue of the judgment, as he should think fit, for the recovery of the arrears and all costs; the court cannot, upon a question as to the validity of a sequestration granted by the bishop, in pur-suance of a writ of levari facias issued upon the judgment entered up on the warrant of attorney, look at the indenture for the purpose of deciding whether it operated as a charge upon A.'s benefice. Johnson v. Brazier, 3 N. & M. 653; 1 A. & E. 624.

A beneficed clergyman granted an annuity by deed, and made it chargeable on his living, and gave a warrant of attorney, to confess judgment at the sait of the grantee for 3,2001. By the annuity deed it was agreed, that the judgment to be entered up on the warrant of attorney was to be a further security for the munity, and that no execution or sequestration should be issued thereon, other than such sequestration as was therein mentioned, until the annuity should be in arrear; and the grantor then covenanted, that, if the grantee should at any time deem it expedient to sequester the living, it should be lawful for him to issue a sequestration by virtue of the judgment for the 3,200%, or any part. Judgment having been entered up on the warrant of attorney, and the annuity being in arrear, the grantee issued a sequestration for 3,2001, (which sum greatly exceeded the arrears due) and entered into possession of the living. On motion the court refused to set aside the annuity deed, warrant of attorney, and judgment; but directed that the writ of sequestration should continue in force only for the arrears that had become due on the annuity. Britten v. Wait, 3 B. & Ad. 915.

A rector was empowered, by act of parliament, with the consent of the bishop, to raise money by way of annuity on lives, for the purpose of build paid by the rector until his death; the sum thus A vicar demised two vicarages for 99 years at paid amounted to the sum advanced, with interest. At the suit of the succeeding rector, the transaccipal sum of money and interest; and he also tion was set aside on the ground of the equitable

ineapacity of the bishop to become the purchaser should be applied in payment of the debts due of the annuity :—Held, that he had a right to to V. and M., with interest, after payment of the avoid the annuity altogether, and that the defen-dant was not entitled to have the secretained, policies of assurance on the life of D., for the what was a proper annuity to have been granted, Ch. 129; 5 Jur. 18.

A rector, who was also the patron of a living, gave warrants of attorney to various creditors, who had mortgages on the advowson, subject to an agreement that the judgment to be entered up by the first mortgagec should have priority over the rest, whenever execution should be issued:—Held, that the agreement pointed so particularly to making the judgment charges on the living that the Court of Chancery could not give effect to it by grauting an injunction

Judgment.]-A judgment is not by the 1 & 2 benefice held by the debtor. Bates v. Brothers, 2 Sm. & G. 509; 23 L. J., Ch. 782; 18 Jur. 715; 2 W. R. 636.

A registered judgment against a clergyman does not create a charge upon his benefice entiling the judgment creditor to the appointment of a receiver under 1 & 2 Vict. c. 110, s. 13. Hawkins v. Gathercole, 6 De G. M. & G. 1; 3 Eq. R. 348; 24 L. J., Ch. 332; 1 Jur. (N.S.) 481; 3 W. R. 194.

A judgment is not made a charge upon the ecclesiastical rectories of the Crown, by 3 & 4 Viet. c. 105, s. 22. Sweeny v. Fleming, 4 Ir. Ch. Rep. 23.

— Registering.]—A judgment entered up on a warrant of attorney, given by a beneficed clergyman in the North Riding of Yorkshire, to secure payment of an annuity, need not be registered under 8 Geo. 2, c. 6; for, though it may be enforced by sequestration, the benefice is not affected by the judgment. Cottle v. Warrington, 5 B. & Ad. 447; 2 N. & M. 227.

Assignment of Rent. ]—To a declaration by a sequestrator, for rent due under a lease, whereby D., the rector of S., demised to the defendant the rectory and parsonage, with the tithes, except the parsonage-house, for fourteen years, if the rector should so long live, at a yearly rent, the defendant pleaded, that before the sequestration D. was indebted to V. and M., and requested them to give time for payment, and also requested V. to lend him a further sum, which they consented to do, and V. lent the money upon the terms that D. should execute the lease and an indenture, for the purpose of authorising the de-fendant to apply the rent as the agent and for the benefit of V. and M. That D. executed the lease; and another indenture of the same date, by which, after reciting the demise to the defendant of the rectory and parsonage, with the tithes, except the parsonage-house, and also reciting that by a deed of even date therewith D. had appointed the defendant his receiver, agent and attorney, to collect the tithes, rents, &c. (except as in the lease excepted), with a declaration that the defendant might retain a percentage for his direct, D. covenanted with the defendant, and whereby the land became exonerated from the directed that the surplus of the tithes, rents, &c., land tax, and chargeable for the benefit of the

and to charge the succeeding rector with his the lease was executed as part of the same transproportion. Greenliev v. King, 3 Beav. 49; 9 action; that D. well knew that the defendant L. J., Ch. 377; 4 Jur. 622, Affirmed, 10 L. J., was the attorney and agent of V., and that the was the attorney and agent of V., and that the indenture was made by D. with the defendant as such agent and attorney, and to enable him to apply the rent reserved by the lease in the manner above mentioned; that there were due from D. to V. and M. moneys exceeding the rent due under the lease, and that the defendant had applied the moneys alleged to be due for rent according to the second indenture. The defendant pleaded also, that before the execution of the lease D. was indebted to V. and M. and others, and that in consideration thereof, and of a further anda receiver. Long v. Storie, 3 De G. & Sm. 308. sum to be lent by V., and of the defendant consenting to be V.'s agent, D. agreed with the defendant and V. to charge the rectory of S. with Vict. c. 110 made a charge on the ecclesiastical that sum and the others, by making the lease and appointing the defendant receiver of the tithes, rents, &c., in order that he might apply the rent reserved by the lease in payment of the moneys so to be charged on the benefice; that the money was advanced by V., and that D., in pursuance of the agreement, and in order to charge the benefice, executed the lease, and also an indenture, appointing the defendant receiver, and that the lease was part of the same transaction :-Held, that the former plea did not show any defeasance of the covenant to pay the rent reserved by the lease; but that, under the second indenture, there was an equitable assignment or a valid appropriation of so much of the rent as was necessary to pay V. and M. their debts, and that such assignment was a charge upon the benefice, and therefore the lease, which was part of the same transaction, was void under 13 Eliz. c. 20. Walthew v. Crafts, 6 Ex. 1; 20 L. J., Ex. 257

> Composition in Consideration of future Income. —A composition with a clergyman in considera-tion of his future income being received by a trustee, and applied in liquidation of his debts, after providing for a curate, is void under 13 Eliz. c. 20. Alchin v. Hopkins, 4 M. & Sc. 615; 1 Bing. (N.C.) 99; 3 L. J., C. P. 272.

> Agreement to Charge future Income.]-In 1811, an incumbent duly charged his then present benefice with an annuity, and covenanted that, if he should afterwards be preferred to any other benefice, he would fully charge the same with the annuity; and that in the meantime the same would be charged with the annuity. In 1814, the incumbent was preferred to another benefice, but no legal charge upon it was executed until 1818 .—Hekl, that the deed of 1811 constituted a good equitable charge, which attached upon the new benefice as soon as it was acquired. Metcalfe v. York (Archbishop), 1 Myl. & Cr. 547; 6 Sim. 224; 6 L. J., Ch. 65.

Redemption of Land Tax.]-In 1798, Dr. K., an ecclesiastical incumbent of a living, redeemed the land tax charged on his rectory out of his own estate, under 38 Geo. 3, c. 60, and did not in his contract with the commissioners for the trouble; and it was agreed that he should apply reduction of the national debt declare his option the surplus of the tithes, rents, &c., as D. should to be considered a purchaser of the land tax, incumbent his executors, administrators and a case being the same against a corporation assigns, with the amount of the 31.per cent. consols aggregate as against an ordinary person. transferred, and with the payment of a yearly sum, by way of interest, equal to the amount of the land tax redeemed:—Held, first, that Dr. K., as an ecclesiastical incumbent, had such an estate as is contemplated by 33 Geo. 3, c. 60, s. 37, taken connection with 39 Geo. 3, c. 6, s. 5, and that he cutor. St. John's College v. Fleming, 2 Vern. 390. was entitled to create the charge upon the living. Kilderbee v. Ambrose, 10 Ex. 454; 3 C. L. R. 181; 24 L. J., Ex. 49.

Held, secondly, that his personal representatives were entitled to maintain an action against the succeeding incumbent, for the recovery of the interest accrued due on the amount of the 31. per cent. consols so transferred from the time when the latter succeeded to the rectory. Ib.

Queen Anne's Bounty-Extension of Term for repayment of Loan.]-Sec 59 & 60 Vict. c. 13, the Incumbents of Benefices Loans Extension Act,

#### XIII. PROPERTY.

1. ADVOWSON AND PRESENTATION.

See ante, V. 1226.

2. CHARGES ON BENEFICES,

See ante, XII. 1263.

#### 3. LEASES.

As against Lessor's Successor. ]-On grant of advowson to bishop and his successors after death of the then incumbent, a lease by bishop, to commence when the advowson falls in, is void against his successor, if incumbent survive him. Montgomery's Case, Dyer, 244, pl. 60.

A manor belonging to a bishop's sec was usually leased out for lives, at a rent of 497. One of the bishops, on renewing the lease, excepted the demesnes, which were of the value of 321., but he reserved the full ancient rent, 491. He, however, accepted a rent of 171, being the proportion, after deducting for the demesnes, in full of the whole reserved rent. This acceptance will not bind his successor. Dyke v. Bath and Wells (Bishop), 6 Bro. P. C. 365.

A lease of a manor by a dean and chapter not in conformity with an enabling statute, held to have been confirmed as against the chapter by the receipt of rent under it; at all events, for the life of the dean who received the rent; and a lease of the reversion, reserving the rent upon and subject to the former lease; and the holder

of such lease not entitled to recover. Pennington v. Cardale, 3 H. & N. 656; 27 L. J., Ex. 438; 6

W. R. 837. A building lease by a dean and chapter omitted a covenant which was required by the local act under which it was nade :—Held, that, if the lease was voidable only, it was made good as against each successive dean and chapter for

Devolution.]—Dean and chapter make a lease to a man, his executors and administrators, for three lives. This was held to be a descendible

By Dean and Chapter. ]- Dean and chapter, for fear of incurring the penalties of the restraining statutes, preserve the same description in their leases as before the making of those statutes and agreements; for such leases, though signed by dean only, will bind the chapter. Ely (Dean and Chapter) v. Stewart, 2 Atk. 44; Barnard. Ch. Rep. 170.

Specific performance refused, of covenants in dean and chapter leases of long standing. *Ib*.

Underlease. ]-A lessee for lives from a dean and chapter, without a covenant for perpetual renewal, granted an underlease, for the same lives, of part of the premises, with a totics quoties covenant at a fixed fine. The reversion quoties covenant at a fixed fine. having become vested in the ecclesiastical commissioners, they refused to renew, but offered to sell the reversion. The lessee purchased :-Held. that the sub-lessee was not entitled to perpetual renewal at the specified fine, but was entitled to a conveyance of the reversion on the terms of paying a due proportion of the consideration and expenses of the purchase, regard being had to his existing interest and the extent of the property comprised in his lease. Postlethwaite v. Lewth-waite, 2 John. & H. 237; 31 L. J., Ch. 584; 8 Jur. (N.S.) 791; 6 L. T. 779; 10 W. R. 459.

Time, of Essence of Contract. |-Time is, to a great extent, of the essence of contract entered into with an ecclesiastical corporation. Therefore, where A. agreed to take a concurrent lease of a dean and chapter, and to pay the fine in January, but was not ready with the money in March following, a bill filed by him for specific performance was dismissed with costs. Curter v. Elu (Dean), 7 Sim. 211 ; 4 L. J., Ch. 241,

Renewal.]-A dean and chapter should always have their succession in view when they contract for a renewal of leases on filling up vacant lives, and not their own immediate advantage. Winne v. Bampton, 3 Atk. 475.

— Obtaining Perpetuity.]—A previous renewal by the tenant of a see to his sub-tenant recited the payment of interest on the renewal fines, and contained a totics quoties covenant for renewal, and a covenant by the tenant to pay what fine or fines the lessor should pay to the sec :- Held, that the sub-tenant was bound to pay interest on the renewal fines on obtaining the perpetuity, under the 6 & 7 Will. 4, c. 99, s. I. Brabazon v. Lucan (Lord), 12 Ir. Eq. R. 432.

In order to entitle a tenant of an eeclesiastical lease to a renewal under any of the statutes, against each successive dean and chapter for lease to a renewal under any of the state of their own times respectively by such their 3 & 4 Will 4, c. 37, 4 & 5 Will 4, c. 90, or 6 & 7 receipt and distribution of the rent. Doo d, Will. 4, c. 90, he must have or be entitled to a Pennington v. Tomiere, 12 Q. B. 998; 18 L. J., Q. B. 49.

Held, also, that, if the lease was absolutely void, such receipt and distribution were evidence from which, without proof of any instrument under scal, a demise from year to year might be presumed learning a perpetuity, under the 6 & 7 Will. 4, c. 99, s. 1. The Simble, interest is customarily payable on renewal fines by sub-tenants of ecclesiastical leases presumed learning them. The presumed long in such with totics quoties coverants for renewal. The

presumed against them, the presumption in such with totics quoties covenants for renewal. Ib.

The immediate lessee of an ecclesiastical land-Will. 4, c. 37, on conveying the perpetuity to a sub-tenant, is not entitled to interest on the purchase money, though a considerable time may have elapsed from the date of his own purchase, and although he may have secured the purchase been paying interest on it himself. S. C., 9 Ir. Eq. R. 540.

Semble, in petition matters under the 153rd section, on the return of the Master's report, the

tions to the report. Ib.

By Vicar. ]-A lease for twenty-one years. made within three years of a former existing lease, by a vicar, of premises belonging to a vicarage situate in London, not being the capital messuage or dwelling-house used for the habitation of the vicar, nor having ground to the same belonging above the quantity of ten acres, is a valid lease, notwithstanding the restraining statutes 13 Eliz. c. 10, 14 Eliz. c. 11, and 18 Eliz. c. 11. Virian v. Blomberg, 3 Scott, 681; 3 Bing. (N.C.) 311; 2 Hodges, 255; 6 L. J., C. P. 55. Affirmed, 7 Sim. 548.

By Vicar and Vestrymen, 1-Leases made by vicar and vestrymen, with unlimited power by act of parliament, one for 999 years, and two for 1000 each, held valid. Att.-Gen. v. Moses, 2

Attorney-general is not a necessary party to bill to set aside ecclesiastical leases,

By Rector-Succeeding Incumbent.]-Lease for years by a rector having ceased by his death, the succeeding incumbent received from the lessee a sum of money, as the rent due for the whole year in the course of which the lessor died. Hawkins v, Kelly, 8 Ves. 308.

Without Consent of Patron.]—The perpetual curate of a curacy augmented by the governors of Queen Anne's bounty, with confirmation of the ordinary and immediate patron, granted a lease for years of unopened mines which had not before been leased; but the patron of the advow-son was no party:—Held, that the lease was void at common law for want of confirmation by such patron paramount; and that it was not set up by the acceptance of rent by the lessor's successor in the enracy; the only effect of such acceptance of rent being to create a tenancy from year to year. Dov d. Brammall v. Collinge, 7 C. B. 939; 18 L. J., C. P. 305; 13 Jur. 791.

Without Consent of Ordinary.]-A perpetual curate, whose curacy has been augmented by a grant of lands under the Queen Anne's Bounty Acts, cannot make a lease for three lives without the consent of the ordinary. Doc d. Richardson v. Thomas, 1 P. & D. 578; 9 A. & E. 557; 8 L. J., Q. B. 145.

Made between 1803 and 1816. - Leases of glebe and of rectorial and vicarial property made between 1803 and 1816, are good; the statute 43 Geo. 3, c. 14, having repealed 13 Eliz. c. 20, and the provisions of the latter not having been (o.s.) K. B. 28.

Renewal - Sale of Reversion. ] - D., being lord, purchasing the perpetuity under statute 3 & 4 entitled to an ecclesiastical lease which it was customary to renew every seven years, bequeathed it to trustees for his daughter for life remainder to her children, subject to a provision for raising out of the income a fund for renewing the lease, and to a power of sale. The reversion money by mortgage under s. 155, and so have having become vested in the ecclesiastical commissioners, they refused to renew, but offered to sell part of the reversion in fee to the trustees upon having a surrender of the lease in the remainder and a sum down. The proposal was opposed by section, on the return of the Masters report, the and is sum down. In proposal way of the world made under the original reference, or on objections to the report. Ib.

considerably reduce her income :—Held, that the sum of the record is the respective to the respe having regard to the provisions of the will, the court had power to direct the trustees under the will to carry the arrangement into effect if, upou due consideration of the rights of all persons interested, it should appear just to do so. And an inquiry was directed whether the arrangement was proper or calculated to give the remainderman the enjoyment as nearly as possible of the corpus of the property bequeathed by the will, or what modification of it, if any more proper, could be arranged. Hollier v. Burne, 42 L. J., Ch. 789; L. R. 16 Eq. 163; 28 L. T. 531; 21 W. R. 805.

A lady bequeathed leaseholds held under a dean and chapter to trustees for a tenant for life, with remainders over, and with power to raise money for renewing the leases. The pro-perty became vested in the ecclesiastical commissioners, with whom the trustees agreed for the purchase of the reversion in part of the leaseholds, in consideration of the surrender of the other part, and the payment of a sum of money. The estate was administered by the court, and the agreement was made subject to the approval of the court :- Held, that the court would not approve of the agreement against the wish of the tenant for life, if his income would be considerably reduced by the purchase. Hayward v. Pile, L. R. 5 Ch. 214; 22 L. T. 893; 18 W. R. 556.

Trustees with power to renew have power to purchase the reversion in leaseholds, under 23 & 24 Viet. c. 124; and the act applies to the estates of corporations, both aggregate and sole. Ib.

Ecclesiastical Leasing Acts, 1842 and 1858— To what Applicable.]—The operation of the Ecclesiastical Leasing Acts of 1842 and 1855 is confined to glebe lands and property of that description, and does not extend to enable the incumbent of a parish, with the consent of the patron of the living and the ecclesiastical commissioners, to grant leases of or rights over all or any portion of the churchyard of the parish. St. Gabriel, Fenchurch Street v. City of London Real Property Co., [1896] P. 95.

Effect of 5 & 6 Vict. c. 27.]-The 5 & 6 Vict. sess. 2, c. 27, does not abridge any right of leasing formerly enjoyed by incumbents. Green v. Jenkins, 1 De G. F. & J. 454; 28 Benv. 87; 29 L. J., Ch. 505; 6 Jur. (N.S.) 515; 8 W. R.

Agreement for. —An incumbent agreed to grant a farming lease of the glebe, at a rent revived until 57 Geo. 3. Doe d. Cates v. Somer-payable half-yearly. The 5 & 6 Vict. sess. 2, ville, 6 B. & C. 126; 9 D. & R. 100; 5 L. J. c. 27, requires the rent to be reserved quarterly: -Held, that the court would not compel the

Held, further, that the court would not, in the face of the act, approve of a lease reserving the rent half-yearly. 1b.

But held, that, if a lease reserving the rent half-yearly had actually been executed by the bishop and patron, it would in favour of the tenant have been a perfectly valid lease. Ib.

If an incumbent contracts to let lands

belonging to the benefice for a term of years, his resignation of the living during the term is a breach of the contract. Price v. Williams, 1 M. & W. 6; 1 Tyr. & G. 197; 5 L. J., Ex. 129. An agreement for lease of farm to clergy-

man for purpose of occupation is void under 57 Hen. 8, c. 13, repealed, and re-enacted by 57 Geo. 3, c. 99. Marris v. Preston, 7 Ves.

Sale—Lunatic Beneficiary.]—When the sanction of the court of chancery is required to the sale of an ecclesiastical lease to the ecclesiastical commissioners, by reason of the beneficiary being of unsound mind, the application should, under 23 & 24 Vict. c. 124, s. 38, be made in chancery, and not in lunacy. *Cheshire*, *In re*, 41 L. J., Ch. 208; L. R. 7 Ch. 50; 25 L. T. 721; 20 W. R. 49.

A lunatic was tenant for life of the advowson of a rectory and other real estates. Under the order of the court a lease of the property for ninety-nine years, if the lunatic should so long live, had been made to two persons at a large rent. This lease had become vested in the administrator of the survivor of the two lessees, the administrator being also the first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was aged eighty-two, and had never had any issuc. The administrator wished to sell the next pre-sentation to the rectory, and petitioned the court, as protector of the settlement, to consent to the barring of the entail or the advowson, so far as might be necessary for effecting the proposed sale: -Held, that as the application was not for the benefit of the lumatic's estate, but only for the benefit of a collateral, the court ought not to interfere. Thurp, or Thorp, In re, 3 Ch. D. 59; 35 L. T. 293—C. A.

Purchase of Leaseholds.]-The court, on a petition by the tenant for life of freehold and ecclesiastical leasehold property, ordered a sale of a portion of the freeholds for the purpose of purchasing the leaseholds. Adams, In re, 20

Charge for Purchase-money of Reversion.] A tenant for life of an ecclesiastical lease who purchases the reversion is considered in equity as a trustee for the remainderman, and is entitled to a charge on the estate for the purchase-money. Mason v. Hulke, 22 W. R. 622.

Compensation for Leaseholds.]-A person bequeathed leaseholds held of an ecelesiastical corporation, giving certain life interests, with remainder over. He directed his trustees, two years or sooner before the time for renewal, to practice to renew the leases every fourteen years, but it was not obligatory on the corporation to do so. They ceased to do so about

lessee to take a lease reserving the rent quarterly. by a railway company to take the property. Ib. The purchases were completed, and the price paid into court, and invested in consols. investment gave a diminished income :- Held, that the tenants for life were only entitled to the income of the fund. No costs allowed to or against the railway company. Wood, In re, 40 L. J., Ch. 59; L. R. 10 Eq. 572; 23 L. T. 430.

# 4. PURCHASES FOR PUBLIC UNDERTAKINGS.

Application of Compensation-money.]-Under an inclosure act some lands were allotted to a rector, who had a power of selling to pay the expenses. Under a railway act compensation was made in respect of other lands of the rectory and paid into court. The court sanctioned the application of the money in court to the payment of the expenses of the inclosure. Lockwood, Ex parte, Oxford, Worcester, &c., Ry., In re, 14 Beav. 158.

Purchase-money-Accumulation during Term. -A railway company took some land which had been demised by a dean and chapter for twentyone years to a lessee on a beneficial lease. The company settled separately with the lessee, and purchased the reversionary interest of the dean and chapter. This purchase-money was ordered to be invested in consols :- Held, that, after providing for the payment to the dean and chapter of the rent reserved by the lease, the remainder of the dividends to accrue on the stock until the expiration of the term were not payable to the dean and chapter, but ought to be accumulated. Gloucester (Dean and Chapter), Ex parte, 19

L. J., Ch. 400; 15 Jur. 239.

Real estate of an eccleslastical corporation (subject to a lease at the ancient rent, with fine upon renewal) having been taken by the commissioners of public works, and the purchase money paid into court:—Held, that the corporation was entitled to so much only of the dividends as was equal to the rent reserved by the lease, with liberty, however, to apply as to the accumulated residue for the amount which would have become due in respect of fines if the property had not been taken. St. Paul's (Deen and Chapter), Ex parte, 1 N. R. 553; 11 W. R. 482. See also Morton College (Warden), Ex parte, 1 N. R. 176; and Christohurch (Dean, Sc.), Ex parte, 23 L. J., Ch. 149.

— Payment by Instalments—Interest payable to Incumbent,— Under the 7 & 8 Vict, ch. xix. which is identical with the Bilston Act (42 Geo. 3, ch. exvii.), the court will direct the payment of the interest of purchase-money for church lands by instalments to the incumbent. the costs to come out of the corpus, Will Chapel, In re, 8 L. T. 599; 11 W. R. 850. Willenhall

Application of Purchase-money-For building Parsonage.]—Money paid into court under the Lands Clauses Act in respect of glebe land purchased by a railway company, ordered to be invested in building a parsonage-louse, part of the necessary funds for that purpose being contributed by the governors of Queen Anne's bounty. bring a sufficient part of the rents into a fund Whitfield (Incumbent), In re, 1 J. & H. 610; 7 to keep the estates always renewed. It was the Jur. (N.S.) 909; 9 W. R. 764.

1866. Previously to that, notice had been given of Queen Anne's bounty by the petitioner. Ib.

The immediate lessee of an ecclesiastical landlord, purchasing the perpetuity under statute 3 & 4 cntitled to an ecclesiastical lease which it Will, 4, c, 37, on conveying the perpetuity to a sub-tenant, is not entitled to interest on the purchase money, though a considerable time may have elapsed from the date of his own purchase, and although he may have secured the purchase money by mortgage under s. 155, and so have having become vested in the ecclesiastical commis-

Semble, in petition matters under the 153rd section, on the return of the Master's report, the court is confined to such an order as could be made under the original reference, or on objec-

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Without Consent of Ordinary.]-A perpetual curate, whose curacy has been augmented by a grant of lands under the Queen Anne's Bounty Acts, cannot make a lease for three lives without v. Thomas, 1 P. & D. 578; 9 A. & E. 557; 8 L. J., Q. B. 145.

Made between 1803 and 1816.]-Leases of glebe and of rectorial and vicarial property made | 380. between 1803 and 1816, are good; the statute 43 Geo. 3, c. 14, having repealed 13 Eliz. c. 20, revived intil 57 Geo. 3. Doe d. Cates v. Somerville, 6 B. & C. 126; 9 D. & R. 100; 5 L. J. (o.s.) K. B. 28.

Renewal - Sale of Reversion. - D., being was customary to renew every seven years, bequenthed it to trustees for his daughter for life remainder to her children, subject to a provision for raising out of the income a fund for renewing the lease, and to a power of sale. The reversion been paying interest on it himself. S. C., 9 Ir. sioners, they refused to renew, but offered to sell Eq. R. 540. having a surrender of the lease in the remainder and a sum down. The proposal was opposed by the tenant for life, on the ground that it would eonsiderably reduce her income:—Held, that under 23 & 24 Vict. c. 124, ss. 20, 35, 37 and 39, and having regard to the provisions of the will, the court had power to direct the trustees under the will to carry the arrangement into effect if, upon due consideration of the rights of all persons interested, it should appear just to do so. And an inquiry was directed whether the arrangement was proper or calculated to give the remainderman the enjoyment as nearly as possible of the corpus of the property bequeathed by the will, or what modification of it, if any more proper, could be arranged. Hollier v. Burne, 42 L. J., Ch. 789; L. R. 16 Eq. 163; 28 L. T. 531; 21 W. R. 805.

A lady bequeathed leaseholds held under a dean and chapter to trustees for a tenant for life, with remainders over, and with power to perty became vested in the ecclesiastical commissioners, with whom the trustees agreed for the purchase of the reversion in part of the leascholds, in consideration of the surrender of the other part, and the payment of a sum of money. The estate was administered by the court, and the agreement was made subject to the approval of the court :-Held, that the court would not approve of the agreement against the wish of the tenant for life, if his income would be considerably reduced by the purchase. Huyward v. Pile, L. R. 5 Ch. 214; 22 L. T. 893;

18 W. R. 556.

Trustees with power to renew have power to purchase the reversion in leascholds, under 23 & 24 Viet. c. 124; and the act applies to the estates of corporations, both aggregate and sole. Ib.

Ecclesiastical Leasing Acts, 1842 and 1858-To what Applicable.]—The operation of the Ecclesiastical Leasing Acts of 1842 and 1858 is confined to glebe lands and property of that description, and does not extend to enable the incombent of a parish, with the consent of the patron of the living and the ecclesiastical commissioners, to grant leases of or rights over all or any portion of the churchyard of the parish. St. Gabriel, Fenchurch Street v. City of London Real Property Co., [1896] P. 95.

Effect of 5 & 6 Vict. c. 27. ]-The 5 & 6 Vict. sess. 2, c. 27, does not abridge any right of leasing formerly enjoyed by incumbents. Green V. Jenkins, 1 De G. F. & J. 454; 28 Beav. 87; 29 L. J., Ch. 505; 6 Jur. (N.S.) 515; 8 W. R.

Agreement for.]-An incumbent agreed to and the provisions of the latter not having been grant a farming lease of the glebe, at a rent payable half-yearly. The 5 & 6 Vict. sess. 2, c. 27, requires the rent to be reserved quarterly: -Held, that the court would not compel the

Held, further, that the court would not, in the face of the act, approve of a lease reserving the rent half-yearly. 1b.

But held, that, if a lease reserving the rent tenant have been a perfectly valid lease. Ib.

If an incumbent contracts to let lands

belonging to the benefice for a term of years, his resignation of the living during the term is a breach of the contract. Price v. Williams, 1 M. & W. 6; 1 Tyr. & G. 197; 5 L. J., Ex. 129.
An agreement for lease of farm to clergy-

man for purpose of occupation is void under 57 Hen. 8, c. 13, repealed, and re-enacted by 57 Geo. 3, c. 99. Morris v. Preston, 7 Ves. 547.

Sale-Lunatic Beneficiary. ]-When the sanetion of the court of chancery is required to the sale of an ecclesiastical lease to the ecclesiastical commissioners, by reason of the beneficiary being of unsound mind, the application should, under 23 & 24 Vict. c. 124, s. 38, be made in chancery, and not in lunacy. Checkive, In re, 41 L. J., Ch. 208; L. R. 7 Ch. 50; 25 L. T. 721; 20 W. R. 49.

A lunatic was tenant for life of the advowson of a rectory and other real estates. Under the order of the court a lease of the property for ninety-nine years, if the lunatic should so long live, had been made to two persons at a large rent. This lease had become vested in the administrator of the survivor of the two lesses, the administrator being also the first tenant in tail in remainder expectant on the death of the lunatic without issue male. The lunatic was aged eighty-two, and had never had any issue, The administrator wished to sell the next pre-sentation to the rectory, and petitioned the court, as protector of the settlement, to consent to the barring of the entail or the advowson, so far as might be necessary for effecting the proposed sale :- Held, that as the application was not for the benefit of the lunatic's estate, but only for the benefit of a collateral, the court ought not to interfere. Tharp, or Thorp, In re, 3 Ch. D. 59; 35 L. T. 293-C. A.

Purchase of Leaseholds. ]-The court, on a petition by the tenant for life of freehold and | &c.), Ex parte, 23 L. J., Ch. 149. ecclesiastical leasehold property, ordered a sale of a portion of the freeholds for the purpose of purchasing the leaseholds. Adams, In re, 20 L. T. 511.

Charge for Purchase-money of Reversion. A tenant for life of an ecclesiastical lease who purchases the reversion is considered in equity as a trustee for the remainderman, and is entitled to a charge on the estate for the purchase-money. Mason v. Hulke, 22 W. R. 622.

Compensation for Leaseholds.]-A person bequeathed leaseholds held of an ecclesiastical corporation, giving certain life interests, with remainder over. He directed his trustees, two years or sooner before the time for renewal, to bring a sufficient part of the rents into a fund to keep the estates always renewed. It was the practice to renew the leases every fourteen years, but it was not obligatory on the corporation to do so. They eased to do so about 1866. Previously to that, notice had been given of Queen Anne's bounty by the petitioner. Ib.

lessee to take a lense reserving the rent quarterly. by a railway company to take the property. Ib. The purchases were completed, and the price paid into court, and invested in consols. investment gave a diminished income :- Held, that the tenants for life were only entitled to the income of the fund. No costs allowed to half-yearly had actually been executed by the or against the railway company. Wood, In re, bishop and patron, it would in favour of the 40 L. J., Ch. 59; L. R. 10 Eq. 572; 23 L. T. 430.

# 4. PURCHASES FOR PUBLIC UNDERTAKINGS.

Application of Compensation-money. |-- Under an inclosure act some lands were allotted to a rector, who had a power of selling to pay the expenses. Under a railway act compensation was made in respect of other lands of the rectory and paid into court. The court sanctioned the application of the money in court to the payment parte, Oxford, Worvester, &c., Ry., In re, 14
Beav. 158.

Purchase-money-Accumulation during Term. -A railway company took some land which had been demised by a dean and chapter for twentyone years to a lessee on a beneficial lease. The company settled separately with the lessee, and purchased the reversionary interest of the dean and chapter. This purchase-money was ordered to be invested in consols :-Held, that, after providing for the payment to the dean and chapter of the rent reserved by the lease, the remainder of the dividends to accrue on the stock until the expiration of the term were not payable to the dean and chapter, but ought to be accumulated. Gloucester (Dean and Chapter), Ex parte, 19 L. J., Ch. 400; 15 Jur. 239.

Real estate of an eccleslastical corporation (subject to a lease at the ancient rent, with fine upon renewal) having been taken by the commissioners of public works, and the purchase money paid into court :-Held, that the corporation was entitled to so much only of the dividends as was equal to the rent reserved by the lease, with liberty, however, to apply as to the accumulated residue for the amount which would have become due in respect of fines if the property had not been taken. St. Paul's (Deun and Chapter), En parte, 1 N. R. 553; 11 W. R. 482. See also Mertan College (Warden), Exparte, 1 N. R. 176; and Christchurch (Dean, 2018).

— Payment by Instalments—Interest payable to Incumbent.]—Under the 7 & 8 Vict. ch. xix. which is identical with the Bilston Act (42 Geo. 3, ch. exvii.), the court will direct the payment of the interest of purchase-money for church lands by instalments to the incumbent the costs to come out of the corpus, Willenhall Chapel, In re, 8 L. T. 599; 11 W. R. 850.

Application of Purchase-money-For building Parsonage.]—Money paid into court under the Lands Clauses Act in respect of globe land purchased by a railway company, ordered to be invested in building a parsonage-house, part of the necessary funds for that purpose being contributed by the governors of Queen Anne's bounty. Whitfield (Incumbent), In rc, 1 J. & H. 610; 7 Jur. (N.S.) 909; 9 W. R. 764,

sanctioned the agreement and the expenditure. in making the house suitable for a vicarage, of purchase-money of a portion of the churchyard, invested under a special act, on the ground that the arrangement was practically the purchase of a house suitable for a vicarage. Nether Stoney Vicarage, In re (L. R. IT Eq. 156), distinguished. Succer Commissioners and Vicar of St. Batolph, Aldgate, Ew parte, 63 L. J., Ch. 862; [1894] 3 Ch. 544; 8 R. 649.

- For Building Rectory. ]-The purchase-money for glebe lands, taken by a railway company, may, with the consent of the bishop, be paid by the court to the rector for the building of a rectory-house. Bradfield St. Claire (Rector), Ex purte, 32 L. T. 248.

Estimated cost of building new rectory-house was 2,3047. That sum, less 1407., having been obtained, but several hundred pounds being still unspent .- Held, that 801., purchase-money of part of glebe, might be appropriated towards expenses still to be incurred in building. Har-

tington (Rector), Ex parte, 23 W. R. 484.

A rector having advanced money to complete the rebuilding of the rectory-house:—Held, that the court had no power under the Lands Clauses Act, 1845, s. 69, to direct the purchase-money of part of the glebe, subsequently paid, to be Williams v. applied in recouping the advance. Aylesbury and Buckingham Ry., 43 L. J., Ch. 825; 31 L. T. 521.

- For Repairs of Rectory and Chancel and Repayment of Loan.]—Purchase money of glebe lands taken by a railway company allowed to be applied for the repairs of the rectory buildings, but not for the restoration of the chancel, or in paying off money borrowed from Queen Anne's bounty. Grimoldby (Rector), Ex parte, Louth and East Chast Ry., In re, 2 Ch. D. 225; 24

- For Improvements. - The purchase money for glebe lands taken by a railway company may, with the consent of the bishop and patron, be applied towards the expenses of im-Claypole (Rector), Exparte, 42 L. J., Ch. 776; L. R. 16 Eq. 574; 29 L. T. 51.

- For Farmhouse.]-Part of a fund in court, the proceeds of sale of a portion of glebe to a railway company, ordered to be paid to the rector towards recouping past outlay in building a farmhouse on the glebe. Gamston (Rector), Exparte, I Ch. D. 477; 33 L. T. 803; 24 W. R.

- Farm Buildings.]-So also towards re-couping past outlay in the erection of certain buildings on part of the glebe, on evidence showing a permanent and valuable improvement.

Holywell-cum-Needingworth (Rector), Ex parte, 27 W. R. 707.

When shown to be beneficial, court will order out in crecting farm buildings on remainder.

Shipton-under-Wychwood (Rector), Ex parte, 19 W. R. 549.

— For Vicarage.]—Where a vicar entered — For Discharge of Rent-charge for Improve-into an agreement for the purchase of a house ments. —Purchase money of land, allotted, under - For Discharge of Rent-charge for Improvefor a vicarage which, in its then present state, an inclosure act and an award, in respect of glebe, was unsuitable for such a purpose, the court paid into court under the Lands Clauses Consolidation Act, 1845, may, under s. 32 of the Settled Land Act, 1882, and s. 1 of the Settled Land Act, 1887, be applied at the discretion of the court in the discharge of terminable rent charges on the glebe, created in respect of improvements by the vicar, with the sanction of the ecclesiastical commissioners, and the consent of the patrons; but such discretion will not be exercised in favour of the viear where the patrons object to the proposed application of the money. Byron's Charity, In re (23 Ch. D. 171), Jesus College, Cambridge, Ex parte (50 L. T. 583), and Bethlehem and Bridewell Hospitals, In re (30 Bechtenen and Britaevest Hospitals, In re (50 Ch. D. 541), followed. Cestle Bytham (Vicar) and Midland By., Ex parte, 64 L. J., Ch. 116; [1895] 1 Ch. 348; 13 R. 24; 71 L. T. 606; 43 W. R. 156.

> For Drainage and Land Tax.]-Where a railway company takes globe lands, the purchasemoney may not only be applied in the purchase of other lands, but in paying for drainage of glebe and redemption of land tax of the lands purchased. Queen Camel (Vicar), In re, 11 W. R. 503 : 8 L. T. 233.

> Costs. ]-Under the London and Birmingham Railway Act, the costs of a second investment in land and the conveyance and petition allowed, and residue of money in court ordered to be paid to the petitioner for his own use. Loughton (Rector), Ex parte, London and Birmingham Ry., In re, 5 Rail. Cas. 591; 14 Jur. 102.

- Of Buying up Leases of other Lands. ]---A bishop presented a petition to have moneys which had been paid into the court by several which that been plan into the court by solvent railway companies for lands taken from the see applied to buying up a lease of other lands be-longing to the see :—Held, that, taking together the Land Clauses Act and the 14 & 15 Vict. c. 104, the companies must pay costs, in the same way as if the purchase had been of freehold lands. London (Bishop), Es parte, 2 De G. F. & J. 14; 29 L J., Ch. 575; 6 Jur. (N.S.) 640; 8 W. R. 714.

Held, also, that the petition ought not to have been served on the ecclesiastical commissioners, but their consent out of court obtained and proved, and that the companies ought not to pay

the costs of their appearance. Ib.

Held, also, that the costs ought to be borne by the companies in equal shares, except the costs of the ad valorem stamp on the assignment, which ought to be borne by them rateably, according to the amounts which they contributed respectively to the purchase-money. Ib.

- Of Re-investment.] - The dean and canons of Manchester presented a petition to have moneys, which had been paid into court by several railway companies and other public bodies for lands taken from them, re-invested in the purchase of leasehold interests in other lands of which they were reversioners in fee :- Held. that the companies and other public companies must pay the costs of re-investment in the same way as if the purchase had been of freeholds. Manchester (Dean and Canons), Ex parte, 28 L. T. 184.

money was paid into court to the account of a prebendary by a board of health, in respect of lands forming part of the estates of the prebend, which the board had purchased under its act of parliament. The property of the prebend became subsequently vested in the ecclesiastical commissioners, who petitioned for payment of the fund, and the prebendary was served with the petition and appeared as a respondent, though he had, as the petition had been originally prepared, been made a co-petitioner:—Held, that the prebendary was not entitled to his costs of appearance, not on the ground that he had been expectance, nor the ground that he had been improperly served, but because no additional expense would have been incurred if he had joined in the petition. St. Margaret's (Leicester), In re, 10 L. T. 221.

Petition for Payment Out.]-An arrangement was, with the consent of all proper parties, made for the rebuilding of a rectory-house, part of the money to be advanced by the commissioners of Queen Anne's bounty, and part to be supplied by money agreed to be paid by a railway company for a piece of the glebe. The rebuilding proceeded, but the railway company was unable to pay, and the money required was advanced by the rector. When the railway company had paid the money, the rector petitioned to have it paid to him:—Held, that the court had no power to make the order. Williams v. Aylesbury and Buckingham Ky., 43 L. J., Ch. 825; L. R. 9 Ch. 684; 3I L. T. 521.

- 42 Geo. 3, c. 116.]-By 42 Geo. 3, e. 116, s. 100, surplus stock in court arising from the sale of land for the redemption of land tax may be laid out in manors, messuages, lands, tenements and hereditaments, to be settled and conveyed to like uses to those upon which the lands taken were settled. A petition by a vicar for the repayment to him out of the fund in court of money disbursed by him for repairs to the vicarage-house was dismissed as an unauthorised investment under the act, the decisions allowing such an investment under the Lands Clauses Aet not being held binding on the court in a case under that act. Nother Stowey (Vicar), In re, L. R. 17 Eq. 156; 29 L. T. 604; 22 W. R. 180.

Churchyards. ]-See post, XXXI. BURIAL, 5, 1439.

# 5. DILAPIDATIONS.

Liability—Frebendary.]—An action for dilapidations of a prebendal house may be maintained by a succeeding prebendary against his pre-decessor. Radeliff v. D' Oyley, 2 Term Rep. 639;

Vicar-Choral. ]-A vicar-choral in a cathedral church, who succeeds or is appointed to a house of his predecessor in the vicar-choralship, is within the custom of ecclesiastical dilapidations, and therefore his representatives may be sucd in respect of dilapidations at his death. Gleaves v. Parjitt, 7 C. B. (N.S.) 838; 29 L. J., C. P. 216; 6 Jur. (N.S.) 805.

Executors of Fredecessor—Fayment pari passu.]—Where the bishop has, under s. 34 —Where Recessive rectors had been in possession the Ecclesiastical Dilapidations Act, 1871, andel of land for above fifty years past, but, in an

Of Appearing on Petition.]-A sum of an order stating the cost of the repairs for which the executors of a late incumbent are liable, the sum so stated is under s, 36 a debt payable to the new incumbent out of the assets of the late incumbent pari passu with the debts of his other creditors. Monk, In re, Wayman v. Monk, 56 L. J., Ch. 809; 35 Ch. D. 583; 56 L. T. 856; 35 W. R. 691 : 52 J. P. 198,

> - Action by Executors of Successor. -- An action is maintainable by the executors of a deceased incumbent against the executors of his predecessor, for dilapidations which occurred during the incumbency of the predecessor. Bunbury v. Hewson, 3 Ex. 558; 18 L. J., Ex.

> The incumbent of a benefice under a sequestration was liable to repay instalments for glebe improvements to his predccessor's executor, Sums were also ascertained, under a commission, as due for dilapidations in the time of the pre-decessor, which were to be set off under the 12 Geo. 1, c. 10. Semble, the bishop could require a molety of the income received by the sconestrator to be deducted for the dilapidations: but, semble, the right of set-off is connected with but, semble, the right of set-off is conflected with the liability to pay the instalments which did not apply to the first year's income, and therefore no deduction should be made from it. Brooke v. Horner, 11 Ir. Eq. R. 214.

In an action by the successor against the exeentors of a deccased rector for dilapidations, the declaration alleged that the deceased was rector of the parish church of T. cum J., and was seised in right of the rectory buildings, and also of glebe lands lying and being, to wit, in the parish afore-said. The rectory consisted of the parish of T., of which the plaintiff was rector, and of the parishes of I. and C., of which he was vicar: Held, that the plaintiff could not recover in respect of dilapidations in the parish of C. Warren v. Lugger, 3 Ex. 579; 18 L. J., Ex. 256.

- Extension of Custom to Wales. ]-The custom of England for rectors and vicars to leave their vicarages in repair to their successors was transferred to Wales by 27 Hen. 8, c. 26. Bunbury v. Heicson, supra.

----- Perpetual Curate.]--- A perpetual curate, who is not removable by his patron, and who holds a house and buildings as curate, and as annexed to his curacy, is bound to repair. Mason v. Lambert, 12 Q. B. 795; 17 L. J., Q. B. 366; 12. Jur. 1045.

— Trustees of Vicar.]—In a declaration by a vicar against his prodecessor for dilapidations, he averred that he was seised in right of his vicarage: it appeared that part of the premises was copyhold, and devised to the master and senior fellows of a college, in trust to permit the vicar to receive the profits arising therefrom, after deducting certain charges which might accrue to the lord of the manor, or the expenses attending the repairs of the premises:—Held, that the legal estate was vested in the trustees; that the use was not executed within 9 Geo. 2. e. 36; and consequently that the plaintiff was not entitled to recover. Browne v. Ramsden, 2. Moore, 612.

action for dilapidations brought by the present bound to put the rectory-house into a finished against the late rector, it appeared that the absolute seisin in fee of the same land was in certain devisees, since the 9 Geo, 2, c, 36, and that no conveyance was enrolled according to the first section of that act, nor any disposition of it made to any college, &c., according to the fourth section :- Held, that no presumption could be made of any such conveyance enrolled (which, if it existed, the party might have shown), and consequently that the rector had no title to the land, as the statute avoids all other grants in trust for any charitable use made otherwise than is thereby directed; although in fact it appeared that one of those devisees was the then rector, and that the title to the rectory was in Balliol College, Oxford, Wright v. Smuthies, 10 East, 409: 10 R. R. 337.

Where Benefice under Sequestration, 1 When a benefice was under sequestration at the death of the incumbent, and after the avoidance the buildings were inspected by the diocesan surveyor, and the bishop made an order pursuant to the Ecclesiastical Dilapidations Act, 1871, s. 34 stating the cost of the repairs required, and declaring the executors or administrators of the incumbent liable for the same :- Held, that the sequestrator was not liable under s. 53 for the cost of the repairs, and was not entitled to deduct the same from the profits of the benefice in his hands. Jones v. Dangerfield, 45 L. J., Ch. 161; 1 Ch. D. 438; 84 L. T. 387; 24 W. R. 203.

- Fences of Allotted Lands. |-- Under an inclosure act, lands were fenced in and allotted to the vicar and his snecessors, in lieu of tithes. The vicar died, leaving the fences out of repair:
—Held, that his executors were liable to be sued by the succeeding vicar for dilapidations. Bird v. Relph, 4 N. & M. 878; 2 A. & E. 773; 4 L. J., K. B. 128.

— Glebe Land.]—Neglect to cultivate the glebe land in a husbandlike manner, is not a dilapidation for which an incumbent can recover. Therefore an action, as for dilapidations, does not lie against the excentors of a prior incumbent for miscultivation of the glebe land. Bird v. Relph, 1 N. & M. 415; 4 B. & Ad. 826; 2 L. J., K. B. 99.

The right of a rector to recover, from the representatives of his predecessor, damages for waste, is confined to the case of dilapidations to houses and buildings, and does not extend to waste committed by digging gravel in the glebe. Ross v. Adewch, 37 L. J., C. P. 290; L. R. 3 C. P. 655; 19 L. T. 202; 16 W. R. 1193.

- Extent of ]-An incumbent of a living is bound to keep the parsonage-house, buildings, and chancel in good and substantial repair, restoring and rebuilding when necessary, according to the original form, without addition of modern improvement; but he is not nature of ornament, such as painting (unless that is necessary to preserve exposed timber from decay), and whitewashing and papering; and in an action for dilapidations against the executors of a deceased rector by the successor, the damages are to be calculated upon this principle, Wise v. Metcalfe, 10 B. & C. 299; 5 M. & Ry. 235; 8 L. J. (o.s.) K. B. 126.

state of repair, but are only bound to restore what is actually in decay, and to make such repairs as are absolutely necessary for the pre-servation of the premises. If the present incumbent has repaired with timber which grew on the glebe, the executors of the late incumbent are entitled to be allowed for the value of such timber in the estimate of dilapidations due from them. Pervival v. Cooke, 2 Car. & P. 460; 31 R. R. 677.

- Principle of Law of. |- The right of a succeeding rector to bring an action for dilapidations against the executor or administrator of his predecessor rests upon particular custom, derived from ecclesiastical law; and it is an incident of such custom that the claim in respect of dilapidations is to be postponed in the distri-bution of assets to the payment of specialty and simple contract debts. Bryan v. Clay, 1 El. & Bl 38; 22 L. J., Q. B. 23; 17 Jur. 276; 1 W. R. 20.

- How Discharged.] - The claim of an inenmbent against the representatives of his predecessor, for dilapidations, will be paid out of equitable assets, pari passu with other creditors, though at law it would be postponed to simple contract creditors. Bissett v. Buryess, 23 Beav. 278; 26 L. J., Ch. 697; 2 Jur. (N.S.) 1221.

17 Geo. 3, c. 53.]-The 17 Geo. 3, c. 53, enables the incumbent of a living, with the consent of the bishop and patron, to add to as well as to repair or rebuild a rectory-house, and necessary or sufficient repairs under that act mean such repairs or additions as the bishop thinks fit, for making the rectory a fit and a comfortable habitation for a clergyman. Buyd v. Barker, 4 Drew. 582; 28 L. J., Ch. 445; 5 Jur. (N.S.) 234; 7 W. R. 297.

Separate Actions for Separate Dilapidations.] -The successor may have separate actions against the executor of the late rector, for dilapidations in different parts of the rectory. Young v. Munby, 4 M. & S. 183.

Ecclesiastical Dilapidations Act, 1871-Reckoning of Time. |-Within three calendar months after the avoidance of a benefice by resignation the bishop of the diocese directed the surveyor to inspect the buildings which were out of repair. After the expiration of the three months the surveyor inspected and reported to the bishop, who thereupon, under the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), made an order for the cost of repairs. The new inenmbent having brought an action upon the order against the late incumbent, the latter pleaded that the surveyor neither inspected nor reported within the three months limited by s. 29 :- Held, that this was no defence to the action, for the three months mentioned in the bound to supply or maintain anything in the section refer not to the surveyor's inspection and report, but to the bishop's direction to the surveyor. Gleaves v. Marriner, 1 Ex. D. 107; 34 L. T. 496; 24 W. R. 539.

The provision of s. 29 as to the time within which the bishop is to direct the surveyor to inspect and report upon the buildings of a benefice after its avoidance is directory only, and not imperative; and a direction to inspect The executors of a deceased incumbent are not and report made by a bishop more than three

On Exchange of Livings. ]-Two clergymen, being possessed of livings, agreed to exchange the one for the other, with the consent of their respective patrons, and the livings were accordingly resigned into the hands of the bishop, and each party was inducted into the other of them. There was no specific agreement entered into upon the subject of dilapidations, but neither party at the time contemplated a claim for dilapidations:—Held, in an action by one of the incumbents against the other, and his successor, for dilapidations, that he was entitled to recover. Downes v. Craig, 9 M. & W. 166; 11 L. J., Ex. 239.

An agreement between two incumbents to exchange their respective livings in their present condition, and that one of them shall not call upon the other to pay for dilapidations, is not necessarily simoniacal, for the dilapidations may be equal or nearly so in each living, or of so insignificant an amount as not to be worth the expense of valuation. Goldham v. Edwards, 16 C. B. 487; 24 L. J., C. P. 189; 1 Jur. (8.8) 684; 3 W. R. 551. S. C. and S. P., 17 C. B. 141. Affirmed in error, 18 C. B. 889; 25 L. J., C. P. 2021, 1 Jur. 686; 25 L. J., C. P. 223 : 2 Jur. (N.s.) 493 ; 4 W. R. 550.

After the passing of the Ecclesiastical Dilapidations Act of 1871, an agreement was entered into by two incumbents for the exchange of the livings they then held, and one term of such agreement was that neither party should make any claim upon the other for dilapidations :-Held, that the agreement was not in contra-vention of the above act. Wright v. Davies, 46 L. J., C. P. 41; 1 C. P. D. 638; 35 L. T. 188; 24 W. R. 841-C. A.

#### 6. WASTE.

Liability—Of Bishop.]—Waste by a bishop is the subject of prohibition. Winchester (Bishop) v. Wolgar, 3 Swanst, 493.

The clerk of a patron who had recovered in quare impedit filed a bill under the act of 1 Geo. 2, c. 23, against the bishop presenting and his clerk, for an account of the profits of the benefice pending the litigation; and it contained charges of acts of interference with the profits and of waste by the cutting of trees and otherwise, "by the defendants or one of them, and of a conversion of a portion of the profits to their own use." Upon a general demurrer by the bishop, which was allowed:—Held, that a bishop as ordinary is not liable to any account at common law, or under the statute West 2, c. 5, giving damages in quare impedit; or to the account

of the profits given under the 1 Geo. 2, c. 23.

Crampton v. Meath (Bishop), San. & Sc. 297.

Held, also, that, although a bishop may by interfering in the defence of a suit, or otherwise, make himself a principal in the transaction and accountable as such, yet that joining as ordinary with his clerk in defence of the quare impedit was not such an act as to render him personally answerable for the profits which accrued during the litigation, nor were the other acts charged sufficient to have that effect, there being no direct and positive charge of any act done by the bishop

months after the avoidance of a benefice may be court under the 1 Geo. 2, c. 23, to account for valid. Catdom v. Piretl., 46 L. J., C. P. 541; 2 the waste committed, and that the incumbent's C. P. D. 562; 36 L. T. 469; 23 W. R. 773. proceeding in the Ecclesiastical Court, under 11 Will. 3, c. 6, and 12 Geo. 3, c. 10. Ib.

The court may interfere at the suit of the Crown to restrain a bishop from wasting the property of the sec, or at the suit of the patron of a living to restrain the incumbent from wasting the glebe-house or lands; but, semble, as to the church and churchyard, the Ecclesiastical Court having, ratione loci, the proper jurisdiction, this court has never interfered to restrain the acts of the incumbent with respect to them. Fitzwilliam (Earl) v. Moore, 3 Ir. Eq. B. 615; Fl. & K. 287.

- Of Lessee. Injunction to restrain the lessee for years of the temporalities of a bishop, under a lease confirmed by the dean and chapter, and without impeachment of waste, from felling timber. Winchester (Bishop) v. Wolgar, 3 Swanst. 493.

Lessee for years sans waste, remainder in fee to a bishop. Lessec enjoined from digging the ground for brick. London (Bishop) v. Webb, 1 P. Wms, 527.

- Of Dean and Chapter, ] - Chapter not being entitled to fell timber on the deanery lands except for the purpose of repairs, a lease granted by it of certain "woods, groves, hedge-rows, and springs," was construed not to include the right of felling timber, and a bill by the lessee for an account of timber felled during the lease by the lessors, was dismissed with costs.

Herring v. St. Paul's (Dean and Chapter), 3 Swanst. 492; 2 Wils. Ch. 1; 19 R. R. 259.

Timber on the estates of ecclesiastical corporations is a fund for the benefit of the church,

Deans and chapters, like other ecclesiastical persons, are not liable to be restrained in cases of waste, either by prohibition or injunction, except in the Ecclesiastical Court, or at the suit of the Crown. It seems that the right to cut timber for the purpose of repairs extends to selling timber and applying the produce. Wither v. Winchester (Dean), 3 Mcr. 421; 17 R. R.

- Of Prebendary.]-Writs of prohibition and assistance, to prevent a prebendary from committing waste on his prebend. Actand v. Atwell, 3 Swanst, 499, n.

- Injunction against Incumbent-Against Bishop—Account of Profits.]—Patron of a living may have an injunction against the incumbent to stay waste. So may the attorney-general against a bishop. But they cannot pray any account of the profits for their own benefit as patrons. Knight v. Moseley, Ambl. 176.

- Of Parson or Vicar, ]-In respect to waste, a parson or vicar is not to be considered as merely lessee for years or as tenant for life under a will or settlement. The court will not restrain an incumbent from ploughing up meadow infested with moss and weeds for the purpose of laying of Clerk. Held, also, that such clerk Seav. 35t | 14t L J, Ch. 24t ; 9 Jun. 256.

defendant is liable in a suit instituted in this | Quære, whether a natron sait.

to an injunction to restrain the incumbent from | of a rectory or of a vicarage, but not fixed into ploughing up ancient meadows. Ib.

Of Vicar. ]-Although, as a general rule, a vicar has a right to cut timber for the purposes of applying it specifically to repairs of the vicarage premises, and possibly a right to sell the timber and buy with the proceeds an equivalent amount of timber in a more convenient place for the purpose of using it in such repairs, he has no right to cut timber for the purpose of selling it to raise a fund to repair dilapidations in the vicarage premises arising from his own 38 L. J., Ch. 617; L. R. 8 Eq. 417; 20 L. T. 868; 17 W. R. 879.

- Of Widow of Rector,]-Injunction to stay waste granted against the widow of a rector, at the suit of the patroness, during vacancy. Hoskins v. Featherstone, 2 Bro. C. C. 552.

Of Rector. A rector may cut down timber for the repairs of the parsonage-house, or chancel, but not for any common purpose. Stracky v. Francis, 2 Atk. 217.

He is entitled to botes for repairing barns and outhouses belonging to the parsonage. Ib.

Repairs. Injunction granted restraining a rector from felling timber on the rectory lands, save only for necessary repairs. Marthorough (Duke) v. St. John, 5 De G. & Sm. 174; 21 L. J., Ch. 381; 16 Jnr. 810.

Semble, if other timber had been cut, and sold merely for the purpose of providing timber more suitable for repairs, the court would not have interfered by injunction. Ib.

The parson, with the consent of the patron and ordinary, may cut timber and open mines, and the court will have no difficulty in directing timber to be cut, and the purchase-money to be applied for the benefit of the living. Ib.

There is no principle of law on which a rector can obtain more extensive privileges as to waste than an ordinary tenant for life. Ib.

-Building Schoolhouse in Churchyard. ]-Where a bill was filed, by a parishiouer on behalf of himself and all others, for an injunction to restrain the defendant, the rector of the parish, from building a schoolhouse in the churchyard, the court refused the injunction, the injury not being of an irreparable nature.

Erecting Buildings in Substitution of Others. |-The executors of a rector are not liable to an action in the nature of waste for pulling down a building on the rectory, and substituting another in a different part, unless the value of the estate is thereby impaired, the burdens upon it increased, or the evidence of title impaired. Not, therefore, if the rector suffers a farm building adjoining the rectory-house to go to decay, and in the meantime erects a better building for the same purpose a mile from the house, but in a situation more convenient for the farming business, as carried on at and from the time of the substitution, although no faculty or licence is obtained for the alteration. Huntley v. is obtained for the alteration. Huntley v. Russell, 13 Q. B. 572; 18 L. J., Q. B. 239; 13 Jur. 837.

- Taking away Movable Buildings. |--- A cottage and farm building placed upon the soil without the consent of the patron and ordinary.

the ground, and intended at the time of the erection to be removable at will, may be removed without incurring liability for waste or dilapidation, although posts on which it stands have, by the weight of the building, become imbedded in the ground to the depth of a foot. Ib.

- Excavating Gravel. - A gravel-pit on the soil of a rectory was opened and kept open by orders of magistrates, under 13 Geo. 3, c. 78, s. 29, and 5 & 6 Will, 4, c. 50, s. 54, for the repair of the highways: the soil was not sloped down nor filled up according to s. 31 of the former, or s. 55 of the latter act, nor was any step taken during the incumbency to enforce this duty upon the surveyors; and the excavation was increased from one rood to four acres in width. While the pit was so kept open some gravel was also dug from it by the rector's lessee of the soil, and sold to private persons, without sloping or filling up the cavities :- Held, in an action against the executors of the rector for dilapidations, that the making or continuance of the excavations for repair of the highways was not chargeable upon the rector or his representatives as an act of waste. Ib.

Held, also, that the executors might allege the compulsory act of the magistrates and surveyors, under a plea that no waste was committed by their testator, or in his time, with his permission; and that the omission to slope or fill up the excavations, or to enforce this duty on the surveyors, did not operate retrospectively so as to make the digging of the soil an act of waste done or suffered by the rector, and to support issues affirming that the rector wasted the soil and permitted it to be wasted, by excavating, &c., without filling up, &c. Ib.

Held, also, that the digging up and sale to private persons of gravel from the pits opened under order of the imagistrates, and improperly kept open by the surveyors, was, as far as it went, equivalent to an original opening by the rector, and was a waste for which the executors were liable in an action for dilapidations. Ib.

Removing Hot-house.]-A rector erected in the garden of the rectory, apart from the rectory-house, hot-houses about seventy feet long and between ten and twenty feet high. They consisted of a frame and glasswork, resting on brick walls about two feet high, and imbedded in mortar on these walls:—Held, that he, in his lifetime, was, or his executors in a reasonable. time after his death were, entitled to remove them, without incurring any liability for dilapidations or waste. Martin v. Roc, 7 El. & Bl. 237; 26 L. J., Q. B. 129; 3 Jur. (N.S.) 465; 5 W. B. 263.

Opening Mines. ]-The coal under parts of the glebe of a vicarage had at different times since 1756, with the consent of the vicars for the time being, been gotten by the persons working adjoining collieries, and royalties had been paid to the vicas for the time being, the working being conducted solely by underground passages from the adjoining collieries without entering on the surface of the glebe :-Held, that no presumption could be drawn from these facts that there had been any grant authorising the vicars to open mines. Burtlett v. Phillips, 4 De G. & J. 414.

The incumbent of a living cannot open mines

Quere, whether he can do so with such consent without the sanction of the ecclesiastical com-

missioners. 1b.

The patron of the living is the proper person to institute a suit to restrain the opening of mines, and generally the only proper person, but, semble, the ordinary may take proceedings to prevent waste by collusion between the patron and incumbent. Ib.

- Consent of Ecclesiastical Commissioners -Unauthorised Working-Right to Sue. ]-The consent of the ecclesiastical commissioners is necessary before any mine can be opened under glebe land. Without such consent no mine may be legally opened, even with the consent of the patron and ordinary. Holden v. Weekes (1 J. & H. 278) and Marlborough (Duke) v. St. John (5 De G. & Sm. 174), considered. Though an open mine may lawfully be worked by an incumbent, an unauthorised opening and working by a former rector does not make a mine an open one so as to enable succeeding incumbents to work it without such consent. Under the Ecclesiastical Leasing Acts, 1842 and 1858, the ecclesiastical commissioners have a clear interest in mines under the glebe, and are, therefore, entitled to under the globe, and are, therefore, childled to sue in order to prevent waste. Huntley, Russell (13 Q. B. 572) and Bartlett v. Phillips (4 De G. & J. 414), considered. Exclesiational Commissioners v. Wookbowse, 64 L. J., Ch. 329; [1805] I Ch. 552; 13 R. 372; 72 L. T. 257; 48 W. R. 305; 60 J. P. 200.

Jurisdiction to order Restoration. ] - The Court of Chancery has no jurisdiction to direct the restoration of the interior of a church to its former condition, from which it has been altered, the loan could not affect the commissioners' Cardinall v. Molyneux, 4 De G. F. & J. 117; 7 Jnr. (N.S.) 854; 4 L. T. 605.

The Court of Chancery has no jurisdiction to order an incumbent of a church, who had made alterations in the building by removing the pews, and substituting chairs, to take the necessary proceedings to obtain a faculty from the bishop of the diocese for the restoration of the church. Ib.

An injunction was granted to restrain the alteration of the walls or brickwork of a church without the authority of the archdeacon or bishop, on the plaintiff's undertaking to apply to the proper ecclesiastical court for authority to restore the church to its original state. Ib.

# 7. REPAIRS.

Loans for.]—The 5 Geo. 4, e. 36, s. 1, gives to churchwardens and overseers of parishes the power to borrow money from the Public Works Loan Commissioners for the purpose of building or repairing churches, and gives the commissioners the power to make loans to them for such purposes. It then confers on the churchwardens the power to make rates for the repay-ment of such loans, "by annual or half-yearly instalments within the period of twenty years, at farthest," from the advancing of any such sums respectively :-Held, that after the expiration of the twenty years the churchwardens and overseers had no power to make a rate for the purposes of paying money borrowed under the act, and that, consequently, a mandamus commanding them to do so could not be sustained. sonal estate, provided they did not exceed a fixed

Holden v. Weckes, 1 J. & H. 278; 30 L. J., Ch., Reg. v. All Saints, Wigan, Churchwardens, 35; 6 Jur. (N.S.) 1288; 3 L. T. 437; 9 W. R. 94. 1 App. Cas. 611; 35 L. T. 381; 25 W. R. 128 -H. L. (E.)

The 19 & 20 Vict. c. 104. s. 15, does not affect this matter. Ib.

A power of that sort given in any particular act must be exercised in exact accordance with the authority given, and the restrictions imposed, by the act itself. Ib.

A loan was made under 5 Geo. 4, c. 36, s. 1 for the purpose of repairing a church. All the formalities required by the act were duly com-plied with before the loan was granted. A portion of the money was expended in repairing the chancel, and the rest in repairing the other portions of the church. Subsequently a rate was made in due form to repay the loan. In a suit against a ratepayer for refusal to pay the rate, he alleged in his answer that it was the duty of the rector alone to repair the chancel; that the preliminary resolution of the vestry contemplated the application of a portion of the loan to the repair of the chancel; that a portion of the loan was expended in repairing the chancel; that the consent of the bishop, and the advance by the commissioners, were given and made respectively on the representation that the loan was wanted for purposes that did not include the repair of the chancel; and that, therefore, the rate was void:—Held, that the word "church" in the statute included the chancel, and that, therefore, a portion of the loan might properly be expended in repairing the chancel. Rippin v. Bastin, 38 L. J., Ecc. 33; L. R. 2 Ecc. 386; 20 L. T. 622.

Held, also, that even if the word "church" did not include the chancel, yet, as all the required formalities had been observed before the loan was granted, an improper expenditure of right to repayment; and that the rate, being duly made in form, was valid. Ib.

Liability of Incumbent for.]-The incumbent of a district church is not the owner or occupier of the church within the Metropolitan Building Act, 1855 (18 & 19 Viet, c. 122). Reg. v. Lee, 48 L. J., M. C. 22; 4 Q. B. D. 75; 39 L. T. 605; 27 W. R. 151. See col. 1296.

Part of a district church became out of repairso as to become a dangerous structure as defined by the Metropolitan Building Act, 1855. The Metropolitan Board of Works took proceedings. under'ss. 69-81 against the owner and occupier, and, upon the repairs not being executed, themselves did the necessary repairs. The metro-politan police magistrate made an order upon the incumbent of the church for the payment of the costs of these repairs; subsequently he refused to issue a distress warrant to levy the amount of these costs as provided by the act, and the board applied to the court for a mandanus to compel him to do so:—Held, that the mandamus should not issue, as the incumbent was not the owner of the church, Ib.

Promise to rebuild by Patron since deceased. -When the patron of a living which had become vacant, who had promised, on the appointment of a new incumbent, to rebuild the parsonage-house at his own expense, died before any new incumbent was appointed, the court gave leave to the trustees of his will to defray the expense of the rebuilding out of his residuary per

Eq. 76: 19 W. R. 794.

Trust for.]—Where property is held by trustees to be employed in the repairs of a chapel, and any surplus is to be distributed among the poor of the parish, the trustees will not be ordered to rebuild the chapel instead of merely repairing it, although it is in a very dilapidated condition, and unequal to the wants of the inhabitants, and the trust estate has increased very largely since its first institution. Booth, In re, 14 W. R. 761.

Duty of Parish as to. |- It is the duty of a parish to repair the fabric of the parish church, and the neglect or refusal to perform this duty will subject those who so neglect or refuse to punishment in the Ecclesiastical Court. Gosling v. Veley, 4 H. L. Cas. 679; 1 C. L. R. 950; 17 Jur.

### XIV. SEQUESTRATION.

What, ]-A sequestration is a charge upon the benefice of a clergyman within 18 Geo. 2, c. 20, and it is immaterial in this respect in what manner the sequestrator has disposed of the rents and profits. Pack v. Tarpley, 1 P. & D. 478; 9 A. & E. 468; 2 W. W. & H. 88; 8 L. J., M. C. 93. A sequestration is a charge upon the rents and profits, including the glebe lands of the benefice, except the parsonage-house, in which the incumbent is bound to reside. Ib.

Judgment. - A judgment creditor, who has obtained a sequestration before a sequestration is issued out by the assignees in bankruptey, is not a creditor holding security within s. 184 of 12 & 13 Vict. c. 106, so as to be entitled to only a ratable part of his debt. *Hopkins* v. *Clarke*, 5 B. & S. 753; 33 L. J., Q. B. 334; 10 Jur. (N.S.) 1071; 11 L. T. 204; 12 W. R. 1029—Ex. Ch.

A judgment is not per se a lien upon a benefice, but it is attached upon it by a sequestration. Wise v. Beresford, 2 Con. & L. 282; 5 Ir. Eq. R. 407; 3 Dr. & War. 276,

The sequestration will not by relation give to the judgment creditor priority over an annuitant who became such after the entry of the judgment but before the sequestration issued. Ib.

What may be taken.]-Semble, ecclesiastical estate may be taken in execution, and in bankruptcy. Meymott, Ex parte, 1 Atk. 200.

Position of Bishop granting. - Where a bishop grants sequestration against the effects of a clergyman within his diocese, he stands in the same situation as a sheriff, and the court has the same power over him as over that officer. Rew v. London (Bishop), 1 D. & R. 486; 24 R. R.

How affected by Sale of Advowson. ]-S. mortgaged the advowson of the vicarage of St. Giles, Camberwell, to the plaintiff, as a security for the repayment of two sums of 7,500l, and 5,000l. advanced by the plaintiff to him, and afterwards conveyed the advowson, subject to the payment of the two sums, to the defendant, who, as a security for the payment, executed a warrant of attorney, whereby he confessed judgment at the suit of the plaintiff for 25,000l. The vicarage having become vacant, the defendant was pre- satisfaction on the judgment, and that the writ

Hotham's Trusts (Lord), In re, L. R. 12 sented, and default having been made in payment of the interest on the several sums, plaintiff caused a writ of sequestration to issue against the vicarage. The plaintiff subsequently died, and his representatives afterwards obtained a decree of foreclosure of the equity of redemption, and sold the advewson for 11,000%. On a motion for a rule to set aside the writ of sequestration : Held, that the sale was not a satisfaction of the indement, and that the sequestration remained in full force and praffected. Long v. Williams. 26 L. T. 878.

> Position of Rector and Tenant.]-Where a notice given by a rector to the tenant of his glebe land expired previously to the time when a sequestration was read:—Held, that the rector might, after receiving a weekly allowance from the tenant, still maintain an ejectment, laying the demise between the time of the expiration of the notice and the reading of the sequestration. Doe d. Morgan v. Bluch, 3 Camp. 447; 14 R. R.

> Before Bankruptcy,]—Order made to prevent the bankrupt from availing himself of a sequestration, obtained by him before his bankruptey, of the rents and profits of a rectory. Hull, Exparte, 1 Deac. 87; 2 Mont. & Ayr. 392; 4 L. J., Bk. 83.

No Priority between Trustees in Bankruptcy. Held, by James and Cotton, L.JJ. (diss. Brett. L.J.), that the effect of s. 88 of the Bankruptcy Act, 1869, is only to give priority to a sequestration issued by the trustee in the bankruptcy of a beneficed elergyman over a sequestration issued by an individual creditor in respect of a debt provable in the bankruptey, but that the section has no application as between segnestrations issued by the trustees in two different bank-rupteies. Chick, Ex parte, Meredith, In re, 11 Ch. D. 731—C. A.

Bankruptcy of Incumbent-Effect of Order of Discharge. - In a sequestration of the benefice of a bankrupt elergyman, where the debts provable in the bankruptcy were nupaid, although the bankrupt had obtained his order of discharge: -Held, that the order of discharge did not entitle the debtor to the income of his benefice. Lawrence v. Adams, 75 L. T. 410.

— Inability of Ordinary to relax Sequestration where Bankruptcy discharged. The ordinary has no jurisdiction to relax the sequestration of the benefice of a bankrupt clergyman if the debts provable in the bankruptcy are unpaid, although the bankrupt has obtained his order of discharge. Lawrence, In re, [1896] P.

Action for Account.]—A vicar suffered judgment to be entered up against him for a debt in virtue of which the tithes, rents, and profits of the vicarage were sequestered; after the sequestration had continued for some time, the vicar filed a bill against the judgment creditor, the sequestrator, and the bishop, praying that an account might be taken of the tithes, rents, and profits received by the sequestrator, and the payments thereout to the judgment creditor; and that upon payment of what should be found due to the creditor, he might be ordered to enter up of sequestration might be discharged:—Held, balance of profits of the benefice which have that the bill must be dismissed with costs against accrued during the vacancy. Russell v. Lay, the bishop and the sequestrator on the ground 66 L. J., Q. B. 582. of want of privity, and against the judgment creditor on the ground that the matter was one entirely for the court of common law in which the judgment was entered up, and that the Court of Chancery had no jurisdiction to decree an account to be taken in such a case. Williams v. Icimey, 23 L. T. 100.

A suit is sustainable for an account on foot of a sequestration over a benefice in the diocese, against the personal representatives of two successive bishops and against the present bishop, on the allegation of loss to the creditor by the default of the se questrator during their respective bishopries. Quere, if a sequestration, not issued for ever be received and paid to the vicar of the until the levari on which it is founded is out vicarage in augmentation thereof." In 1841 a of return, be not void, although the benefice was in the bishop's hands under a prior sequestration. Hogg v. Garrett, 12 Ir. Eq. R. 559.

A sequestrator being in possession of a rectory, under a sequestration issued by a creditor of the rector, a second creditor, having obtained a second sequestration, is entitled to an account in conity against the first sequestrator, and payment of the surplus after satisfaction of the first creditor; nor are prior incumbrancers, who have

19 R. R. 52.

Bill by a vicar against a sequestrator for an account of profits during the vacancy, the bishop must be a party. Jones v. Barret, Bunb. 192.

Profits of Benefice of Bankrupt before. ]-The profits of a benefice of a bankrupt clergyman do not vest in the assignces under 24 & 25 Viet. c, 134, s, 135, until the assignees have obtained a sequestration and the same has been published. Sequestration and the same has been profished. Hopkins v. Clarke, 5 B. & S. 753; 33 L. J., Q. B. 334; 10 Jur. (N.S.) 1071; 11 L. T. 204; 12 W. R. 1029—Ex. Ch.

Fruits of Benefice during.]-When a living is vacant by reason of the suspension of a clerk under sentence founded on proceedings under the Church Discipline Act (3 & 4 Viet. c. 86), and the proceeds have been sequestrated, the fruits of the sequestration belong to the bishop, as chief pastor of the church, subject to the duty of providing for the services. Thakeham, In re, L. R. 12 Eq. 494; 24 L. T. 902; 19 W. R. 1001.

Queen's Bench, a sequestrator had been regularly appointed and was in receipt of the profits of a vicarage, and afterwards a second sequestration to a different sequestrator was issued and published by virtue of a decree of suspension for eighteen mouths pronounced in a proceeding in the Arches Court against the viear under the Church Discipline Act :- Held, that such second sequestration had the effect of suspending, from the time of its publication, all right to receive the profits of the vicarage under the first sequestra-tion. Bunter or Fisher v. Cresswell, 14 Q. B. 825; 19 L. J., Q. B. 357; 14 Jur. 692.

the sequestrator of a vacant ecclesiastical benefice, necessary repairs to the buildings at 1401, and

Arrears of Income as between Vicar and Sequestrators.] — A. in 1763 bequeathed the residue of her personal estate to trustees, "for the sole use and benefit of the vicar for the time being of the vicarage of N. . . . . such vicar for the time being, in the forenoon of every 21st June for ever, preaching in the parish church, immediately after divine service, an anniversary sermon in commemoration of her and of that her begnest." The testatrix also directed that the yearly or other dividends or proceeds of the whole of her residuum should from time to time vicar was duly instituted; but he was ignorant of the existence of the bequest, and of the duty thereby imposed on him, and no sermons were prenched by him. In 1847 a sequestration was issued against him. In 1852 he took the benefit of the Insolvent Debtors Act, and an assignee of his estate and effects was appointed. In 1858 the vicar became aware of the bequest, and the preaching of the sermons was resumed. In 1863 there was a large sum of money in the hands of not obtained sequestration, necessary parties to the trustees, representing arrears of the dividends the suit. Caddington v. Withy, 2 Swaust. 174; on the estate accrued from 1841 to 1858. Thecourt assumed the assent of the ordinary. Upon the question who was entitled to such sum :-Held, that the vicar was entitled to so much of the sum as represented the arrears accrued prior to 1847, and the sequestrators to that which represented the arrears accrued subsequently to that period. Parker, In re, 32 Beav. 654; 9 L. T. 72; 11 W. R. 937.

> Sequestrator-Charges of. ]-A sequestrator has no right to charge the estate with the expense of andit dinners if the incumbent expressly forbids it; but, by lying by and not objecting at the time, the incumbent cannot afterwards object to such charge if it is the practice to give such dinners to the payers of tithe. Sanders v. Penleuse, 1

Where the bishop appointed a stranger to act as curate during the sequestration, at a salary, with the use of the parsonage-house, the payment of the rates of the house out of the estate by the sequestrator seems reasonable; but the incumbent who had acted as curate on the same terms. and seen the estate applied to the payment of — Effect of Second.]—Where, under a writ such rates, cannot object to such payment if a of sequestrari facias issued out of the Court of stranger afterwards is appointed curate. Ib.

> - Right to maintain Action, ]-A person who has been appointed sequestrator of an ecclesiastical benefice under a sequestrari facias has no such interest in the profits of the living as will entitle him to maintain an action against a party who wrongfully takes them. Harding v. Hall, 10 M, & W. 42; 11 L. J., Ex. 354; 6 Jur. 649.

— Repairs done by.]—A benefice having been sequestrated under a writ of sequestra-tion in an action, an inspection of the glebe buildings by the diocesan surveyor was directed Profits accrued during Yacaney—Claim by the bishop, and a report made by such sur-by Succeeding Incumbent.]—The common-law veyor under the Ecclesiastical Diapidations action for money had and received lies against Jack 1871. The report estimated the cost of the at the suit of the succeeding incumbent, for the no objections were taken to such report under s. 16 of the act. The sequestrator, being subsequently of opinion that the repairs provided for by the surveyor's report were inadequate, expended on the repairs of the buildings a much larger sum than 140. No inspection or report, except as before mentioned, was ordered by the bishop or made by the surveyor:—Held, that the sequestrator had no authority to expend on repairs out of the proceeds of the benefice a larger sum than that estimated as necessary by the surveyor's report under the Ecclesiastical Dilapidations Act, 1871, and 'that such expenditure must be disallowed. Kinher v. Pararticini, 54 L. J., Q. B. 471, 15 Q. B. D. 222; 53 L. 7. 299; 33 W. R. 907.

— Liability for Costa of Repairs.]—When a benefice was under a sequestration at the death of the incumbent, and after the avoidance the buildings were inspected by the diocesan acreyor, and the bishop nade an order pursuant to the Ecclesiastical Dilapidations Act, 1871, s.4s, stating the cost of the requirs required, and declaring the executors or administrators of the incumbent liable for the same:—Held, that the sequestrator was not liable, under s. 53, for the cost of the repairs, and was not cutified to deduct the same from the profits of the benefice in his hands. Jones v. Dangerfield, 43: L. J., Ch. 161; 1 Ch. D. 433; 34 L. T. 887; 24 W. R. 208.

Writ—Issue of.]—On the death of a bishop, to whom a writ of sequestration has been directed, no fresh writ of sequestration need issue, and his successor is bound to return the writ. Phelps v. St. John, 3 C. L. R. 478; 10 Ex. 895; 24 L. J., Ex. 171.

Where the sheriff returned to a capies utdeagating that the defendant had no goods nor any lay fee within his balliwick, but that he was a beneficed elergyman, not stating the name or situation of the benefice, the court refused a writ of sequestration, but suggested a notion for a rule calling upon the sheriff to amend his return.

Rew v. Powell, 1 M. S. W. 321; 5 L. J., EX. 170. Where the sheriff returned to a capins utlagatum that the defendant had no goods nor any lay few without his balliwick, but that he was possessed of a rectory, the court awarded the writ of sequestration, although the shoriff did not return that he had seized the rectory into his bands. Rew v. Armetrong, 2 C. M. & R. 205; 3 D. P. C. 760; 5 Tyr. 752; 4 L. J., Ex. 167.

The defendant, a beneficed clerk, having falled to pay to the plaintiff his debt as ordered by the court, an attachment was issued against him, to which non est inventus was returned. The ordinary writ of sequestration was then issued, to which it was returned that the defendant had no lay property, and the court, on motion, ordered a writ of sequestrat facins de bonts ecclosiasticis to issue as of course, directed to the bishop of the diocese. Aller v. Williams, 2 Sm. & G. 455; 3 Eq. R. 67; 24 L. J., Ch. 160; 3 W. R. 83.

—— After partial Levy.]—A writ of sequestration may issue, notwithstanding a partial levy may have been made under a former writ; the elergyman having only a life estate in certain freehold rents, the sheriff could not make the usual return of nulla bona. Rabbittes v. Woodward, 20 L. T. 603. But see S. C., Ib. 778.

— Contumacy.]—Sequestration under 2 & 3 Will. 4, c. 93, against a party declared contumacious by the Ecclesiastical Court. Cooper v. Dodd, 15 Jur. 69.

— Provisional Assignee.]—A provisional assignee, in whom the estate and effects of a prisoner, who is a beneficed clergyman, are vested by an order of the Insolvent Debtors Court under 1 & 2 Vict. c. 110, s. 37, has power to apply for a sequestration under s. 55. Smith v. Wetherell, 2 B. O. Rep. 179, 5 D. & L. 278; 17 L. J., Q. B. 57; 12 Jur. 53.

Effect of Interim Order for Protection.]
—An Interim order for protection under 5 & 6
Vict. c. 116, and 7 & 8 Vict. e. 96, operated only
to protect the person of the petitioner and such
of his property as by those acts vested in his
assigness, and, therefore, such order did not
prevent a creditor from issuing a sequestrari
facias to seize the profits of a benefice after the
insolvent's petition and before the final order.

Parry v. Jones, 1 C. B. (N.S.) 339; 26 L. J.,
C. P. 36; 2 Jun. (N.S.) 190.

— After Discharge.]—The fact that a baukrupt beneficed elergyman has obtained an order of discharge does not prevent the trustee in the bankruptey from issuing a sequestration of the profits of the benefice which the bankrupt held at the time of the bankruptey. Chick, Ex parte, Mercdith, In re, 11 Ch. D. 781.—C. A.

— Priority of.]—When several writs of levari facias are delivered to the bishop's officer, he is bound to issue the writs of sequestration thereon in the order of time in which the writs of levari facias were delivered to him to be executed, and not according to the date of their teste. Sturgis v. Lundow (Bishop), 7 El. & Bl. 542; 26 L. J., Q. B. 20; 3 Jun. (K.S.) 564.

— Statute of Frauds.]—Writs of leverifacias are not within the 16th section of the Statute of Frauds. Ib.

Two Benefices, One Writ. ]-A judgment of outlawry was obtained against a clergyman and the incumbent of two benefices situate in the counties of Stafford and Salop. Special writs of capias atlagatum issued at the suit of the plaintiff, directed to the same sheriffs, to which they respectively returned the inquisitions made under those writs into the treasury of King's Bench, and stated that the defendant had no goods, &c., but that he had a benefice in each county and within one diocese :- Held, that one writ of sequestrari facias was sufficient, there being only one suit and one defendant, though two inquisitions had been rendered necessary by the situation of the benefices in different counties. Hinde, In re, 1 Tyr. 347; 1 C. & J. 389; 1 D. P. C. 286; 9 L. J. (o.s.) Ex. 107.

— Publication of.]—It is not necessary that a writ of sequestration should be published before the return day of the levari facins upon which it is founded, or that a copy should be fixed to the church door where that is not the usual mode of publication. Barrettv. Apperley, 6 B. & C. 630; 9 D. & R. 639.

- Effect of ]-A sequestration issued by the assignces of an insolvent incumbent operates

only from the time of publication, and does not can apply for an account of the moneys received entitle the assignces to the arrears of composition in a bigner of the scale before publication. White v. lield by an insolvent in his diocese. Majfatt, Em Bishap. 1 C. M. & R. 505; 3 D. P. C. 234; 5 parte, W. W. & D. 358; 1 Jur. 453. Tyr. 90: 4 L. J., Ex. 50.

property of the incumbent from the time of such lodging. Ib.

- Duration of. ]-A writ of sequestration is a continuing execution, and remains in force until the debt and costs are realised, without reference to the time at which the writ is nominally returned, or until the bishop is ruled to return it, which puts an end to the writ. Pholps v. St. John, 3 C. L. R. 478; 10 Ex. 895; 24 L. J., Ex. 171.

Though a levari facias de bonis ecclesiasticis is a continuing execution, and a levy may be made after it is returnable; yet, if it is actually returned, the bishop's authority is at an end. Marsh v. Faucett, 2 H. Bl. 582; 3 R. R. 510.

The proper way is to rule the bishop from time to time, to ascertain what he has levied. Ib.

- Validity.]—The parish of H., which had been included in the diocese of L., was by an order in council in 1836 transferred to the diocese of W. In 1843 a sequestration was issued by the bishop of L., founded upon a writ of levari facias, against the vicar of H., under which the sequestrator received the rents up to Lady-day, 1848. No other writ of sequestration had at that time been issued by the bishop of We into the parish of H. In an action by the vicer of H. to recover the rent of certain premises due at Lady-day, 1848:—Held, that the issuing the sequestration was an act of jurisdiction or authority exercised by the bishop of L., to whose diocese the parish formerly belonged, and that it was rendered valid by 10 & 11 Vict. e. 98, s. 8. Powell v. Hibbert, 15 Q. B. 129; 19 L. J., Q. B. 347; 14 Jur. 866.

- Setting Aside. ]-Judgment having been obtained against a beneficed clergyman, a writ of sequestration was issued against him on 17th August, at which time no fl. fa. had been issued. On 9th October a fi, fa. against him was returned by the sheriff nulla bona, but not that he was a beneficed clerk. The rule to set aside the writ was moved for on 22nd November :-Held, that the writ was irregular, and that the application to set it aside was made in sufficient time. Bromage v. Vaughan, 7 Ex. 223; 21 L. J.,

Return to Writ.]-It is a good objection to a rule requiring a bishop to make his return to a levari facias, obtained by an attorney not employed in the cause originally, that the order for changing the attorney has not been served on the bishop. Phillips v. Berkeley, 5 D. P. C. 279; W. W. & D. 50.

A bishop cannot be required to make a return of what has been levied under a levari facias previously to his coming into office. Ib.

Upon the translation of a bishop to another diocese pending a sequestration issued by him, the return to a fi. fa. de bonis ecclesiasticis is properly made by his successor. *Dawson* v. *Symmons*, 12 Q. B. 830; 18 L. J., Q. B. 34; 12 Jur. 1072.

Lodging a levari facias with the registrar of \_\_\_\_\_ Before Execution satisfied.]—A levari the bishop of the diocese does not bind the facias having been returned by the bishop, and filed, before the execution was satisfied, the court granted a rule absolute, in the first in-stance, that the writ should be taken off the file and sent back to the bishop, and that he should certify to the court what he had done under it. Alderton v. St. Aubyn, 6 M. & W. 150; 8 D. P. C. 223; 9 L. J., Ex. 60; 4 Jur. 53.

> —— Sufficiency of ]—A levari facias having been issued in 1834, the bishop, in 1838, was ruled to return what sums he had from time to time levied under the writ; he made a return, setting out certain items of receipt and disbursement:—Held, insufficient, inasmuch as it did not state that the items of receipt were all that had been received, or that payments had been actually made. Alchin v. Hophins, 1 Arn. 399; 7 D. P. C. 146; 3 Jur. 11.

> - Within what Time Application should be made.]—Where no wrongful act is shewn, it is too late, three years after satisfaction of a sequestrari facias, to call upon the bishop to certify to the court what has been done under the writ. Billing v. St. Aubyn, 7 Jur. (N.S.) 775 ; 4 L. T. 404.

> Deductions from Sum levied.]-A return having been made by a bishop to a sequestrari facias de bonis ecclesiasticis, with the amounts annexed, which had been filed in the bishop's court after suit, the Court of Exchequer of Pleas referred it to the master to examine the deductions made from the sum levied under the writ, and to say whether they were proper to be allowed. Morris v. Phelps, 4 Ex. 895; 19 L. J., Ex. 165.

> When a return is made by a bishop to a fieri facias de bonis ecclesiasticis issued either to himself or his predecessor, the Court of Queen's Bench will refer it to the master to say whether the deductions made from the sum levied under the writ in respect of the sequestrator's charges are proper to be allowed. Dawson v. Symmons, 12 Q. B. 830; 18 L. J., Q. B. 34; 12 Jur. 1072.

Practice—Service of Monition.]—Where an incumbent of a benefice cannot be found, service of a copy of a monition, by leaving it at the parsonage-house, is sufficient whereon to found a sequestration, notwithstanding the incumbent does not habitually reside in it, the officiating minister being the sequestrator, and having the original in his possession. Green v. Cobden, 2 Bing, (N.O.) 627; 3 Scott, 80; 2 Hodges, 6; 5 L. J., C. P. 209.

\_\_\_\_Proof.]—The production of the judgment-roll, and of the writs of execution issued thereupon, one of which is of sequestrari facias to the bishop, is good evidence that a benefice has been sequestered, although the judgment-roll does not contain an award of the latter writ. Pack v. Tarpley, 1 P. & D. 478; 9 A. & E. 468; 2 W. W. & H. 88; 8 L. J., M. C. 93.

- Receiver.]-A receiver will not be ap-— Who can Apply for. ]—The assignces of an insolvent debtor only, and not his creditors, pointed over an ecclesiastical benefice with cure issued and the bishop was not a party to the suit. M Curdy v. Chichester, 2 Jones, 358.

A receiver appointed of the profits of a rectory under sequestration, and an injunction granted against enforcing sequestration, Silvery, Norwich (Bishop), 3 Swanst. 112.

A third incumbrancer on a rectory having obtained a sequestration, a receiver was appointed at the instance of the second incumbrancer. White v. Peterborough (Bishop), 3 Swanst. 109; 19 R. R. 183.

Where the plaintiff, as mortgagec of the tithe rent-charge, filed a bill against the incumbent and a sequestration creditor in possession, and the answer of the creditor submitted that the mortgage was void under the 10 & 11 Car. 1. c. 3 (lr.): the court appointed a receiver. Kenny v. Cumming, Fl. & K. 321.

— Injunction.]—Sequestrators forcibly dis-possessed, restored by injunction. Pelham (Lord) v. Newcastle (Duchess), 3 Swanst, 289.

 Cause of Action passing to Assignees. ]-In an action by an insolvent beneficed clergyman against an attorney, the court charged negligence in setting aside a sequestrari facias issued against the benefice, by reason whereof the writ remained in force longer than it otherwise would have done, whereby the rents were lost:—Held, that the cause of action passed to the assignees. Wetherell v. Julius, 10 C. B. 267; 19 L. J., C. P. 367; 14 Jur. 700.

—— Sequestrator, When Party.]—Sequestrators in possession of a benefice, and who have been appointed merely for the purpose of paying curates, &c., are not necessary parties to a bill by an annuitant whose annuity is charged upon the benefice. Stannus v. Robinson, 2 Jones, 498.

# XV. CHURCHES AND CHAPELS.

# 1. GENERALLY,

Antiquity. |-- A parochial chapelry must have been coeval with the parish, that is, immemorial, but, in the absence of evidence to the contrary, its existence may be inferred from modern usage, like other ancient rights and exemptions. v. Mostyn, 5 Ex. 69; 19 L. J., Ex. 249.

A church and chapel were formerly synonymous terms. A church may be presented to as a chapel. and yet remain in right a church ; and a chapel may commence a church by being presented and instituted to as such. Yuteman v. Cux, 2 Bro. P. C. 191.

Chapelry. - A chapelry in 1 & 2 Will. 4, c. 38, s. 14, means a parochial chapelry, strictly so called, not merely a district recently treated as a parochial chapelry. Carr v. Mostyn, 5 Ex. 69; 19 L. J., Ex. 249.

Where parishioners, dwelling within a chapelry, contribute to the repairs of the parish church, it is strong, but not conclusive, evidence that the

The question, whether a chapelry is a perpetual curacy or not, may be judged of by three con-

of souls in a case where no sequestration had of the inhabitants of the district; and thirdly, as to the rights and dues belonging to the curate such a curate not removable at pleasure. A bill is the proper mode of establishing a right to a perpetual curacy, &c., and not an information in the name of the attorney-general, except in the case of charities. Angmentations of vicarages, &c., form such an exception. Att.-Gen. v. Brereton, 2 Ves. 425.

> Church whether a "House"-" Owner." ]-A church is a house, and the vicar an owner, within the meaning of the Folkestone Improvement Act, 1855 (wherewith the Towns Improvement Clauses Act, 1847, is incorporated); and, where the vicar was proceeding to build a church upon a site where, under that act, the corporation had power to prescribe the line of building, but the corporation did not actually prescribe the line of building until after the foundations of the church were laid and the walls commenced :- Held, that the corporation was too late in prescribing the line of building, and was not entitled, though offering compensation, to have the church set back or to restrain the vicar from building as he proposed. Follestone Corporation v. Woodward, 42 L. J., Ch. 782; L. R. 15 Eq. 159; 27 L. T. 574; 21 W. R. 97.

> By the term "houses," in s. 105 of the Metropolis Local Management Act, 1855, and the term "land," in s. 77 of the Metropolis Local Management Act, 1862, it is intended to include (with certain exceptions) all the frontage of a new street, so as to make all the owners of the frontage liable to contribute to the expense of paving the new street. The word "house" includes every building which is capable of being used as a human habitation. If a building, which is physically capable of being so used, is prevented, either by common law or statute, from being ever put to such a use, it is exempted from the liability to contribute to the expense. A consecrated church of the Established Church of England is exempted, because, by reason of its consecration, it becomes by the common law for ever incapable of being used as a habitation for man. Wright v. Ingle, 55 L. J., M. C. 17; 16 Q. B. D. 379; 54 L. T. 511; 34 W. R. 220; 50 J. P. 436-C. A.

> Wesleyan Chapel.]—But a leasehold chapel fronting on a new street, the chapel being vested in trustees, on trust to permit it to be used as a place of religious worship by a congregation of Wesleyans, is a house within the meaning of s. 105, for, by the consent of the landlord, the trustees, and the cestuis que trustent, the trusts might at any moment be put an end to:-Held, also, that the trustees were the "owners" of the chapel, and as such liable to contribute to the expense of paving the new street. Ib.

- Dissenting Chapel. The appellants were trustees of a chapel which abutted on and formed part of a new street, within the meaning of 18 & 19 Vict. c. 120. The chapel was registered As scaling, does not not contain the preference unit in the state of the scaling does not be contained as the inhabitants as a place of worship, but had not been consected, and not a separate and distinct crated, and there was no dedication of the hand chaptery. Dant v. Rob. 1. Y. & C. 1. vestry, and there were also rooms for a caretaker, besides lecture and schoolrooms underneath the carring drountstances; first, whether there are lorder in the longer in the longer in the longer in the chapel in the longer in the chapel in the longer in the chapel in the longer in and were liable to contribute to the expense of the incumbent. Winchester (Bishop) v. Rugg, making and paving the street. Clipper v. St. 37 L. J., Ecc. 11.

Mary. Lelington. Vestry. 50 L. J., M. C. 59; 44 L. T. 605; 29 W. R. 538; 45 J. P. 570.

---- Lessee of Chapel.]—The appellants, being seised in fee of a building used as a chapel, leased it for twenty-one years to N., who was then in possession of it:—Held, that N. was the owner within the meaning of 18 & 19 Viet, c. 122, s. 3, and, therefore, an order upon the appellants for expenses incurred by the commissioners under s. 73 (relating to dangerous structures) was bad. Mourilyan v. Labalmondiere, 1 El. & Él. 533; 30 L. J., M. C. 95; 7 Jur. (N.S.) 627; 3 L. T. 668; 9 W. R. 341. See Reg. v. Lee, post, col. 1302.

# 2. Consecration.

New Church-Publication of Poor-rate. ]-An ancient chapel in a township having fallen into decay, a new church was built and consecrated in 1832, and divine service had been regularly performed there since, but parish meetings were sometimes held, and christenings and burials performed, in the chapel. There was also a schoolhouse in the township where divine service was performed on Sundays:-Held, that the new church was de facto the church of the place, and that the publication of a poor-rate by affixing the notice required by 7 Will. 4 & 1 Vict. c. 45, at or near the principal door only, was sufficient. Ormerod v. Chadwick, 16 M. & W. 367; 16 L. J., M. C. 143.

Non-Consecration.] - Sackville College had attached to it a building called the Chapel, which did not appear to have been consecrated, and in which the warden, a elergyman, read prayers and performed other divine offices, according to the forms prescribed in the Book of Common Prayer, and the rites and ceremonies of the United Church of England and Ireland, without the licence, and, subsequently, contrary to the inhibition, of the bishop of the diocese. The inmates of the college attended, and sometimes their friends, but strangers were not allowed to be present at the services :- Held, that such chapel was not a private house; that officiating there was a public officiating; and that the warden had, therefore, committed an ecclesiastical offence, for which he was liable to ecclesiastical ceusure. Freeland v. Neale, 1 Rob. Ecc. Rep. 648; 12 Jur. 635.

After rebuilding Church. - When an old parish church is pulled down and rebuilt on the same site, the new building does not become a parish church without consecration, and the Ecclesiastical Court has no jurisdiction to entertain a suit with respect to the pews or seats in Battiscombe v. Ere, 9 Jur. such a building. (N.S.) 210 ; 7 L. T. 697.

But, when a church has not been entirely destroyed or pulled down, there is no need of

meanment of a pullding within his parish, if 36 × 37 vict. c. 50 (Places of Worship Sites Act), the bishop overules such objection, and proceeds is. 1. Satishury (Marquis) and Ecclesiastical to consecrate the building, such consecration Commissioners, J. iv. pt. 45 L. J., Ch. 250; 2 Ch. D. will not be invalid by reason of the dissent of 29; 34 L. T. 5; 24 W. R. 380—C. A.

as Burial-Ground. -The guardians of the poor of a parish, being owners in fee of land, on part of which a parish workhouse had been erected, and another part of which had been consecrated as a burial-ground, prayed a faculty in the Consistory Court of London to authorise the erection of a chanel for the immates of the workhouse, and other buildings connected with the workhouse, on a part of the consecrated ground in which no bodies had been buried. No sentence had been pronounced by the Consistory Court; and a stranger to the parish, and having no interest in the matter, obtained a rule for a prohibition to prohibit proceedings in the suit. The court discharged the rule: first, because, although a faculty ought not to be granted to apply consecrated ground to seenlar purposes, yet a distinc-tion might be made as to the chapel being an ecclesiastical purpose; and it was not to be presumed that the inferior court would exceed its jurisdiction and grant the faculty for both the purposes prayed; and, secondly, because, in the exercise of its discretion, the court would not Twiss, 10 B. & S. 298; 38 L. J., Q. B. 228; L. R. 4 Q. B. 407; 20 L. T. 522; 17 W. R. 765.

Dedication. - An ancient church of great architectural beauty belonged to a corporation as trustees for a charity. The church had been granted by the Crown in the sixteenth century to the use of the charity, but soon afterwards it was, and had ever since been, used by the inhabitants of the district as a parish church, the charity not requiring the whole of the accommodation. In 1846 a railway company obtained their act of parliament; and as the line passed over the site of the church it was provided by the act that the company should not make their railway till they had agreed with the corporation on a plan for the removal and rebuilding of the church on some neighbouring site in the same style and model; but it should be competent to the company to pay a sum as compensation in lien of the foregoing obligation. The company paid 17,000% as compensation:—Held, that, in consequence of the ancient user under the grant, there had been a dedication of the church for the use of the neighbouring inhabitants, concurrently with user by the charity. Clephane v. Edinburgh Magistrates, 4 Macq. H. L. Cas. 603; 10 L. T.

Held, also, that the corporation was not bound to rebuild the church in the old style and model, but merely to build a church giving the same accommodation, and to apply the surplus of the money for the use of the charity. Ib.

### S. SITE.

reconsecration. Purker v. Leach. 4 Moore, P. C. (X.S.) 180; 36 L. A., P. C. 26; L. R. 1 P. C. 312; a tenant for life of a settled estate cannot, as 12 Jun. (N.S.) 911; 15 L. T. 370; 15 W. R. 204; guardian by nature of his infant son, who is entitled to the inheritance in remainder, concur Liscent of Incumbent to.] - Although the on the son's behalf in a grant by himself of part incumbent of a parish has a right to object to of the settled estate as a site for a church, under

# 4. PRIVATE CHAPELS.

Ownership of . - Acts of user and reparation from time immemorial will support a prescriptive title in the lord of a manor to the exclusive use and occupation of a private chapel annexed to a parish church, Churton v. Frewen, 35 L. J., Ch. 692; L. R. 2 Eq. 634; 12 Jur. (N.S.) 879; 14 L. T. 846.

A lord of a manor claimed exclusive right to a chapel annexed to the parish church, as appendant or appurtenant to the manor or the manorhonse. He shewed that from time immemorial the lords of the manor had repaired, and had been held liable to repair, the chapel; that previous lords or their permissees had been buried therein; and that monuments had been erected by the lords as of right, and without permission asked :- Held, that though the freehold was vested in the rector, and not in the elaimant, still he was entitled to such exclusive use and occupation. Ib.

Held, also, that this right was not affected by the fact of his non-residence in the parish, and that such right need not necessarily be claimed

in respect of any house in the parish. Ib.

It is necessary, in a claim of prescriptive right to a chapel, to allege and prove reparation; and, in such a case as the claim to a chapel, the court will presume that at the time of its foundation such special rights were reserved by the founder in consideration of his founding the church. Ib.

- Right of Proprietor of Unconsecrated. to remove Person therefrom.]—A proprietor of an unconsecrated chapel, though open for the performance of divine service according to the rites of the established church, has a right to request anyone therein to depart, and if he refuses, to remove him by ordinary legal measures. Heuth v. Bosanquet, 3 L. T. 290; S W. R. 35.

Licences to Officiate.]—A bishop granted a licence to a clerk to officiate as minister in an unconsecrated proprietary chapel in a parish within the diocese; the licence was granted with the consent of the incumbent of the parish. Afterwards the bishop died, and the incumbent died, and the succeeding incumbent forbade the clerk to minister in the parish. The clerk insisted on his right to officiate in the chapel, and the succeeding incumbent promoted crimiand the successing inclined by hard the clerk under the Church Discipline Act, and prayed that he should be moutished to abstain from officiating in the chapel:—Held, that the licence was invalid as against the promoter, and did not, under the circumstances, authorise the clerk to officiate in the chapel. Richards v. Fincher, 43 L. J., Ecc. 21; L. R. 4 Ecc. 255.

of Charitable Institution.]—The trustee of a charity is not authorised by the Church Buildings Act to convey to the commissioners the private chapel of a charitable foundation held by him as a trustee for the benefit of the charity.

Att.-Gen.v. Manchester (Hishop), L. R. 3 Eq. 436;
15 L. T. 646; 15 W. R. 673.

Such a conveyance was declared to be a breach of trust, and a reconveyance ordered, although the commissioners had caused the chapel to be chapel, the ecclesiastical commissioners were

church, and caused a district to be assigned to it as a parish church under an order in council. Ib.

The acts of public functionaries who exceed the bounds of their authority, by assuming a power over property which the law does not give them, whether a corporation or individuals, are treated as the acts of private persons dealing with property without legal authority. Ih,

Of Ease.]—A private act, after providing for the sale of glebe land, and the erection of an additional church with part of the proceeds, directed that the curate of the new church should, during the incumbency of the then rector, be appointed by him; and that, after his death, avoidance or resignation, the new church should become the principal church, with all the rights, immunities and privileges appertaining to a mother church, and the then church should become and be deemed a chapel-of-ease thereto, to be served by a minister capable of having cure of souls; and that the patronage of or right of presentation to the chapel, as well as the patronage of or right of presentation to the new church, should be vested in the patron of the rectory, his heirs and assigns; so nevertheless that the minister of the chapel should not be removable at pleasure :- Held, that the chapel-of-ease thus created by the act was thereby made presentative and not donative. Reg. v. Foley, 2 C. B. 664: 15 L. J., C. P. 108.

Proprietary - " Regular Clergyman."] -Where a lease of a proprietary chapel contained a covenant against allowing anyone who was not a "regular elergyman of the Church of England" from officiating therein:—Held, that "regular clergyman" meant a person who could officiate in the chapel without being guilty of irregularity, and that a clergyman of the Church of England who had been inhibited by the bishop from performing divine service within the diocese in which the chapel was situate would be guilty of irregularity by performing divine service in the chapel in defiance of the inhibition and without the consent of the vicar of the parish, and must be restrained by injunction from continuing to so officiate. Foundling from continuing to so officiate. Hospital Governors v. Garrett, 47 L. T. 280.

# 5. DISTRICT CHURCHES AND CHAPELS.

# a. Creation and Formation.

Under 59 Geo, 3, c. 134. ]-An ancient chapelry, situate within a large parish, had from time immemorial had a separate church and churchyard, and separate churchwardens and church rates, and in which the incumbent had performed marriages, christenings, churchings and burials, and retained the fees to his own use. The right of presentation to the chapelry (which was a perpetual curacy) was in the rector of the parish. The chapelry was described as a parish in the ecclesiastical survey, but in recent local acts of parliament the church of the chapelry was referred to as a church, or ancient chapel-of-ease : -Held, that the chapetry was not a distinct parish, and that, under the power conferred by 59 Geo. 3, c. 134, s. 16, authorising the assignment of a district to a chapel-of-ease, or parochial consecrated as a parish church, and had caused the grant of the consecrated as a parish church, and had caused the parson who was chaplain of the charity and to again a particular district to the appointed the incumbent, as of a parish longer Tuckense v. Alexander, 2 Dr. acism.

821; 11 W. R. 938.

Where a district chapelry had been carved out of an ancient parochial chapelry, and part the same fees as were taken in the mother of such district chapelry had been formed into a Peel parish, and the incumbent of the ancient 19 & 20 Vict. c. 104, s. 14, was not a licence by parochial chapelry claimed to be entitled to the hishop, which, by 6 & 7 Will: 4, c. 85, s. 32, is publish bunys and celebrate marriages between revocable, but an authority under an order of publish banus and celebrate marriages between Peel parish, and to receive the fees for such offices :- Held, that, when marriages were sanctioned in the chapel attached to the district chapelry, the incumbent of the district chapelry had an exclusive right to publish banns and celebrate marriages between persons residing in the district chapelry, and to receive the fees for so doing, and that the creation of the Peel parish out of the district chapelry did not restore the right of the incumbent of the ancient parochial c. 38, s. 16, and not in the parishioners, under chapelry, and therefore that (whatever might 6 & 7 Vict. c. 37, s. 15. Ib. be the rights as between the incumbents of the district parish and Peel parish) the incumbent of the ancient parochial chapelry had no right to perform such offices or receive the fees in the Peel parish. Ib.

A district formed under 59 Geo. 3, c. 134, and called a consolidated chapelry, is governed by the same regulations as a district formed under 58 Geo. 3, c. 45, and called a district parish. Jones v. Gough, 3 Moore, P. C. (N.S.) 1; 11 Jur. (N.S.) 251; 12 L. T. 31; 13 W. R. 509.

Inrolment of Name and Description of Boundaries.]-A consolidated chaptry, formed by order in council, on the representation of the church building commissioners under 8 & 9 Vict. c. 70, s. 9, the boundaries of which are set forth in the order, is duly constituted without of a district church. Ib. involment of the name and description of boundaries in chancery, even supposing it rendered essential by 59 Geo. 3, c. 184, s. 6. Reg. v. South Wradd Overwere, 5 B. & S. 301; 33 L. J. M. C. 193; 10 Jur. (N.S.) 1099; 10 L. T. 498; 12 W. R. 873.

Assignment of District to Chapel vested in Trustees.]—Where an order in council assigned to a chapel, originally built as a chapel-of-ease to a parish church, and vested in trustees upon trusts declared by a deed, a definite part of the parish as a district :- Held, that the effect of the order in council was to withdraw the chapel from the trusts declared by the deed, to make it a benefice, and the perpetual curate thereof a beneficed clergyman; and, there having been an avoidance of the parish church, that the new vicar had no right to receive the pew-rents of, or to appoint the clerk or sexton for, the new benefice. Fitzgerald v. Fitzpatrick, 33 L. J., Ch. 670; 10 Jur. (N.S.) 913; 10 L. T. 477; 12

Licence of Bishop for Marriages. ]-By 19 & 20 Vict. c. 104, s. 14, wheresover barns of matrimony, and the solemnisation of marriages, churchings and baptisms, are authorised to be published and performed in any church to which a district, and the purish chapel was declared a district shall belong, the incumbent of which to be the church of that district.—Held, that is entitled to the fees for the performance of 19 & 20 Vict. c. 104, s. 10, did not operate to a district shall belong the incumbent of which is entitled to the fees for the performance of such offices, such district shall be a distinct parish for ecclesiastical purposes, such as contemplated in 6 & 7 Vict. c. 37, s. 15. A new still remained in the vicar of the parish church was built and endowed, and had a district assigned to it, and a fund provided for the L. R. 3 C. P. 107; 17 L. T. 26; 16 W. R. 277 repairs of the church under 1 & 2 Will. 4, c. 38, Ex. Ch.

614; 32 L. J., Ch. 794; 9 Jur. (N.S.) 1026; 8 L. T. | and the bishop, under 6 & 7 Will. 4, c. 85, gave his licence for the publication of banns and the solemnisation of marriages there, and for taking church :-Held, that the authority intended by persons resident in such district chapelry and the commissioners, under 19 & 20 Vict. c. 104, s. 11, and therefore the district did not become a distinct parish within that section. Reg. v Perry, 3 El & El, 640; 30 L. J., Q. B. 141; 7 Jur. (N.S.) 655; 3 L. T. 885; 9 W. R. 383.

Held, therefore, upon a mandamus to the incumbent of this new church to summon a meeting of the inhabitants to elect a churchwarden, that the election was in the renters of pews in the new church, under 1 & 2 Will. 4,

Rights of Incumbent.]-An incumbent of a district parish created by a private act of parliament will not be allowed to restrain the incumbent of the mother church from publishing banns and celebrating marriages between persons resident in the district parish, nor from receiving ecclesiastical dues. Fitzgerald v. Champagys, 2 J. & H. 31; 30 L. J., Ch. 777; 7 Jur. (N.S.) 1006; 5 L. T. 233; 9 W. R. 850.

The provisions of a local act governing a district parish remain in force where they are not specially repealed by the Church Building

Acts. Ib.

The 7 & 8 Vict. c. 37, the 7 & 8 Vict. c. 94, and the 19 & 20 Vict. c. 104, considered in connection with a private local act, for the building

See also eases under FEES AND DUES, next sub-head.

Incumbent of, whether "Owner."]-The incumbent of a district church in the metropolis, although the freehold of each church is vested in him under the Church Building Acts, is not the "owner" of the church within the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122, Part. II, Dangerous Structures), so as to be personally liable for the expenses incurred by such church as a dangerous structure. Reg. v. Lee, 48 L. J., M. C. 22; 4 Q. B. D. 75; 39 L. T. 605; 27 W. R. 151. See Mourilyan v. Labalmondiere, ante, col. 1297.

Freehold in Incumbent.]—In 1816, under a local act, a new church was built in St. Paneras, which was to be the parish church, the old church being thereby converted into a parish chapel. In 1853, by an order in council, the original burial-place for the parish, which surrounded the old church, and also an additional ground provided under an earlier local act, were closed, and a cometery was provided for the whole parish. In 1863 that part of the parish in which the old church stood was turned into a vest the old burial-ground in the incumbent of - Right to County Vote. |-The incum-usual quarter-days, by even and equal portions, bent of a district chapelry had the freehold of beginning from Christmas-day, and, if the powthe church and its site, and, in virtue of his benefice, received fees to the value of more than forty shillings a year for marriages, churchings, and baptisms, performed within the church; -Held, that these fees were paid for the personal services of the incumbent, and not for the use of the church, and, therefore, did not arise out of land, and could not add to the value of the church and site (which of themselves were of no value), so as to entitle the claimant to be registered as a county voter for a freehold of the clear yearly value of 40s. Kirton v. Dear, 39 L. J., C. P. 36; L. R. 5 C. P. 217; 21 L. T. 532; 18 W. R. 144; 1 Hopw, & C. 349,

Stopping up Paths and Ways.]-Under 59 Geo. 3, c. 134, s. 39, the notice of stopping up useless ways must be given before making an order by the commissioners; and an order made and consented to by two justices before notice, and confirmed at the sessions, is bad. Reg. v. Arkwright, 12 Q. B. 960; 18 L. J., Q. B. 26; 13 Jnr. 300.

Although it appeared to be the intention of the legislature to give an appeal against an order of the commissioners under 59 Geo. 3, c. 134, they had not carried that intention into effect, Reg. v. Stock, 3 N. & P. 420; 8 A. & E. 405; 1 W. W. & H. 894.

Evidence of . - It does not of necessity follow that there cannot be a parochial chapel because there has not been a union of parishes in ancient times, nor any vicarage or mother church with which the chapel can be supposed to have been anciently united. And the circumstance that there is no vicarage may be accounted for by the fact of the rectory having been conveyed to a monastery prior to the statutes 15 R. 2 and 4 Hen. 4. Dent v. Rob. 1 Y. & C. L.

#### h. Fees and Dues.

Payable to Incumbent.]-Under 59 Geo. 3, c. 184, and by an order in council, a district, with a district church, was parted off from the parish of St. Matthew, Bethnal Green; but the order in conneil directed that, during the incumbency of the rector of St. Matthew, two-thirds of the fees to be received for marriages, baptisms, churchings, and burials at the district church should belong and be paid to the rector, and one-third to the district minister :- Held, that, where the minister had actually received the entire fees for marriages, &c., the rector might recover from him the two-thirds in an action for Q. B. 971; 18 L. J., Q. B. 59; 18 Jur. 297.

Held, also, that the act and order in council

did not oblige the minister to receive the fees, or any part of them, and that the rector could not maintain assumpsit against him on a supposed duty to take the fees and pay the rector his twothirds. Ib.

The minister of the church of a district which had been constituted under the 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, brought an action against the churchwardens for stipend due in respect of two quarters ending Michaelmas-day, 1867. By the assignment of his stipend out of the pewrents, which had been made by the commis-

rents did not in any one year produce 550l, after paying the clerk's salary, the minister should receive the residue of them in lien of 550l. The churchwardens had paid over to the plaintiff all the moneys that had been paid for pew-rents and had come to their hands prior to Michaelmas. but they held in their hands a sum of money which had been received at Michaelmas for pewrents payable in advance for the occupation of news for the ensuing half-year from Michaelmas to Lady-day. This sum of money amounted to 1201., a sum less than a quarter of 5501., the full amount of the stipend :-Held, first, that the minister might maintain an action against the churchwardens, by virtue of the provisions of the acts and assignment, for pew-rents in their hands applicable to payment of his stipend: but, secondly, that the churchwardens were entitled to retain in their hands the 1201, against the stipend accraing after Michaelmas, 1867; and, thirdly, that they were not liable in respect of new-rents received by their predecessors in office, but which had not come to their hands. Lloyd. v. Burrup, 38 L. J., Ex. 25; L. R. 4 Ex. 63; 19 L. T. 696.

The publication of the banns of marriage and the solemnisation of marriage are "ecclesiastical purposes" within the meaning of 19 & 20 Vict. 2. 104, s. 14, and, where a district becomes within this section a separate and distinct parish for ecclesiastical purposes, the incumbent of such parish has the exclusive right of performing the office of marriage in the case of persons resident in his parish, and of receiving the fees for such marriages, and consequently the incumbent of the mother parish has no right to solemnise such marriages in the church of the mother parish or to receive the fees for the same. *Fuller v. Alford*, 52 L. J., Q. B. 265; 10 Q. B. D. 418; 48 L. T. 431; 31 W. R. 522; 47 J. P. 423. See also Fitzgerald v. Champueys, col. 1302.

Meaning of "Incumbent" under 19 & 20 Vict. c, 104, s, 12.1—By 19 & 20 Vict. c, 104, s, 12, the ecclesinstical dues arising within the limits of a new district shall belong to the original incumbent until the first avoidance of such incumbency, or the relinquishment by such incumbent ; then to the incombent of the new district :-Held, that in case of a consolidated chapelry created under 59 Geo. 3, c. 134, the words "such incumbent" mean the incumbents of all the parishes out of which the chapelry has been formed. Janes v. Gaugh, 3 Moore, P. C. (N.S.) 1; 11 Jnr. (N.S.) 251; 12 L. T. 31; 13 W. R. 509.

— Relinquishment of Fees, how made.]— The voluntary relinquishment of fees required by 19 & 20 Vict. c. 104, s. 12, may be made without the execution of any written instrument.

Payable to Clerk and Sexton. |- In 1810 a chapel was purchased for the purpose of being consecrated as a chapel of ease in a parish. The chapel was consecrated under the provisions of a deed of the 25th August, 1810, by which the parish clerk and sexton were to be entitled to the fees for christenings, burials, and marriages in the chapel and cemetery, as if they had taken place in the mother church. By an order in sloners, it was provided that the stipend should council of the 2nd August, 1853, the chapel was be 550% and be paid quarterly, on the four most created a district chapelry, under 59 Geo. 8, council of the 2nd August, 1853, the chapel was

c. 134, s. 16. By s. 10, when any parish shall tion; and therefore a lay rector has not, as be divided under 58 Geo. 3, c. 45, or 59 Geo. 3, against the vicar, any right to the possession or c. 134, all fees belonging to the parish clerk or sexton respectively of any such parish, which shall thereafter arise, "in any district or division of any parish divided" under 58 Gco. 3, c. 45, shall belong to and be recoverable by the clerks and sextons of each of the divisions of the parish to which they shall be assigned. The clerk and sexton of the parish having brought an action for money had and received against the clerk and sexton of the chapel, for the fees received by him for christenings, burials, and marriages in the chapel:—Held, first, that the action for money had and received would lie for these fees. Anthon v. Roberts, 2 H. & N. 432; 26 L. J., Ex. 380.

Held, secondly, that this being a district chapelry was not within the operation of 59 Geo. 3, c. 134, s. 10, and therefore that the clerk and sexton of the parish was entitled to the fees

arising at the chapel. Ib.

By 13 & 14 Vict. c. 41, s. 6, passed for sub-dividing the parish of Manchester, it was provided that there should be paid to the rectors of the new parishes for marriages, churchings, and burials, the fees usually payable at the parish church during the continuance in office of the chaplains, minor eanons, and clerks of the parish church then being in office, or any of them; and that the rectors should pay the same to one of the chaplains or minor canons, who should distribute them to the persons entitled. All the chaplains and minor canons had ceased to hold office :- Held, that the mode by which the fees received by the rectors were to be paid to the parties entitled was only machinery appointed by the act for the purpose, and, there being no chaplains or minor canons remaining through whom it could be carried out, the parish clerk was entitled to recover by action from the rector the amount due to him. Nichols v. Davis, 38 L. J., C. P. 127; L. R. 4 C. P. 80; 17 W. R. 291.

# c. Rating.

Paving.]-A district church erected under 6 & 7 Vict. c. 37, is not exempt from being rated under 50 Geo. 3, c. clxix. and 57 Geo. 3, c. xxix. (St. Luke's, Middlesex, Paving Acts), and the churchwardens are liable to pay the rate, although they have no parochial funds for that purpose. Mills v. Rydon, 10 Ex. 67; 2 C. L. R. 1045; 23 L. J., Ex. 305.

Forming Street.]-A church, built on land conveyed to the commissioners for building additional churches, is not liable to be assessed to the expenses of forming a new street, either as house or land, under the Metropolis Management Acts. Angel v. Paddington Vestry, 9 B, & S. 496; 37 L. J., M. C. 171; L. R. 3 Q. B. 714: 16 W. R. 1167. See cases, ante, XV. 1, ool. 1296.

#### 6. CHANCEL.

Grant of. ]-A grant of part of the chancel of a church, by a lay impropriator to A., his heirs and assigns, is not valid in law. Clifford v. Wicks, 1 B. & Ald. 498; 19 R. R. 364.

Freehold of. ]-The freehold of a church, ineluding the clamed and the churchyard, is in sper, 'que cancellus parcohistis rulgariter nun-the rector, but the right to the corporal possess- cupatur''; the corporation and the parish are son is in the spirtual incumbent after indue- soldly to repair the north transept and the whole

against the vicar, any right to the possession or control of the chancel. Griffin v. Dighton, 5 B. & S. 93; 33 L. J., Q. B. 181; 10 L. T. 814; 12 W. R. 441-Ex. Ch.

Upon a bill filed in equity to establish a right to a chancel as part of a parish church, against the lord of a manor, who claimed it as appendant to the manor or manor-house, it appeared that the chancel was an ancient chapel, coeval with the church, and that it was a private chapel erected by the lord of the manor :- Held, that the immemorial use and occupation, coupled with reparation, entitled the lord of the manor by prescription to the perpetual and exclusive use of the chancel; and that this right might exist, notwithstanding that the freehold might not be in the person prescribing, and although the estate or house to which the chancel was appendant might not be situate in the parish. Churton v. Freucen, 35 L. J., Ch. 692; L. R. 2 Eq. 634; 12 Jnr. (x.s.) 879; 14 L. T. 846. A freehold interest in the soil of a lesser

chancel or private chapel, forming part of a parish church, may exist in a private individual without being annexed to a messuage or manorhonse. Chapman v. Jones, 38 L. J., Ex. 169; L. R. 4 Ex. 273; 20 L. T. 811; 17 W. R. 920.

The existence of such freehold interest is sufficiently proved by evidence that a man's predeeessors in title have from time immemorial exclusively repaired the chapel, and kept a lock on the door of it, and that sittings in it have always been occupied by their family or tenants,

Chapel forming Chancel of Parochial Church, or belonging to Individual—Right to Access
of Light.]—The monastic priory of Arundel
was suppressed or dissolved in the reign of Richard II. (about the year 1380), and a college consisting of a master or warden and twelve seculars or chaplains was by the king's licence created in its stead. The instrument of foundation contained rules or statutes for the government of the members of the college, and for the services to be celebrated "in ecclesia prefata." The church of St. Nicholas, Arundel, which, architecturally considered, was one entire building, all apparently of the same date, was a "cross-church," with a nave and aisles; a central tower; transepts rather shorter than would be usual in a church of such proportions; and eastward of the central tower and transepts, a chapel (known as the Fitzalan Chapel) occupying the place commonly filled by the parish chancel; a north aisle called the Lady Chapel; and at the north-east corner a room originally a " sacristy," but which had for many years been used as a school-room, and as a place where the elections to offices in the corporation of Arundel were habitually held. In 1511, disputes having arisen between the college and the corporation of Arundel as to the repair of "ye crosse-partes" or transepts, the bell-tower of the church, the bells and bell-furniture therein, they were submitted for arbitration to the then Earl of Arundel and the then Bishop of Chichester. These "erossepartes" were described as going from south to north "inter chorum et navem ecclesiæ"; and the award of the earl and bishop was as follows: -The college are solely to repair the south tranof the nave and its aisles; and the expense of keeping up and repairing the bell-tower, bells, and bell-furniture is to be defrayed by the corporation and the parish on the one part, and the college on the other part, in equal moieties. In the 26th year of Henry VIII. (1544) the master or warden and chaplains of the college surrendered to the king "totum cantarium sive collegium nostrum prædictum; ac etiam totum scitum, fundum, circuitum, ambitum, vel procinctum, ac ecclesiam, campanile, et cimiterium ejusdem, cantariæ sive collegii, cum omnibus et omnimodis domibus, ædificiis, ortis, pomariis, gardinis, terrâ et solo infra dictum circuitum et procinctum cantariæ sive collegii prædicti," &c. In the same year the king, in almost the same words, granted the college and its possessions to Henry, Earl of Arundel, and his heirs, through whom the plaintiff claimed. Since the surrender and re-grant of 1544, no act of religious worship had taken place, nor had prayers been said within the walls of the Fitzalan Chapel, with the exception of reading the burial service of the Church of England over the bodies of members of the plaintiff's family which had been buried there; and during the whole of that time the plaintiff and his predecessors had claimed to exclude, and had in fact excluded, the vicar and parishioners of Arundel from the whole of the Fitzalan Chapel. An iron lattice-work or grille filling the arch which would be commonly called the "chancel-" and which apparently was as old as the Fitzalan Chapel itself, and divided it from the rest of the structure, was locked on the eastern side (there being no key-hole on the other side), and the key was always kept by the plaintiff and his predecessors in title. Vaults had been made and interments had taken place both in the Fitzalan Chapel and in the Lady Chapel, at their sole pleasure. No faculty had ever been applied for, nor had any fees been paid in respect of such vaults and interments. Against these acts of ownership exercised by the plaintiff's predecessors during more than three hundred years. there was not a single act of ownership proved on the part of either the vicar or the parishioners. The answers returned by successive church-wardens for a long series of years (from 1844 to 1875) to articles of visitation, episcopal and archidisconal, for the most part shewed that they assumed the south transept to be the chancel of the parochial clurch. In 1873 the plaintiff erceted a wall across the west end of the Fitzalan Chapel: in 1877 the defendant, who was vicar of Arundel, pulled down part of it. There had been some correspondence as to the respective rights of the parties; but the plaintiff declined nego-tion and claimed the Fitzalan Chapel as his property :- Held, that these facts above stated shewed that the building in question was not the chancel of the parochial church of St. Nicholas, Arandel, but had always remained the property of the Duke of Norfolk and his predecessors, and that a legal origin for the plaintiff's claim must be presumed. Norfalk (Duke) v. Arbuthnot, 49 L. J., C. P. 782; 5 C. P. D. 390; 43 L. T. 302; 44 J. P. 796—C. A.

Held, further, that the defendant could not justify the pulling down part of the wall on the ground that he was entitled to the access of light from the Fitzalan Chapel into the parochial church; for such a claim could not be justified either by prescription at common law, under the Prescription Act (2 & 3 Will. 4, c. 71), ss. 3, 4, or by virtue of a lost grant. Ib.

Criminal Suit promoted by Churchwardens against Lay Rector to compel Repair—Monition.]—The articles in a criminal suit promoted by the churchwardens of a parish against the lay rector of a parish church charged that the chancel of the church was in a very dilapidated condition, and that the respondent, though legally bound to repair it, had for four years refused and neglected to do so. On the respondent giving an affirmative issue to the articles and submitting to judgment, the ordinary pronounced that the respondent giving and adminished him to do the repair law, and admonished him to do the repair required. Morley v. Leaveroft, [1886] P. 92.

7. GIFTS FOR CHURCH BUILDING AND ENDOWMENT.

Exception to Mortmain Act.]—Exception to 9 Geo. 2, c. 36, in the case of a bequest of moneys to the extent of 500l. for building and endowing a church. Girdlestone v. Creed, 10 Hare, 480.

— 43 Geo. 3, c. 108.]—Testatrix bequeathed a sum of money to be applied as trustees should think fit in defraying expenses of building a church, if within seven years after her death such church should have been built by inhabitarts of parish and consecuted:—Held, that the bequest is good, at any rate, under 43 Geo. 3, c. 108, s. 1, if the amount of the bequest is quite 500L, and the testator sarvives the will three months. Discon v. Dutler, 3 Y. & C. 677.

Limit of £500.]—A bequest to a church diocean building society towards building and endowing a church, but without referring to an existing site or expressly excluding the application of the unempt to the acquisition of land, is void except to the extent of 5000l. Lev., In re, 27 L. T. 89. 21 W. R. 163.

Reduced to £500,]—A testator bequesthed, 5,0004, three per cent. cousols to be laid out in building a church. Upon the petition of his executors this bequest was reduced to 500%, under 43 Geo. 3, c. 108, and the expenses of the petition were directed to be paid out of the 5,000%. consols. Ireland's Will, In re, 12 L. J., Ch. 881.

Generality of ].—A duvise of houses or land to sodd, and the proceeds applied in furtherance of the several objects of the statute 33 Geo. 3, c. 108, cannot be supported under that act, and is void under the statute 9 Geo. 2, c. 36. Theoryported Ohurch Building Society v. Coles, 18 J. Morgan V. J. 145; 24 L. J., Ch. 103; 3 Eq. R. 176; 3 W. R. 101. Affirmed, 5 De G. M. & G. 324; 24 L. J., Ch. 178; 1 Jur. (N.S.) 761; 3 W. R. 396.

The legislature intended that each gift to be protected by the statute 48 Geo. 3, c. 103, should be for one church, chapel, or other building mentioned in the act, and not a vague and general gift, to be applied to the enlargement, building, or repairing of churches or chaptles generally. 1b.

Reservation.]—The power by the statute 43 Geo.. 3, c. 108, given to a testator to pass "all such his estate, interest, or property" in lands, as in the act mentioned, must be exercised without reserve, as is provided in similar cases by the statute 9 Geo. 2, c. 36. II.

The 43 Geo. 3, c. 108, and 4 & 5 Vict. c. 38, authorise a donor to give land to trustees for the

deed of gift, or by agreement with the trustees. Fisher v. Briveley, 29 L. J., Ch. 477; 6 Jur. (N.S.) 615; 8 W. R. 485.

Uncertainty. - A gift by a donor of a piece of land under these acts for the purposes of a church and school, without distinguishing which part should be for a church and which for a school, is not void for uncertainty. Ib.

Conditional.]—A bequest of 1,000l. to be applied towards building a church at Newark, near Northgate, in connection with the established church; but, if it should not be commenced during the testator's lifetime, or before two years after his death, or if not erected at Northgate, then the legacy not to be payable, and notice of the conditions to be given to the legatees, is void. Pratt v. Harrey, L. R. 12 Eq. 544; 25 L. T. 200 ; 19 W. R. 950.

To be valid, a charitable gift for building must refer to an existing site, or expressly exclude the application of the money in the purchase of land. Ib. But see Lee, In re, supra,

Future Church.]—A gift for the endowment of a future church is not void under the Mortmain Act. Sinnett v. Herbert, 41 L. J., Ch. 388; L. R. 7 Ch. 232; 26 L. T. 7; 20 W. R. 270.

A testatrix gave the residue of her personal estate to trustees upon trust to be by them applied in aid of erecting or endowing an "additional church" at A. :-Held, that "additional church" was not limited to a church added between the dates of the will and the death of the testatrix. Ib.

Inquiry directed. -An inquiry was directed whether the residue could be laid out or employed in aid of creeting or of endowing an additional

church at A. Ib.

Bequest of fund to be applied "in or about restoring, altering and enlarging and improving the church, parsonage-house and schools." inquiry was directed as to which of the three specified objects was erected on land already in mortmain, and as to the sums required. The Davy, 48 L. J., Ch. 268; 11 Ch. D. 949; 40 L. T. 189; 27 W. R. 390.

Pure and Impure Personalty.]-Under 43 Geo. 3, c. 108, the legacy was payable out of the impure personalty to the extent of 5001., in addition to the amount which, under the general law, would be attributable to it out of pure personalty. Ih.

Where pure and impure personalty is given to trustees to erect or endow a church they are entitled under 43 Geo. 3, c. 108, in addition to the pure personalty, to 500%. out of the impure personalty, which should be applied in the crection of the church. Sinnett v. Herbert, supra.

Repair and Decoration.]—One devises 500l. to the church of St. Helen's: this is good, and belongs to the churchwardens, and to be employed in repairing and adorning the church. Att.-Gen. v. Ruper, 2 P. W. 125.

purposes of building a church and school although of churches and chapels" is not within the a benefit may be reserved to him, either by the Statute of Mortmain. Endowment does not imply a direction to purchase land or to build, but is a gift in favour of something in existence. Hall v. Edwards, 4 W. R. 38.

> - Separate District. ]-A beynest of money upon trust, in case, at testator's death or within twenty-one years thereafter, B. should be constituted, under 6 & 7 Vict. c. 37, a separate parish for ecclesiastical purposes, to transfer the same to the ecclesiastical commissioners for providing a church for such district and endowing and augmenting the income thereof :-Held, not to be world under the Mortmain Act. Baldwin v. Baldwin, 23 Beav. 419; 26 L. J., Ch. 121; 2 Jur. (N.S.) 773; 4 W. R. 744.

Parsonage-House.]—A legacy to build a parsonage-house is valid if there is globe land on which the house can be built. Sowell v. Crewe Read, 36 L. J., Ch. 136; L. R. 3 Eq. 60.

A testator bequeathed 1,000l. to be vested in trustees to be expended in building a parsonage in connection with Trinity Church, Brompton, In 1826 land was granted for ecclesiastical purposes to the church building commissioners, and on a portion of this land Trinity Church was built; the remainder of the land was consecrated as a burial-ground, but it had ever since its consecration been intended to reserve a portion as a site for a parsonage when funds for building could be obtained. The burial-ground had before the date of the will, been closed by act of parliament, and the portion intended as a site for the parsonage had been used by the incumbents of the church as a garden :- Held, that the bequest was good to the full extent, and not merely to the limit of 500l, allowed by 43 Geo. 3, c. 108. Cresswell v. Cresswell, 37
 L. J., Ch. 521; L. R. 6 Eq. 69; 18 L. T. 392;
 16 W. R. 699.

# 8. Apportionment of Charitable Gifts.

Finality of Order.]—Where under the Church Building Acts district parishes have been severed from an original parish, and the income of a charity belonging to the original parish has been apportioned by an order of the court among such district parishes and the remainder of the original parish, such order is not final, and may be discharged or altered from time to time by the court when changes in the distribution of population or other circumstances shall make such alteration desirable. Cumpden Charities, In re, 52 L. J., Ch. 780; 24 Ch. D. 213; 48 L. T. 521; 31 W. R. 741.

Practice under 8 & 9 Vict., c. 70.]—Applications, under the 8 & 9 Vict. c. 70, s. 22, for the apportionment of charitable gifts given to a parish, between a parish district formed out of it and the remainder of the parish, ought to be headed both in the matter of the 8 and 9 Vict. c. 70, and in the matter of the 52 Geo. 3, c. 101. In such applications it is not necessary to allege or prove any abuses in the past or existing management of the charities. West Hum Charities, In re, 2 De G. & Sm. 218; 17 L. J., Ch. 441; 12 Jur. 788.

Between Divisions of Parish. ]-The parish of Endowment — Meaning of — Mortmain.]—A W. H. was formerly divided into three divisions, gift of residue to trustees for "the endowment called S. P. and C. and charitable gifts had been made to the parish of W. H. for these treasurers, secretaries, and bankers, large sums divisions separately. A district parish was of money were raised by public subscription. formed out of the S. division, and another Ire first appeal stated that the committee district parish was made up of the P. division :-Held, that, under the two acts, the gifts given for the S. division might be apportioned between the district parish, forming part of the S. division, and the remaining part of the S. division, and that the gifts given for the P. division might be given to the new district parish made up of the P. division. Ib.

On what Principle.]—Two schemes being thereupon proposed, one of apportionment according to the gross population of the districts, the other according to the population, including only occupiers of houses of the annual value of 151, and under; the court adopted the apportionment according to the gross popula-

Parish divided into Districts. - In a parish divided into districts under the Church Building Acts there were certain charities distributable among the whole of the parishioners. They were vested in separate trustees, but were subject to the administration of the incumbent and churchwardens and inhabitants of the aucient parish in vestry assembled:—Held, upon an application made under 8 & 9 Vict. c. 70, that the charities were apportionable between the several district parishes and the remaining parts of the whole parish. Brompton (Incumbent), Ex parte, 5 De G. & Sm. 626; 22 L. J., Ch. 281.

- Principle of 8 & 9 Vict. c. 70.]-The sound view of 8 & 9 Vict. c. 70, is that the court has a discretion, in exercising which it should be guided by the consideration whether the adminisstration of the charity is prejudicially affected by the division of the parish into districts. Ib.

District Parish. —A district parish carved out of the original parish, and forming a new ecclesiastical district, is not entitled to an apportionment of the income of a charity which was to be applied in the "reparation, ornament, and other necessary occasions of the parish church" of the original parish. Att.-Gen. v. Love, 23 Beav. 499; 26 L. J., Ch. 539; 3 Jur. (N.S.) 948.

A new church, substituted for the original church, is equally entitled to the exclusive benefit of the charity. Ib.

The gift of a piece of land, to apply the rents

for the reparation, ornaments, and other necessary occasions of a parish church, is in its purpose indivisible. Ib.

Gift not apportionable. - When real estate has been from time immemorial vested in and applied by the churchwardens of a parish for the use and repair of the parish church :- Held, that such a charity is not a charitable devise, bequest or gift made or given for the use of the parish within 8 & 9 Vict. c. 70, s. 22, and is therefore not apportionable on the parish being subdivided, and other churches crected, and new parishes constituted. Wandsworth Church Estate Charity, In re, 40 L. J., Ch. 157; L. R. 6 Ch. 296; 24 L. T. 243; 19 W. R. 456.

In answer to three printed circulars or public appeals, headed "Deplorable spiritual destitu-tion" in a parish, the first two of which set mediately upon the building and occupation of a

desired, in the first instance, to seek remedial measures for one section, viz., that of the north, or Pentonville, end of the parish : that the appeal was for the north, and that the objects were to defray the expense of a new parochial act, to compensate the incumbent for any loss which he might sustain by the severance of the chapel-ofease from the south end, to enlarge the chapel so as to supply, if possible, a number of free sittings, to provide an endowment fund, and to erect a parsonage-house and schools. The second appeal stated that the plans of the committee were so far altered that they sought funds for at least three new churches, with free sittings, an endowment fund, schools, and parsonage-houses; and the third appeal stated that the first object of the committee was the erection of three new churches, the first to be erected in Pentouville. Part of the moneys subscribed was expended in the crection of schools and establishing benefit societies; and the remainder was invested in the funds. A new church was in the course of erection in the north, or Pentonville, district, and another was proposed to be built in the south district of the parish. On an information at the relation of certain of the trustees :- Held, that the balance of the fund, after paying 130% to the incumbent, and the costs, ought not to be divided, but the whole applied towards the completion of the church in the Pentouville district. Att.-Gen. v. Pascall, 7 Jur. (N.S.) 818; 4 L. T. 394.

### 9. EASTER AND OTHER OFFERINGS.

Generally. - Oblations, obventions, and offerings are one and the same thing; though obvention is the largest word, and is in the nature of tithe. Offerings are reckoued among personal tithes, and such as arise from the labour and industry of the parishioner are payable by custom to the parson or viear, either occasionally at sacraments, marriages, burials, churching of women, &c., or at constant stated periods, as at Easter, &c. By statute 2 & 3 Edw. 6, c. 13, they are to be paid to the parson of the parish where the party dwells. 2 Inst. 659, 661. Graunt's the party (wens, 2 thst, 695, 661. Gramma, Case, 11 Co. Rep. 16; Lawrence v. Jones, Bunbl. 173. S. C. 1 E. & Y. 801; Egerton v. Still, Bunb. 198; 2 Wood, 250; 1 E. & Y. 818; Carthew v. Edwards, Amb. 72.

Easter Offerings. ] - Easter offerings are due of common right, though demanded by custom, for they are a composition for common tithes. Ih.

- Custom excluding Common Law Right.] -Upon the question of the right of a vicar to Easter offerings, terriers in support of the claim were produced, dating from 1727 to 1825, all of which contained the following:—Easter offerings. Every communicant, 2d.; every cow, 2d.; every plough, 2d.; every foal, 1s.; every hive of bees, 1d.; every house, 3½d.:—Held, first, that the terriers were evidence of a custom so as to exclude the common-law right to Easter offerings. Reg. v. Hall, 7 B. & S. 642; 35 L. J., M. C. 251; L. R. 1 Q. B. 632; 12 Jur. (N.S.)

Held, secondly, that the custom attached imforth the names of trustees, of a committee, new house, and was not confined to houses in existence at the time of the making of the terrier. Ib.

Held, thirdly, that the word communicant

Held, thirdly, that the word communicant must be held to apply only to such as actually communed. Ib.

Held, fourthly, that the word communicant did not override the whole terms of the terrier, but that the fact of a person being a non-communicant, and as such exempt individually from the charge, did not exempt him from payment of the other items enumerated in the terrier. Ib.

Upon an appeal to quarter sessions, under the 7 & 8 Will, 3, e. 6, s. 7, against an order of justices, evidence in addition to that addited before the justices may be given. Ib.

— Custom disputed.]—An Easter offering of 64d. Irom housekeepers was elatined by enstom, and summary proceedings under 7 & 8 Will. 8, c. 6, s. 1, were faken to enforce payment :—Hold, that the justices, on the attorney for the party summoned stating before them that the enstom was boun fittle disputed (there being nothing to shew that it was not so), ought to have forborne to give any judgment in the matter; and that therefore an order made by them afterwards was bad. Reg. v. Kidd, 16 L. T. 203.

Alms. ]-See post, XVI. 4.

#### 10. BELLS.

Control and Ownership.]—The control of the clurreh bells belongs to the incumbent, but, to constitute an ecclesisatical offence, it is not sufficient to allege that the ringing complained of took place without his consent; it must be against his wishes, expressed either in a general or particular prohibition. Daviat v. Crucker, 37 L. J., Ecc. 1, L. R. 2 Ecc. 41.

Unless the incumbent of the church consents, the parishioners cannot, except on the occasion of divine worship, procure the ringing of the church bells. Redhead v. Wait, 6 L. T. 580. S. P., Hurrison v. Eurobes, 6 Jur. (N.S.) 1353.

Bell-ropes.]—The property of the bell-ropes of a parish church is vested in the church-wardens. Anchwan v. Adams, 2 Scott, 599; 2 Bing, (8.C.) 402; 1 Hodges, 339; 5 L. J., C. P. 79. See Harrison v. Raund, 2 H. & W. 18; 6 N. & M. 422; 4 A. & E. 799.

Interference with Ringing.]—In an action for placing lighted brimstone in a church tower, whereby the plantiff, who, with others, was ringing the bells, was annoyed by the fumes, the defendant pleaded the general issue, and that the plaintiff was wrongfully in the church tower making a disturbance, and that the rector requested him to depart, and that, as he would not, the defendant, by the command of the rector, placed and lighted the brimstone, to cause the plaintiff to depart.—Held, that to support the special plac evidence must be given of the request to depart, and also of the rector's authority to the defendant to put the brimstone. Ecans v. Lisic, 7 Car. & P. 562.

Held, also, that to entitle the plaintiff to a verdict, on the general issue, the jury must be satisfied that the plaintiff sustained some substantial damage from the fumes of the brimstone. Ib.

Injunction to Restrain Ringing. ]—An injunction was granted by a court of equity after a trial at law, to restrain the ringing of the bells of a Roman Catholic church, so as to occasion any nuisance, disturbance and annoyance to the plaintiff, who resided very near to the church. Soltan v. De Held, 2 Sim. (N.S.) 133; 21 L. J., Ch. 133; 16 Jur. 320.

### 11. KEYS.

Custody of ]—The lawful custody of the keys of the church belongs to the incumbent. Redherd v. Wait, 6 L. T. 580. And a mandamus lies to deliver up the keys of

a church, Anon., 2 Chit, 255.

The rector has the freehold of the church, and the keys are his property. Ritchings v. Cording-ley, L. R. 3 Ecc. 113; 19 L. T. 26.

Possession of Ghapel by Delivery of.]—The delivery of the key of a chapel to the plaintiff for the purpose of preaching therein, which chapel the plaintiff and conveyed to the defendant by a deed of which the validity was questioned, was held not sufficient possession to enable the plaintiff to maintain trespass, where the defendant had made a foreible entry upon the plaintiff's subsequent refusal to re-deliver the key. Revett v. Browne, 5 Bing, 7; 2 M. & P. 12; 6 L. J. (O.S.) C. P. 194; 30 R. R. 524;

### 12. REGISTER BOOKS.

Custody, —Where a rectory is in fact void, although one has acted as rector and appointed an officiating chaplain, the court of queen's bench will not grant a mandamus, at the instance of one of the churchwarlens, to compel a wrongdoer to give up the register books of the purish to the churchwardens, as there is another-remedy. Holloway, Exp purte, Reg. v. Cumley, 3 W. E. 247.

When a benefice is full, the incumbent is the proper custodian of the parish books, and, semble, if void, the churchwardens, Ib.

### XVI. DIVINE SERVICE.

#### 1. GENERALLY.

What is Divino Service.]—Reading prayers or a sermon in a private family is not performing divine service. Divine service is an expression often used in acts of parliament which directs the reading of proclamations after divine service, Trebe v. Krith, 2 Att. 499.

Right to, in Parish Church.]—Parishioners have a right to demand that divine offices should be celebrated in their own parish church, unless such right has been limited by lawful authority. St. David's (Bishop) v. De Rutzen (Buron), 7 Jur. (N.S.) 884.

Accordingly, where a person dismantied, withnot legal authority, the church, which was very dilapidated, of one of three adjoining parishes (the greater part of which he owned), he was ordered, although there was a new church with sufficient accommodation for the three parishes built in one of the other parishes, and the three parishes were united by order in council for all ecclesiastical purposes, to restore the ancient church to the state it was in when he dismantled it, and to pay costs of suit. Ib. . Duty of Clergyman as to. ]-It is not competent to a clerk in holy orders, having two churches in one benefice, to perform divine service in one only at his own discretion : it is his duty to perform a service every Sunday in each church. Winchester (Bishop) v. Rugg, L. R. 2 A. & E. 247; 18 L. T. 486.

Refusal to admit to the Lord's Supper. ]-In an action against a Presbyterian minister for refusing to admit the plaintiff to the sacrament of the Lord's Supper, the plaint did not state facts to shew how it was the duty of the defendant to administer the sacrament to the plaintiff, or any contract by which he was bound to do so :- Held, that an averment that the plaintiff was "entitled to participate in the sacrament" was not a sufficient averment of duty on the part of the defendant to administer it to him; and that an averment that the defendant had acted maliciously could not assist the plaintiff to compel the defendant to do what he was not bound to do, or to perform what he had not promised. Laggard v. Stewart, Ir. R. 10 C. L. 222.

Omission to Perform Service-Power of Bishop.] -Seet, 109 of 1 & 2 Vict. c. 106, does not apply to prevent the bishop instituting proceedings against a beneficed clergymun, under the Church Discipline Act (3 & 4 Vict. c. 86), for omitting to perform, or provide for the performance of, divine service in a consecrated building within his parish; the provisions of s. 77 only applying to cases where the services of any benefice have inadequately performed, not where they have been omitted altogether. Winchester (Bishop) v. Rugg, 37 L. J., Eec. 11.

Right to Attend. ]-The statute of 5 & 6 Edw. 6. c. 1, s. 2, having imposed a general duty to go to church, which still is binding upon members of the Church of England, has conferred a correlative general right to go to church on those who are so obliged to go. Tuylor v. Timson, 57 L. J., Q. B. 216; 20 Q. B. D. 671; 52 J. P. 135.

Disturbing Congregation during.]-A constable may be justified in removing a person from a church for disturbing the congregation in time of divine service, although no part of such service was actually going on at the time; yet he has no right to detain such person in custody afterwards for the purpose of taking him before a magistrate. Williams v. Glenister, 4 D. & B. 217; 2 B. & C. 699; 2 L. J. (o.s.) K. B. 143.

# 2. PREACHING.

What.]-Preaching is not a "ministration" nor a "rite," nor does it form part of the adminis-tration of the sacrament of the Lord's Supper. Rabinson, In re, Wright v. Tugwell, 66 L. J., Ch. 97; [1897] I Ch. 85; 76 L. T. 95; 45 W. R. 181; 61 J. P. 132—C. A.

In Black Gown.]—It is not illegal for a clergy-man of the Church of England to preach in a black gown, and therefore a condition that a black gown should be used in preaching, attached to a bequest for the endowment of a church, is not void for illegality. Ib.

Restraining Preaching.]—A clergyman in a pending action, in which many of the inhabiwas restrained from preaching a sermon upon In the right-hand compartment figures represent-

the subject in his chapel in the town; also from issuing placards announcing his intention to preach the sermon. Macket v. Herne Bay Commissioners, 24 W. R. 845.

— Without Licence, ]—An inhibition, signed at the bishop's desire by a vicar-general of a diocese, and under the seal of the Consistorial Court, forbidding a strange clergyman to preach in the diocese, is, in fact, the inhibition of the bishop, and is not a judicial act requiring a previous citation. Down and Connor (Bishop) v. Miller, 11 Ir. Ch. R. (App.) i.-xliv.; 5 L. T. 30.

A bishop of one diocese has the power to inhibit, at his pleasure, and without cause assigned, a beneficed and licensed clergyman of another diocese from officiating or preaching in his diocese without his licence, though the clergyman has the leave of the incumbent to preach in his church. Ib. A licence to serve a care in one diocese deter-

mines by the curate giving up the cure, and leaving the diocese wherein he was residing. Ib. A usage of clergymen of different dioceses to assist occasionally one another, and preach without the bishop's licence, is of no avail against his

inhibition. Ib. A parson can neither preach, administer the sacrament, nor celebrate marriage, without the bishop's licence, though such a licence is not necessary for every particular case; but a bishop may suspend a minister wholly, if he is irregular, till he submits to perform his duty properly. Ib.

See also ante, II. 8 a, col. 1208.

3. REREDOS, COMMUNION-TABLE AND SER-VICE, ORNAMENTS AND VESTMENTS.

Reredos.]—A reredos, of which the central compartment consisted of a sculptured panel representing the crucifixion, having the figure of the Saviour on the Cross, and the figures of St. John and the three Marys on either side, all such figures being in high relief, was erected in a newly-built parish church. The bishop of the diocese refused to consecrate the church unless the central compartment of the reredos was removed, and it was accordingly removed, and the church was consecrated. Subsequently the churchwardens of the parish petitioned the ordinary for the grant of a faculty authorising the replacement of such central compartment in the church, and the ordinary sent the case by letters of request to the court of arches. The letters of request having been accepted, an appearance was entered for a parishioner, who opposed the grant of the faculty, on the ground that the central compartment of the reredos proposed to be replaced would, if so replaced, be either illegal or likely to receive superstitious reverence, and be abused or be inexpedient, and likely to cause scandal and offence:—The court ordered a faculty to issue for the restoration of the central compartment of the reredes. Hughes v. Edwards, 2 P. D. 361.

The incumbent of a parish church applied to the ordinary for a faculty authorising the decoration of the reredos of his parish church with a painted design, intended to represent the Adoration of Our Lord in Majesty by the Faithful, of which the following individual figures formed a part :- In the centre of the three compartments into which the reredos was divided, a figure tants of a town were to be examined as witnesses, intended to represent Our Lord seated as King.

Stephen and St. John ; the four last-mentioned figures being represented with their faces turned towards the centre compartment of the reredos. The grant of the faculty was not opposed:— Held, that there would be danger of the representation contained in the centre compartment of the reredos being abused by receiving "superstitious reverence," in the sense explained in Clifton v. Ridsdale (1 P. D., at pp. 352, et seq.); and that, therefore, the court ought, in its discretion, to refuse to sanction its introduc-tion into the church. St. Lawrence, Pittington, In re. 5 P. D. 131.

The chancellor of the diocese of Manchester decreed a faculty to issue for the erection in a parish church of that diocese of an oaken reredos about eight feet in height, in the form of a nion-table within the meaning of the laws, triptych with painted panels, of which panels the two side ones or wings, being hung to the centre panel by hinges, could be closed over it when divine service was not being performed; the centre panel to have painted thereon a representation of the Last Supper, and on the one wing to be represented in painting "The Agony in the Garden," and on the other" The Risen Christ with the Marys at the Tomb"; the reverse sides of the wings to be plain; the whole to be surmounted by a figure of Our Lord carved in plain oak eighteen inches high, between figures of Moses and Elias of the same height beneath pillared canopies connected by an arch of tracery work over the central figure, and flanked by angels. The faculty so decreed to be issued was required to contain a proviso that the triptych was always to remain open during the allowed. Ib. performance of Divine service. St. Pendlebury v. Parishioners, [1895] P. 178.

Upon a reredos creeted for purpose of decoration in Exeter Cathedral by the dean and chapter of Exeter were sculptured representations in high relief of the ascension, the transfiguration and the descent of the Holy Ghost on the day of Pentecost, with figures of the apostles delineated as forming part of the connected representation of the historical subject. On each side of the reredos, as finials to its architectural form, was a separate figure of an angel. The Bishon of Exeter, at a visitation of the cathedral of the dean and chapter, held the structure to be illegal, and ordered it to be removed :-Held, that although the bishop, as ordinary, in the exercise of his visitatorial power over the cathedral church of Exeter, cannot at his discretion order any alteration in its fabric, it was within his jurisdiction to find that the sculpture had been unlawfully erected, and on that definite legal ground to order its removal. Phillpotts v. Boyd, 44 L. J., Ecc. 44; L. R. 6 P. C. 435; 32 L. T. 73; 23 W. R. 491.

Held, also, that the structure was not illegal and that so much of the decree of the court of arches as reversed the order of the bishop directing its removal must be affirmed. Ib.

The 3 & 4 Edw. 6, c. 10, "for the abolishing and putting away divers books and images," remains unrepealed, but must be taken to apply only to images, &c., which have been abused, or are likely to be abused, by giving occasion to superstitious and idolatrons practices, not to such as are merely decorative. Ib.

ing St. Lawrence and the Blessed Virgin. In the parish church is a church ornament within the left-hand compartment figures representing St. meaning of the rubrics; but, it not being meaning of the rubrics; but, it not being prescribed by them, nor being in any way necessary or subsidiary to the performance of the services of the church, a faculty will not be granted for one. White v. Bowron, 43 L. J. Ecc. 7: L. R. 4 Ecc. 207.

> Stations of Cross. ]-Semble, that the set of delineations used in Roman Catholic churches, and commonly called "Stations of the Cross and Passion," are decorations forbidden by law in churches of the Church of England. Clifton v. Ridsdale, 1 P. D. 316; 35 L. T. 432.

Communion-table. ]-A stone structure of great weight, and firmly imbedded in the floor of the church, so as to be immovable, is not a commucanons, and constitutions ecclesiastical of the realm, neither do these laws authorise the crection of a credence-table. Faulhner v. Litchfield, 9 Jur. 234.

Communion-tables to be used in churches should be tables in the ordinary sense of the word, made of wood, flat and movable, and capable of being covered with a cloth, having no cross attached. Liddell v. Westerton, and Liddell v. Beal, 5 W. R. 470—P. C. On appeal from, 1b. 179—Arches Court (4 W. R. 167; 1 Jur. (N.S.) 1178—Consistory Court). And see report, published separately, by E. F. Moore, 1857.

Credence-table, and altar cloths of various colours, allowed. Ib.

Linen cloth, with embroidered or lace border. at the administration of the sacrament, not

A parishioner brought in an act on petition to enforce a monition, alleging, that it was in great part uncomplied with; first, that a metal cross had been placed on the sill of the great eastern window of the church, above the communion-table; secondly, that the table which had been substituted for a stone altar was not a flat table, but had an elevation, or super-altar; thirdly, that the Ten Commandments were not set up on or against the east end of the church, over the communion-table, but were set up against the walls on each side of the chancel screen. In the answer it was alleged, that the monition had been obeyed; that the cross was disconnected with the communion-table; that the table was flat, the elevation being a movable ledge of wood at the back of the table, on which the candle-sticks were placed; and, lastly, that, on account of the structure of the church, the congregation would not be able to read the Commandments if they were placed over the communion-table :-Held, that the monition had been substantially complied with; first, as the metal cross was a legal ornament, and was not attached to the communion-table. Liddell v. Beal, 14 Moore, P. C. 7; 3 L. T. 218; 8 W. R. 569.

Held, secondly, that the wooden ledge on the communion-table was not a superstitious ornament, or contrary to law. Ib.

Eld, thirdly, that the placing of the Ten

Commandments against the walls on each side of the chancel screen was, from the structure of the church, a substantial compliance with the monition, and was not an evasion. Ib.
Semble, that ornaments which have been

Baldacehino.]—A baldacchino, or marbic church by the incumbent, cannot be lawfully canopy, erected over the communion-table in a removed, save under the sanction of the ordinary.

Ritchings v. Cordingley, L. R. 3 Ecc. 113; 19 | Clifton, 46 L. J., P. C. 27; 2 P. D. 276; 36 L. T. L. T. 26.

Cross or Crucifix.]—Crosses, as distinguished from crucifixes, when used as mere emblems of the Christian faith and not as objects of superstitions reverence, may lawfully be erected as architectural decorations of churches. Liddell v. Westertun, and Liddell v. Beat, 5 W. B. 470—P. C. On appeal from J. I. 170—Arches Court (1 Jun. (N.S.) 1187; 4 W. B. 167—Consistory Court).

A movable wooden cross, without the sanction of a faculty or the concurrence of the parishioners' churchwarden, but with the concurrence of the vicar's churchwarden, was, by the vicar's authority, placed on a retable or wooden ledge at the back of and immediately above the communion-table in a parish church, with the intention that it should remain there permanently. Two days afterwards the cross was removed by the parishioners' churchwarden, without the authority of a faculty, from the retable, and taken by him out of the church, and retained by him. In a criminal suit promoted by the vicar in the court of arches against him for having removed the same :—Held, that the cross, in the position which it occupied while in the church, is forbidden by law; but, as both parties were in the wrong in having acted without a faculty, the suit was dismissed without costs. Musters v. Durst, 45 L. J., P. C. 51; 1 P. D. 373; 35 L. T. 37; 24 W. R. 1019—P. C.

- Screen.]-On the top and in the centre of a screen, stretching across a church at the entrance to the chancel, was placed a figure of the Saviour on the Cross, in full relief, and about eighteen inches long, facing the congregation :-Held, that the faculty authorising the erection of the screen, having been granted without any knowledge that it was to be surmonnted by a crucifix, did not authorise the erection of the crucifix, which, therefore, in the absence of a proper faculty, had been unlawfully set up and retained. Ridsdale v. Clifton, 46 L. J., P. C. 27; 2 P. D. 276; 36 L. T. 865.

Held, that the ordinary ought not to grant a faculty for the crueifix, it being in danger of becoming the object of superstitious reverence.

Ib.

Holy Communion-Mixed Chalice. ]-In the celebration of the holy communion it is not an ecclesiastical offence to administer wine with which some water has been mixed beforehand, such mixing not taking place in or as part of the section. Helbert v. Purchas (L. R. 3 P. C. 605) disapproved on this point. Read v. Lincoln (Bishop), 62 L. J., P. C. 1, [1892] A. C. 644; 67 L. T. 128; 661 P. 735—P. C. S. P. Elphinstone v. Purchas, 39 L. J., Ecc. 28; L. B. 3 Ecc. 66.

The administration of wine mixed with water, instead of wine, to communicants at the communion is unlawful, although the mixing of water with the wine is done privately, before the service. Hebbert v. Purchas, 7 Moore, P. C. (N.S.) 468; 40 L. J., Ecc. 33; L. R. 3 P. C. 605;

19 W. R. 898.

Wafer Bread, ]—It is not unlawful for the minister to use in the administration of the communion bread made in the form of circular wafers, provided that the substance is bread such as is usual to be eaten, and not a composition of flour and water unleavened, such as is a ceremony additional to the ceremonies of the word "wafer" usually denotes. Ridsdale v. the church, and is unlawful. Ib.

The rubric directs that the bread used in the administration of the communion shall be broken by the priest during the course of the prayer of consecration, but it does not require that the bread so used should be of any particular shape. The bread may be wafer bread, or bread made in the special fashion and shape of circular wafers. Elphinstone v. Purchas, 39 L. J., Ecc. 28; L. R. 3 Écc. 66.

The administering wafer bread to communicants at the communion is unlawful. Hebbert v. Purchas, supra.

— Consuming Remnants. ]—To use excessive eare in reverently consuming the remnants of the consecrated elements in the church after the benediction and the conclusion of the service is not an ecclesiastical offence. Read v. Lincoln (Bishop), supra.

Agnus Dei. - Nor is the singing a hymn, consisting of words taken out of the Bible, before the reception of the elements, if the service is

not delayed thereby. Ib,

It is unlawful for a minister of the Church of England to cause to be said or sung during the performance of the service for the administration of the communion, after the prayer of consecration, and before the reception of the elements by the communicants, the hymn or prayer known as the Agnus Dei. Martin v. Mackonochie, L. R. 4 Ecc. 279; 32 L. T. 568.

- Eastward Position. ]-The adoption of the "eastward position" during the earlier part of the service before the prayer of consceration explained. Read v. Lincoln (Bishop), supra.

A elergyman stood during the whole of the prayer of consecration in the communion service between the body of the people and the table, with his back to the people, so that the greater part of the people could not see the breaking of he bread or the act of taking of the cup into his hands, and the side of the table at which he so stood was not the north side :- Held, that such a position was unlawful. Hebbert v. Purchus,

It is not unlawful for the officiating minister. while saying the prayer of consecration in the communion service, to stand at the west side of the communion-table with his face to the east and his back to the people, provided that the communicants present, or the bulk of them, being properly placed, are able, if they wish it, to see him break the bread and take the cup in his hand. Ridsdale v. Clifton, 46 L. J., P. C. 27;

2 P. D. 276; 36 L. T. 865. Semble, that evidence that persons sitting immediately behind the officiating minister could not see him perform the manual acts mentioned is not sufficient to establish the charge of illegality. Ib.

- Manual Acts .- The manual acts must be performed so as to be visible to the communicants. Read v. Lincoln (Bishop), 64 L. T. 149; [1891] P. 9.

\_\_\_ Sign of Cross.]\_Making the sign of the cross during the absolution and the benediction,

- Lighted Candles. To take part without objection in the service while lights are burning on the holy table at a time when they are not there during the service, provided they are used required for the purpose of giving light is not an ecclesiastical offence. A clergyman who takes part in the service in a church in which unlawful ornaments are present does not necessarily use such ornaments as a matter of ceremony. Read π. Lincoln (Bishop), 62 L. J., P. C. 1; [1892] A. C. 644; 67 L. T. 128; 56 J. P. 725—P. C.

It is unlawful for a minister of the Church of England to use lighted candles on the communion-table, or on a ledge immediately above the table during the performance of morning prayer, when such candles are not wanted for the purpose of giving light. Martin v. Mac-

the purpose of giving light. Martin v. Machenochie, L. R. 4 Ecc. 279; 32 L. T. 568.

To cause lighted candles to be held one on each side of the minister when reading the gospel, such lighted candles not being required for the purpose of giving light, is unlawful. Sumner v. Wix, 39 L. J., Ecc. 25; L. R. 3 Ecc. 58 : 21 L. T. 766.

The ceremonial lighting and burning of candles, placed on a ledge or a shelf over the communiontable, and of candles placed on each side of the table is, during the communion service, unlawful. Ib.

 Incense.]—The ceremonial use of incense immediately before the celebration of the communion, so as to be preparatory or subsidiary to the celebration of the communion, is unlaw-Th

- Prostration and Elevation. - A clergyman having been admonished not to kneel or prostrate himself before the consecrated elements during the prayer of consecration in the communion service, and having afterwards been in the habit, during the prayer of consecration, of bowing down towards the communion-table after replacing the bread upon it, remaining some seconds in that position with his forehead so low that it almost touched the table, and having been in the habit of doing the same thing after replacing the cup :-Held, that the monition had been disobeyed in respect of prostration. Martin w. Machonochie, 7 Moore, P. C. (N.S.) 239: 40
 L. J., Ecc. 1; L. R. 3 P. C. 409: 24 L. T. 204; 19 W. R. 545. S. P., 39 L. J., Eec. 11; L. R. 3 P. C. 52; 18 W. R. 217.

A clergyman having been admonished to abstain from the elevation of the cup and paten above his head during the prayer of consecration in the communion service, and having afterwards been in the habit during the prayer of consecration of elevating above his head, not the paten, but the bread, the judicial committee decided, the accused admitting that the elevation of the bread was equivalent to the elevation of the paten and they being of that opinion, that the monition had been disobeyed in respect of the elevation of the paten. Ib.

The committee expressed an opinion that any elevation of the elements, as distinguished from the mere act of removing them from the table and taking them into the hand of the minister, is illegal.

- Adoration.]—The articles and formularies of the church forbid all acts of adoration of the elements in the communion, Sheppard v. Bennett, 41 L. J., Ecc. 1; L. R. 4 P. C. 350; 26 L. T. 923; 20 W. R. 804. - Flowers.]—It is lawful to place vases of flowers on the communion-table, and to keep them as decorations only. Elphinstone v. Purchas, 39 L. J., Ecc. 28; L. R. 3 Ecc. 66.

Vestments. ]-A clergyman of the Church of England wore on different days, while officiating in the celebration of the holy communion, a chasuble, a tunic and au alb :- Held, that each of these vestments was unlawful. Hebbert v. Purchas, 7 Moore, P. C. (N.S.) 468; 40 L. J., Ecc. 33; L. R. 3 P. C. 605; 19 W. R. 898.

It is not lawful for the officiating minister to wear during the service of the communion the vestments known as an alb and a chasuble. Ridsdale v. Clifton, 46 L. J., P. C. 27; 2 P. D. 276; 36 L. T. 865.

Advertisements of Queen Elizabeth, 1-The incumbent of a parish church was charged with wearing, when officiating in the communion service, vestments called a chasuble, alb, amice, maniple and stole. At the hearing of the suit, the charge was proved : but it was submitted on his behalf, that, as the promoter had not proved the advertisements of Queen Elizabeth, he had failed to establish that the vestments were illegal :--Held, that the court was bound to follow the rnling of the privy council in Ridsdale v. Clifton (2 P. D. 276), and that it was unnecessary for the promoter to prove the advertisement. Combe v. Edwards, 2 P. D. 354.

Rubrics, Construction of ] - See post, XIX., col. 1326.

## 4. ALMS.

Right to. ]-The alms collected, whether at the offertory or during divine service, in a pro-prietary chapel, and having a district assigned to it, belong as of right to the rector of the parish in which the chapel is situate, to be disposed of as he and the churchwardens shall direct, and that notwithstanding 14 & 15 Vict. c. 72 (Ir.). Davidall v. Hewitt, 10 L. T. 823.

The court declined to order a decree or a citation in a criminal suit to issue against a clergyman officiating in a chapel to which no district was assigned, for refusing to pay over to the incumbent and churchwardens of the church of the district in which such chapel was situated the alms collected at the offertory in such chapel. there being no satisfactory evidence before the court that the district had become a separate parish. It ordered a citation to issue in a civil suit, calling upon the clergyman to shew cause why he should not pay over to the incumbent and churchwardens of the district church the moneys he had received at the offertory in his chapel. Liddell v. Rainsford, 37 L. J., Ecc. 83.

An unconsecrated chapel was locally situated within the district of a chapel of ease, with a chapelry district annexed: - Held, that the incumbent and churchwardens of the chapel of ease, notwithstanding that the incumbent had sole and exclusive cure of souls within the chapelry district, were not entitled to claim the sacramental alms collected at such unconsecrated chapel. Liddell v. Rainsford, 38 L. J., Ecc. 15.

Right of Collection, in whom. ]-Upon an information under 23 & 24 Vict. c. 32, s. 2, for unlawfully molesting an incumbent, whilst engaged in | even if the committee itself should be of opinion collecting the offertory during the reading of the offertory sentences by another elergyman :-Held, that the duty of collecting the offertory was a lay duty imposed by the rubric upon the "deacons, churchwardens or other fit person (of lower degree) "appointed for that purpose. Cope v. Barber, 41 L. J., M. C. 137; L. R. 7 C. P. 393; 26 L. T. 891; 20 W. R. 885.

Custody of . - Where collections for ordinary church expenses are made at the morning and evening services in parish churches, the churchwardens are the proper custodians of the moneys collected, and such moneys should be placed by them at a bank to an account in their joint names. Howell v. Holdroyd, [1897] P. 198.

Deviation from Usual Practice in Collecting, an Ecclesiastical Offence. —By the accustomed practice of a parish church, when collections from the congregation were made either at the morning or the evening service on Sundays, the collecting bags were brought after the collection up to the chancel steps and placed in the alms dish there held by the minister for the purpose of receiving the same and placing them on the communion-table. One of the churchwardens of the parish was charged in a criminal suit with having committed offences against ecclesiastical law in that, during the time he held office, he had at the morning service on one Sunday and the evening service on another Sunday vexatiously refused to place the bag, in which he had collected money from the congregation, in the alms dish in accordance with the above practice. At the hearing these charges were sufficiently proved :-Held, that, in so deviating from the practice in use in the matter, the respondent had offended against the laws ecclesiastical, and that he ought to follow such practice for the future unless otherwise ordered by the bishop. Ib.

## XVII. ARTICLES OF RELIGION.

Doctrine Contradicting. —The 13 Eliz. c. 12, s. 2, is positive in its prohibition, and forbids the promulgation of any doctrine contradicting the articles by a beneficed clergyman. *Heath* v. *Burder*, 15 Moore, P. C. 1; 8 Jur. (N.S.) 597; 6 L. T. 562; 10 W. R. 673.

It is immaterial for the purposes of the statute whether the unsound doctrines are preached or

published in a book. *Ib*.

The word "advisedly" in this statute is not limited in its operation to those who avowedly reject the articles, but is used simply to shew that the act complained of is the deliberate act of the accused, and not a casual expression dropped inadvertently. Ib.

It is not necessary, in order to bring a beneficed clergyman within the operation of the 13 Eliz. c. 12, that he should have propounded any intelligible heterodox doctrine: it is sufficient if what he has propounded is directly repugnant to the doctrine laid down in the articles. Ib.

Unless a clergyman convicted under the statute expressly and unreservedly revokes his errors, the court has no discretion, but must pronounce sentence of deprivation. Ib.

Heresy.]—In a charge of heresy the judicial committee is not compelled to affix a definite meaning to any given article of religion, the construction of which is fairly open to doubt.

that a particular construction is supported by the greater weight of reasoning, and the accused onght to be allowed a reasonable latitude of opinion with reference to conformity to the articles and formularies of the church. *Joysey* v. *Nuble*, 7 Moore, P. C. (N.S.) 167; 40 L. J., Ecc. 11; L. R. 3 P. C. 357; 25 L. T. 167; 19 W. R. 629.

It is not necessary to establish a charge of heresy that there should be a contradiction totidem verbis of some passages in the articles. The publication of opinions repugnant to, or inconsistent with, their clear construction is sufficient. Ib.

It is not competent for a clergyman of the Church of England of his own mere will, not founded upon any critical inquiry, but simply upon his own taste and indgment, to assert that whole passages of some canonical books are without authority, as being contrary to the teach-ing of Christ as contained in other canonical books. Ib.

A clergyman was charged with opposing "commonly-received doctrines," but the doctrines were not specified. The judicial committee rejected the charge, on the ground that the as those contained in the articles of religion or formularies of the church. Ib.

Heretical Doctrines. - Proceedings against a clerk in holy orders, under 3 & 4 Vict. c. 86, for publishing heretical doctrines, in contravention and violation of the articles of religion and formularies of the Church of England, are of a criminal nature; and it is necessary that the accusation should be stated with precision and distinctness in the pleadings. Williams v. Stilishury (Bishop), 2 Moore, P. C. (N.S.) 375; 3 N. R. 494; 10 Jur. (N.S.) 406; 9 L. T. 787; 12 W. R. 445.

With respect to the legal tests of doctrine of the Church of England, by the application of which the judicial committee, as the appellate court, is to try the soundness of the passages libelled, it is in the province of that court, on the one hand, to ascertain the true construction of the articles of religion and formularies referred to in each charge, according to the legal rules for the interpretation of statutes and written instruments; and, on the other hand, to ascertain the plain grammatical meaning of the passages which are charged as being contrary to, or inconsistent with, the doctrines of the church. Ib.

Matters of doctrine, in which the church has prescribed no rule, may be discussed without penal consequences; and no rule is to be ascribed to the church which is not found expressly and distinctly stated, or which is not plainly involved in, or to be collected from, the written law of the church. Ih.

In the 11th article of religion it is laid down that "We are accounted righteous before God only for the merits of our Lord and Saviour Jesus Christ by faith, and not for our own works or deservings":—Held, that, as the article was wholly silent as to the merits of Jesus Christ being transferred to us, and asserts only that we are instified for the merits of Jesus our Saviour by faith alone, it is not penal in a clergyman to speak of merit by transfer as a fiction, however unseemly that word may be when used in connection with such a subject. Ib.

In an article against a clergyman, it was charged that it was a contradiction of the Church The first state of the state of that any part of the canonical books of the Old or New Testament upon any subject whatever, however unconnected with religious faith or moral duty, was not written under the inspiration of the Holy Spirit :- Held, that the charge that every part of the Scriptures was written under the inspiration of the Holy Spirit was not established, as it was not to be found either in the 6th or 20th articles of religion, the formularies, the Service for the Ordering of Priests, or the the Nicene Creed. Ih.

It is not competent to a clergyman of the Church of England to teach or suggest that a hope may be entertained of a state of things contrary to what the church expressly teaches or declares will be the case. Ib.

But it is not penal for a clergyman to express a hope of the ultimate pardon of the wicked.

Visible Presence in Holy Communion.]-The Church of England does not by her articles or formularies affirm or require her clergy to accept any other presence in the communion, than a presence in the soul of the faithful receiver ; but the articles and formularies of the church do not exclude the maintaining a "real, actual objective" presence in that sacrament, inasmuch as a presence other than spiritual is not thereby affirmed. Sheppurd v. Bennett (2nd appeal), 41 L. J. Ecc. 1; L. R. 4 P. C. 371; 26 L. T. 923; 20 W. R. 894—P. C. On appeal from, L. R. A. & E. 167; 39 L. J., Ecc., 68; 23 L. T. 339.

It is not lawful for a clergyman to teach that the sacrifice or offering of Christ upon the cross or the redemption, propitiation or satisfaction wrought by it, is or can be repeated in the ordinance of the Lord's Supper; nor that in that ordinance there is or can be any sacrifice or offering of Christ which is efficacious in the sense in which Christ's death is efficacious, to procure the remission of the guilt or punishment of

The articles and formularies of the church forbid all acts of adoration of the consecrated elements in the communion. Ib.

The successive alterations and omissions in the Book of Common Prayer, by which words or passages inculcating particular doctrines or assuming a belief in them have been struck out, are evidence that the church has ceased to affirm those doctrines, but the effect of such changes, when they stand alone, is that it ceases to be unlawful to contradict such doctrines, and not that it becomes unlawful to maintain them. Ib.

Before an appeal is presented to the queen in council in respect of an order directing the reformation of articles of charge or other pleadings, the actual reformation which appears to the judge to be required should be made by him on the face of the order, so that on appeal the very passages omitted may be clearly brought under the judgment of the judicial committee. Ib.

## XVIII. HOMILIES AND DOCTRINE.

Standard of Doctrine.]—Semble, the homilies are, under the 35th article of religion, a standard of doctrine applicable to the published opinions of the clergy of the Church of England. Salisbury (Bishop) v. Williams, 6 L. T. 726.

(Bishop), 14 Jur. 443 (see report, published separately, by E. F. Moore, 1852)—P. C.

Baptism.]-The doctrines that baptism is a sacrament generally necessary to salvation, but that the grace of regeneration does not so necessarily accompany the act of baptism that regeneration invariably takes place after baptism; that baptism is an effectual sign of grace, by which God works invisibly in us, but only in such as worthily receive it, in whom alone it has a wholesome effect; that, without reference to the qualification of the recipient, baptism is not in itself an effectual sign of grace; that infants baptised, and dving before actual sin, are certainly saved, but that in no case is regeneration in baptism preconditional, are not contrary or repugnant to the doctrines of the Church of England, Ib.

Impugning the Doctrine of the Trinity.]-Semble, the 53 Geo. 3, c. 160, does not alter the common law with respect to impugning the doctrine of the Trinity, but only removes the penalties imposed on persons denying such doctrine by 9 & 10 Will. 3, c. 32, and extends to such persons the benefits conferred on all other Protestant dissenters by 1 Will. & M. sess. 1, c. 18. Rew v. Waddington, 1 B. & C. 26; 1 L. J. (o.s.) K. B. 37; 25 R. R. 288.

# XIX. RUBRICS.

Baptism.]—The rubrics of the Common Prayer Books of 1603 and 1661, relating to private baptism, are cumulative, and not substitutionary of the rabric in force anterior to 1603, and do not affect the validity of lay baptism. Escott v. Martin, 4 Moore, P. C. 104; 6 Jur. 765.

A child baptised with water in the name of the Trinity by a layman (a Wesleyan Methodist), not anthorised to administer the right of baptism :-Held, not to be nubaptised, within the meaning of the rubric for the burial of the dead in the Common Prayer Book, as incorporated into the Uniformity Act, 13 & 14 Car. 2, c. 4. 1b.

A child baptised with water, in the name of the Holy Trinity, by a person alleged to be in heresy or schism with the Church of England, is not unbaptised within the meaning of the rubric for the burial service in the Book of Common. Prayer. Titchmarsh v. Chapman, 3 Curt. 840; 8 Jur. 626.

Holy Communion. |-The rubric of the second year of the reign of King Edward VI., sanctioned by 2 & 3 Edw. 6, c. 1, regulates the ritual of the Church of England. Martin v. Machowchie, 38 L. J., Ecc. 1; L. R. 2 P. C. 365; 19 L. T. 508; 17 W. R. 187.

According to this rubric, the following practices are unlawful :- First, the elevation during or after the prayer of consecration of the paten and cnp. Secondly, kneeling or prostration before the consecrated elements. Thirdly, the use of lighted candles on the communion-table during the celebration of the holy communion, such candles not being wanted for giving light. Fourthly, using incense in the celebration of the holy communion. And fifthly, mixing water with the wine used in the administration of the holy communion. Ib.

"Minister." ]-The word "minister," in | contained the following direction : " Every the rubries relating to the administration of the holy communion, must be taken to include a bishop, and a bishop officiating as minister in the service of the holy communion is bound to celebrate it in the order and form prescribed by the Book of Common Prayer. Read v. Lincoln (Bishop) (No. 2), 14 P. D. 148.

Covering of Holy Table. ]-It is contrary to the 82nd canon, and has no warranty in primitive use or custom, to leave the communion-table without any decent covering during divine service. even though there should be no administration of the communion. Elphinstone v. Purchas, 39 L. J., Ecc. 28: L. R. 3 Ecc. 66.

Position of Minister. |-- It is contrary to the rabric, viz., that which precedes the Lord's Prayer at the beginning of the communion service for the minister to read the collects next before the epistle for the day in the communion service, standing in front of the table, with his back to the people, or, while reading the collects following the creed, to stand in front of the middle of the table at the foot of the steps leading up to the same, with his back to the people; and though, perhaps, not governed by any positive order in a rubric, it is contrary to the intent of the prayerbook for the minister to read the epistle in the communion service with his back to the people, the epistle not being a prayer addressed to God, but a portion of the scripture read to the people. Ib.

Notices. - The minister has no warranty in the prayer-book for announcing the celebration of the communion as a "high celebration of the Holy Eucharist," or for giving notice of holy days other than those which the church has directed to be observed, and which are to be found after the preface of the prayer-book, under the head of "A Table of all the Feasts that are to be observed in the Church of England throughout the Year." Ib.

\_\_\_\_ Vestments.] — The ornaments of the minister to which the rubric refers are those mentioned in the prayer-book of Edward VI., and no ecclesiastical censure can attach for their use in the prescribed manner in the performance of divine service. Elphinstone v. Purchus, 39 L. J., Ecc. 28; L. B. 3 Ecc. 66.

They are, for ministers below the order of bishops, and when officiating at the communion service, cope, vestment or chasuble, surplice, alb and tunicle; in all other services the surplice only, except that in cathedral churches and colleges the academical hood may be also worn. The cap called a "biretta," though not mentioned may be worn by the minister as a decent

protection to the head when needed. Ib.

By the first book of Edward VI. (1549) the minister is directed, while celebrating the communion, to wear a white alb, plain with a "vest-ment" (chasuble) "or cope." By I Eliz. c. 2, 2.5, it was enacted that "Such ornaments of the church, and of the ministers thereof, shall be retained and be in use, as was in this Church of England by authority of parliament in the second year of Edward VI. (1549), until other order shall therein be taken by the authority of the Queen's majesty, with the advice of her commissioners, appointed under the greal seal of England for causes ecclesiastical, or of the metropolitan of this realm." In 1566, advertisements were issued

minister saying any public prayer, or ministering the sacraments or other rights of the church. shall wear a comely surplice with sleeves, to be provided at the charge of the parish." The rubric of the present prayer-book (1662) directs that "such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained and be in use as were in this Church of England, by the authority of parliament, in the second year of the reign of Edward VI." (1549):—Held, that the ornaments rubric of 1662 does not repeal all legislation on the question subsequently to 1549, but must be read as subject to any further order taken under 1 Eliz. c. 2, s. 25; that the advertisements of Elizabeth were a "taking other order," within the act, by the Queen, with the advice of the metropolitan; and that, as the advertisements enjoined the use of the surplice at the administration of the communion, they rendered the use of albs and chasubles, at that administration, unlawful. Ridsdalev. Clifton, 46 L. J., P. C. 27; 2 P. D. 276; 36 L. T. 865,

See also col. 1322.

- Number of Persons to Communicate. ]-In a proceeding under the Public Worship Regnlation Act, 1874, it was proved that the incum-bent of a parish church had, at the celebration of the communion, consecrated and received the elements when only one person communicated with him. It was also proved that a like infringement of the rubric had taken place on several previous occasions during his incumbency, and that no steps had been taken by him to prevent its recurrence:—Held, that he must be admonished to obey the rubric. Clifton v. Ridsdale, 1 P. D. 316; 35 L. T. 432. Affirmed on this point, S. C., supra.

- Refusal to Administer.]—The 1 Edw. 6, c. 1, s. 8, provides "that the priest shall not, without lawful cause, deny the communion to any person that shall demand and humbly desire it." The 27th canon (1603) provides that "no minister, when he celebrateth the communion, shall wittingly administer the same to any that are common and notorious depravers of the Book of Common Prayer." J. having published a volume of "Selections from the Old and New Testaments," omitting chapters and parts of chapters, and being requested by his minister to explain such omissions, wrote a private letter stating—"The parts I have omitted are quite incompatible with religion or decency": -- Held, that he was not a common and notorious deprayer of the Book of Common Prayer, within the meaning of the canon. Jenkins v. Cook, 45 L. J., P. C. 1; 1 P. D. 80; 34 L. T. 1; 24 W. R. 439.

The "canse" which under the words of the

rubric, defining a cause for repulsion, is sufficient to warrant a minister of his own authority in repelling a parishioner from the communion, is that he is "an open and notorious evil liver," who thereby gives offence to the congregation; the term "evil liver" being limited to moral conduct as distinguished from belief. Ib.

# XX. FACULTIES. 1. GENERALLY.

Injunction to Restrain Persons from acting this realm," In 1566, advertisements were issued under Faculty if Granted.]—It is an abuse of by the metropolitan and other prelates, which the process of the court to ask for an injunction

to restrain the vicar and churchwardens of a i not yet been granted by an ecclesiastical court.

Proud v. Price, 63 L. J., Q. B. 61; 9 R. 40; 69

L. T. 664; 42 W. R. 102. Affirming 57 J. P. 533.

Practice.]—The vicar and one of the church-wardens, and the parishioners and inhabitants of a parish, were cited in the consistory court of Lichfield, to shew cause why a faculty should not be granted for the removal of certain additions and articles alleged to have been placed in the church without a faculty. An appearance was entered on behalf of the vicar and the churchwardens. They brought in an act on petition which concluded with a prayer to the judge to direct the issue of a faculty confirming the placing of the additions and articles in the church. The judge directed this prayer to be struck out of the act on petition :-Heid, on appeal, that the prayer ought not to have been struck out, and that the vicar and churchwardens were entitled to pray for a confirmatory faculty without the issue of a fresh citation. Gardner v. Ellis, L. R. 4 Ecc. 265.

- Locus Standi, ]-Observations as to what interest is sufficient to confer a locus standi on opponents in causes of faculty. Hansard v. St. Matthew, Bethnal Green (Parishioners), 4 P. D.

Right to sue-St. Margaret's, Westminster. ]-A member of the commons house of parliament has a sufficient interest to institute a faculty suit in respect of alterations in or additions to the parish church of St. Margaret's, Westminster. Vincent v. Eyton, [1897] P. 1.

Faculty derogating from previous Faculty. ]-See St. Galriel, Fenchurch Street v. City of London Real Property Co., [1896] P. 95.

# 2. AS TO CATHEDRALS.

Fabric. ]-Semble, that a faculty is not necessary for an alteration in the fabric of a cathedral church. Phillpotts v. Boyd., 14 L. J., Ecc. 41; L. R. 6 P. C. 485; 32 L. T. 78; 28 W. R. 491.

## 3. AS TO CHURCHES AND CHAPELS.

Alterations in Churches without Legal Authority. |-- Articles having been filed against a clergyman for making alterations in his church without having first obtained a legal sanction to them, he gave an affirmative issue thereto. The court then requested the archdeacon of the inspect such alterations, and to report to it as to their nature and propriety, which he did:—Held, that the court will adopt the recommendation of such a report, unless it contains some grievous misstatement of fact, or erroneous conclusion of law. Siereking v. Kingsford, 36 L. J., Ecc. Cas. 1: 15 L. T. 300.

- Removing Ornaments placed without Faculty-Rector's Right.]-The rector of a parish church has no legal right without the sanction of a faculty to remove out of the chancel church ornaments, such as military colours, placed there without a faculty in a permanent position with the concurrence of cumbent and churchwardens, with the approval a former rector and former churchwardens. of the vestry, apply for a faculty for alterations in Vincení v. Eyton, [1897] P. 1.

To remove things introduced without a parish from acting under a faculty which has Faculty. |-The ordinary decided that it was competent for a churchwarden to promote a suit for a faculty to remove things introduced into the church without a faculty in opposition to his co-churchwarden. Amongst the things for the removal of which a faculty was ordered to issue were the following :- 1. A chancel-screen with gates, the screen made of oak, about thirteen feet in height, with close panels up to the height of two feet six inches from the ground, and open tracery above, and surmounted with a cross over the centre opening. 2. Three additional steps, on which the communion table was raised above the floor of the chancel. 3. A wooden screen separating the south transept from the rest of the church. Against the decree of the ordinary. so far as it authorised the removal of the things last above mentioned, one of the opponents appealed to the court, and, by leave of the court and consent of all parties, two of the parishioners who had not appeared in the court below were allowed to intervene in the appeal, and prayed that a confirmatory faculty authorising the retention of the things forming the subjectmatter of the appeal might issue :- The court directed that a confirmatory faculty should issue to the interveners authorising the retention in the church of the chancel sercen, without the gates and with the panels in decent form, but in all other material respects confirmed the decree of the ordinary. Bradford v. Fry, 4 P. D. 93.

> Considerations for granting.]—On an applica-tion for a faculty, to authorise alterations in a parish church, made on behalf of the vicar, and one of the churchwardens of the parish, it appeared that, although the major part of those parishioners who were members of the Church of England was in favour of the application, the majority of the vestry, composed principally of parishioners not members of the Church of England, was opposed to it. The court, in granting a faculty to authorise some of the proposed alterations, held that, although it might be fairly influenced by the vote of the vestry in relation to alterations likely to affect the architectural appearance of the church or the convenience of the public, yet it was bound in matters connected with the comfort and convenience of those who attended the church to give greater weight to the opinion of the majority of those parishioners who were members of the Church of England, Tottenham (Vicar) v. Venn, L. R. 4 Ecc. 221.

The rector of a parish church applied for a faculty to make certain alterations, at his own expense, in the furniture and fittings of the church, which were not in a dilapidated state. The churchwardens, acting on behalf of the parishioners, opposed the grant of the faculty. The applicant having failed to shew either that the existing arrangements in the fittings of the church were so inconvenient and uncomfortable as to deter the parishioners from attending divine service, or that the proposed alterations were so clearly for the increased comfort and advantage of the parishioners as to induce the court to overrule their opposition, the faculty was refused. *Evans* v. *Slach*, 38 L. J., Ecc. 38.

- Opinion of Parishioners. ] - Where the in-cumbent and churchwardens, with the approval their parish church, and the grant or the refusal of the faculty is merely a matter for the discreption of the ordinary, the faculty ought not to be Sepulchre Vivar v. St. Sepulchre Churchwargranted unless it is proved to the satisfaction of the ordinary that if the proposed alterations are carried out, the church will be thereby rendered of the parishioners who worship there, more suitable, more appropriate or more adequate to its purposes, or that there exists either on the part of the parishioners generally or of the parishioners actually attending the church, a general desire in favour of the faculty being granted. Peek v. Trower, 7 P. D. 21; 45 J. P. 797. Explained in Nickalls v. Briscoe; see col. 1333.

Against wish of Vestry. ]-At the time of the erection of a new church, which on consecration became the parish church of A., the foundations were laid, and the designs prepared for a stone pulpit, but, from want of funds at the time, a temporary wooden pulpit was placed in the church. Some years afterwards, certain persons connected with the parish gave directions for the execution of the new pulpit, and, having raised a portion of the estimated cost of it by voluntary contributions, and given security for the rest, so that the parish could not incur any liability in the matter, they applied to the proper court for leave to fix it in the church. The defendants, acting on a resolution of the vestry of the parish, refused to consent to the erection of the new pulpit until the debt for the building of the church itself had been paid off. No objection was made to the character or ornamentation of the proposed new pulpit:-Held, that, as the parish had already provided a substantial pulpit, which continued in good order and was in no way dilapidated, the court could not, against the expressed objection of the vestry, order the removal of such temporary pulpit, and that it should be replaced by a new one; but it might allow a faculty to issue on the terms proposed by the vestry. Jackson v. Singer, 37 L. J., Ecc. 9.

To whom Faculty should Issue-Parish with two sets of Churchwardens. ]-The parish church of St. Sepulchre is within the city of London, but the parish of St. Sepulchre is situate partly within the city of London and partly in the county of Middlesex, and five churchwardens of the parish church are annually elected, three by the vestry of the portion of the parish within the city of London, and two by the vestry of the portion of the parish in the county of Middlesex. The vicar and the churchwardens elected by the city portion of the parish having petitioned the ordinary for a faculty to authorise certain repairs in the parish church, the churchwardens elected by the Middlesex portion of the parish appeared as opponents in the cause, and prayed the court to direct the faculty, if granted, to issue to them jointly with the petitioners, and to declare what were the rights of the respective parties to the suit with respect to church management. It was admitted that the churchwardens elected by the city portion of the parish had for a long series of years had the sole control of a certain trust fund available for payment of the costs of the proposed alterations :—Held, that the churchwardens elected by each portion of the parish were equally officers of the ordinary in all mat-

dens. 5 P. D. 64.

For Appropriation of Vault. ]-The grant of a more convenient, more fit for the accommodation faculty for the appropriation of a vault in a church or a chapel is entirely within the discretion of the ordinary. The ecclesiastical law requires, before such faculty is decreed, that all persons interested in opposing the grant should be heard before the ordinary. The vicar or perpetual curate of a church, though entitled to officiate in and have free access to the chancel has no right to fees for the erection of monumental tablets, or for the construction of vaults in the chancel. A faculty for that purpose may be legally granted without his consent; but he has a persona standi, by reason of his position as a persona stand, by reason of an postuon as incumbent, to oppose the grant of such a faculty. Rugg v. Kingsmill, 5 Moore, P. C. (N.S.) 79; 37 L. J., Ecc. 13; L. R. 2 P. C. 59; 18 L. T. 94.

> - Discretion, how to be exercised. ]-Where a faculty was granted by the ordinary (confirmed by the arches court), for the appropriation of a family vault under the chancel of a district church, though objected to by the vicar of the parish because, among other reasons, the access to it, being only from the exterior and no churchyard or burial-ground attached, there was no consecrated ground outside the church on which any part of the burial service could be performed:—Held (by the judicial committee), that, though the granting of such a faculty was entirely within the discretion of the ordinary, yet such discretion ought to be exercised so as to prevent the possibility of a misuse by the grantee : and that, in the circumstances, the grant ought only to issue on condition that the grantee (who was owner of the land adjacent to the church) appropriated, and consented to the consecration of, a sufficient piece of ground near the opening of the vault, to be so consecrated for the sole and special purpose of burials in the vault ; and such faculty decreed accordingly. Ib.

For Window - Inscription - Discretion of Ordinary.]—An application was made to the consistory court of Chester to authorise by faculty the erection in a parish church in the diocese of Chester of a stained glass memorial window, having placed below it an inscription in Latin, the translation of a portion of which was as follows :- " Of your charity pray for the soul of H. F. . . . deceased . . . and for the sonl of J. H. C. . . . deceased":—Held, that the ordinary ought not in his discretion to sauction the introduction into the church of any inscription of which the above words would form part, and that so much of the application as prayed that a faculty might be granted for placing such words beneath the proposed window must be rejected. Breeks v. Woolfrey (1 Curt. 880) discussed. Eyerton v. All Saints, Odd Rode, [1894] P. 15.

For affixing Military Colours to Walls of Chancel of Parish Church. ]-The ordinary has jurisdiction to authorise by faculty the affixing of military colours as church ornaments to the walls of the chancel of a parish church where it appears that a former rector of the church has ters relating to the management of the parish approved of their being placed in the chancel, church, and that the faculty must issue to the Vincent v. Euton. [1897] P. 1.

For Movable Seats in Chancel ]-Where the placed thereon, holding that such loft and such chancellor of the diocese had decreed a faculty for placing two movable benches in the chancel for the use of the vicar and his family, the Court of Arches held, on appeal, that such a decree would not be disturbed unless it were plainly shewn that a clear violation of a private right was involved, or that such decree would give rise, actually or probably, to a considerable the chancel sercen without the loft surmounting degree of general inconvenience. Eld v. Perry, 11 Jur. (N.s.) 228,

- Removable at Discretion of Ordinary. A faculty to place in the chancel movable seats, which may be removed at the discretion of the voluntary subscriptions, and that the organ and ordinary, is valid. Ib.

For Stained Glass Window in Chancel Opposition of Majority of Parishioners — Discretion of Ordinary. —The discretion of the ordinary as to granting or refusing a faculty for placing a stained glass window in the chancel is the same as if it is proposed to place the window in any other part of the church; and the wish of the majority of the parishioners that an existing window shall not be replaced by a stained glass window in nowise fetters the ordinary in exercising such discretion. Peek v. Trancer (7 P. D. 21) explained. Nichalls v. Briscoe, [1892] P. 269.

Memorials not Admissible in Evidence.]-Decision by the consistory court of Rochester that in a contested cause of faculty memorials signed by parishioners, asking that the faculty prayed for be not granted, are inadmissible as evidence. Ih.

For Rood-Loft and Rood-Chancel Screen and Gates. |-The vicar and churchwardens of a parish church in the diocese of Norwich petitioned the ordinary to authorise by faculty the retention in the church of the following works introduced into the church since its consecration and without the sanction of the faculty :-- A chancel screen without gates, but surmounted by a loft resting on the top of the screen, four feet wide, and with sides three feet high, to which access was obtained by the old rood-loft stairs. A beam extending across the west end of the chancel at a height of four feet above the chancel screen, and placed upon such beam a figure of Our Lord upon the Cross, and on one side a figure of the Virgin Mary, and on the other side a figure of St. John ; all such figures being graven in wood and of about life-size. -And the erection of the following new works:—The placing upon the above-neu-tioned beam of two other figures, one to represent Mary Magdalenc, and the other a Centurion together with the figure of a Cherub at each end of the beam, the erection of gates to the chancel screen, of screens across the aisles, and of choir stalls with screens behind them. It appeared that a dedication service had been held in the church on the occasion when the figures on the beam across the chancel had been put up, and that every year on Palm Sunday members of the church choir went into the loft above the chancel screen and sang there. The chancellor of the diocese of Norwich refused to grant a faculty for the retention in the church of the on the ordinary being satisfied that the figures loft over the chancel screen or of the figures placed on the beam above the same-in his ration only, and that there was no ground for

figures so placed were unlawful within the ruling of Lord Penzance in Clifton v. Ridsdale (1 P. D. 316), and matters as to which in the discretion of the court a faculty ought not to be granted, there being danger of "superstitious reverence" being paid to the rood. Further, the chancellor decreed a faculty to issue for it; for the addition of gates to such screen, for the screens across the aisles with gates attached, and for the choir stalls and screens ; evidence being before him that the expense of the works yet to be done would be met by other property in the chancel and aisles required protection. St. John the Baptist, Timberhill v. Rectors of same, [1895] P. 71.

Retention on Chancel Screen of Carved Figures -Historical Scene.]-A figure of Our Lord upon the Cross was in 1880 placed in a parish church above, and on the centre of the screen separating the chancel from the nave; and in 1893 there were placed on one side thereof a figure of the Virgin Mary, and on the other side thereof a figure of St. John. All the figures were carved in wood, were about two feet nine inches in height, the central figure being rather higher than the two others, and all had been placed in the church without the sanction of the faculty. There was not in the church anything of the nature of a rood-loft or rood-stairs, and no candles were round or in front of the figures. In 1896 the rector and churchwardens of the parish instituted a cause of faculty praying the ordinary to authorise by faculty the retention of the three figures on the screen, and filed affidavits stating that the services of the church had been conducted in accordance with the directions of the Book of Common Prayer, and that there was not and had not been anything in the said services or in the attitude of those attending the services to indicate or suggest any probability of worship, adoration, or any superstitious reverence being adoration, or any superstations reverence being paid to the figures on the screen. No person appeared to oppose the grant of the faculty. The faculty ordered to issue as prayed. Bursham (Rector) v. Parishioners, [1896] P. 256.

Restoration of Chancel Screen-Figures of Our Lord upon the Cross, St. Mary, and St. John.]-A crucifix with the accompanying figures of the Virgin Mary and St. John is not forbidden by law to be erected on a chancel screen, but may be placed in that position in a parish church under a faculty where the ordinary is satisfied that it is not likely to be abused by superstitions reverence being paid to it. faculty authorising the restoration in a parish church of a stone chancel screen or interior chancel arch of pre-Reformation date by placing on three existing pedestals springing from ornamental tracery in the upper parts of such screen interior arch three stone figures without gilding or painting, each two feet three inches high —one, the central figure, representing Our Lord upon the Cross, and the other two representing respectively the Virgin Mary and St. John—was granted by the consistory court of St. Albans would be for the purpose of architectural decoopinion a rood-loft and rood—or for the erce-ronsonable apprehension that they would be tion of the additional figures proposed to be abused or made the subject of superstitious tants, [1897] P. 185.

- Dispensing with Resolution of Select Vestry.]—A petition by the vicar and church-wardens of the parish church of R., and the chapelwardens of a chapel of case in the parish of R., asking for a faculty to authorise the erection in the chapel of a chancel screen with grates, and with a cruefit and figures of the Virgin Mary and St. John placed on the top of the screen, was supported by a resolution of a meeting of the pew-renters of the chapel. The vestry for ecclesiastical purposes of the parochial area in which both the parish church and the chapel of ease were situate was a select vestry of the whole civil parish of R., which comprised a larger area than the parochial area above mentioned, and the vestry had passed no resolution either in favour of or against the grant of the faculty:—Held, (i.) That a resolution of the select vestry might be dispensed with. (ii.) That a faculty for chancel screen gates ought not to be granted. (iii.) That a faculty for a crucifix with or without figures on either side placed on a chancel screen ought not to be granted, Richmond (Vicar) v. Inhabitants, [1897] P. 70.

For Chancel Gates.]-A faculty for chancel gates was granted, it being shewn that the chancel, from its richness, required protection. St. Agnes, In re. 11 P. D. 1.

A faculty for the erection of chancel screen gates in a parish church was granted by the consistory court of London, on that the court being satisfied in its discretion that the erection would be of utility. St. James, Norland v. Parishioners, [1894] P. 256.

The rector and churchwardens of a parish church in the diocese of St. Albans petitioned the ordinary for a faculty to anthorise the erection in the church of a chancel screen with gates in the centre, by the closing of which access to the chancel from the nave of the church would be wholly cut off, and at the hearing of the suit it appeared that, if the faculty were granted and the screen erected as proposed, the gates to it would be kept open during the performance of divine service, but would be fastened at other times when the church was open, and, being so fastened, would afford protection against the contents of the chancel and vestries being injured or stolen. The chancellor of the diocese of St. Albans being of opinion that the grant of a faculty, authorising the creetion of the gates, would be an exercise of his discretion in opposition to the decision of the court of arches in Bradford v. Fry (4 P. D. 93), refused the faculty as prayed, but intimated that, if the petitioners desired, the court would decree a faculty to issue for the crection of the chancel screen without any gates to it. St. Andrew, Romford v. Parishioners, [1894] P. 220.

For Communion Table in Side Chapel.]-The court, on the ground of convenience and saving of expense, decreed a faculty for the erection of a communion table in a side chapel of a church in which there was already a communion table. Holy Trinity Church, Stroud Green, In re, 12 P. D. 199; 36 W. R. 288.

The consistory court of London, before granting a faculty authorising the placing of a second communion table in a side chapel under the BURIAL, 7, post, col. 1457.

reverence. Great Burdfield (Vivar) v. Inhabi- same roof as a parish church, requires to be satisfied that the side chapel in which it is proposed to place the second communion table is separated from the aisle of the church by trellis work or otherwise, so as to indicate that it is, in ecclesiastical law, a side chapel, intended for use as such when the chancel or nave of the church is not used for divine service. St. Peter's. Eaton Square v. Parishioners, [1894] P. 350.

### 4. AS TO CHURCHYARDS.

Altering or Building on Part of. ]-No judge has power to grant a faculty to convert a part of a churchyard into a highway requiring to be widened for the public benefit, though consent is given by all persons interested. St. John's, Walbrook v. Parishioners, 2 Rob. Ec. Rep 515; 16 Jur. 645.

No judge has power to grant a faculty to sanction the use of consecrated ground for secular purposes; but, as a vestry room is employed for ecclesiastical as well as secular uses, a faculty, after some hesitation, was granted for the erection of a vestry room on consecrated ground.

Campbell v. Paddington Parishioners, 2 Rob.

Ec. Rep. 558; 16 Jur. 646.

The churchwardens of a parish, with the sanction and approval of the vicar, the rural dean of the district, and the bishop of the diocese, but without any legal authority, permitted a portion of the churchyard to be separated from the remainder, and to be taken into and to form part of a public road :- Held, that it is not in the power of any ecclesiastical court whatever to allow any portion of consecrated ground to be devoted to secular uses, or to grant a faculty to confirm such an appropriation, Harper v. Forbes, 5 Jur. (N.S.) 275.

Consecrated Ground-Want of Jurisdiction to sanction Conversion to Secular Use. ]-The vicar and churchwardens of a parish church in the diocese of Rochester petitioned the ordinary to decree a faculty to authorise a strip of consecrated ground, added to the churchyard under the Burial Act, 1852, but in which burials were prohibited by secretary of state's order, being taken therefrom and made part of an adjoining public highway for the purpose of widening the same. In their petition they alleged (inter alia) that no interments had ever been made within the portion of the churchyard proposed to be so dealt with by the faculty; that inconvenience was caused to persons attending the church from there being no pathway on the side of the highway adjacent to the churchyard; and that the proposed widening would enable such a pathway to be made, and would greatly conduce to the convenience of those attending the church as well as of the general public. The citation to lead the faculty was by order moved for in court. On the hearing of the motion the chancellor of the diocese of Rochester, being of opinion that by granting the faculty prayed for he would be authorising the approoriation of consecrated ground to secular uses, thus entertaining a cause beyond the jurisdiction of the court, refused the motion. Plumstead Burial Ground, In re [1895] P. 225.

Disused Churchyards. - See XXXI. BURIAL; 5, post, cols, 1439 et seq.

For Erection of Mortuary. ]-See XXXI.

tion of 19 & 20 Vict. c. 112, s. 3, and is, therefore, within the powers and duties of the ecclesiastical commissioners. Ecclesiastical Commissioners v. Clerkenwell Vestry, 7 Jur. (N.S.) 326; 4 L.T. S2; 9 W, R. 495.

It was never the intention of the act for building fifty new churches, that there should be a suit in the ordinary courts of justice. The commissioners are the persons to determine any dispute. Vernon v. Blackerly, 2 Atk. 144.

If the commissioners do anything improper, the court of king's bench will grant a mandamus. Ib.

The commissioners are, by the acts, directed to account before the auditors of the treasury and, if there be any grievance, the relief is by

applying to a court of revenue. Ib.

The several acts relating to this matter must

be taken together. Ib.

Nothing can issue by order of the treasurer without a previous one from the commissioners.

The commissioners should have been parties only, and not the treasurer, for it is absurd to make a person who acts ministerially the sole party. Ib.

- Authority of Ecclesiastical Court. ]-The ecclesiastical court has no authority to examine the validity of an order under seal made by the ecclesiastical commissioners under the provisions of an act of parliament. It is bound to obey the directions it contains, although it may be satisfied that there was an irregularity in procuring it. White v. Steele, 7 Jur. (N.S.) 805.

Authority of Vestry to pull down Portions of Churches under 18 & 19 Vict. c. 100, s. 90.]— The expressions contained in 18 & 19 Vict. c. 100, 8, 90, and 19 & 20 Vict. c. 112, s. 3, do not exempt the ecclesiastical commissioners acting under the church building acts, from the provisions of the first-mentioned act, and vestries have, under it, authority to pull down such portions of churches, as well as of other buildings, as or characters, as wen as order similaries, as transgress the provisions of that act. Ecclesi-astical Commissioners v. Clerkenwell Vestry, 3 De G. F. & J. 688; 30 L. J., Ch. 454; 7 Jur. (N.S.) 810; 4 L. T. 599; 9 W. R. 681.

Church Patronage and Appointments.]--By 4 & 5 Anne, c. xxii., a rectory was united and annexed to a deanery, and the dean was to be instituted without presentation; by 3 & 4 Vict. c. 113, s. 50, all the estate and interest of any holder of any deanery in any lands, tithes and other hereditaments or endowments whatsoever, annexed or belonging to, or usually held or enjoyed with, such deanery (except any right of patronage), or whereof the rents and profits had been usually taken and enjoyed by the holder of such deanery, as such holder, separately and in addition to his share of the corporate revenues of the chapter, were vested in the ecclesiastical commissioners; and by 13 & 14 Vict. c. 94, s. 19, no spiritual person appointed to a deanery of a cathedral may accept, to take and hold therewith, any benefice unless in the cathedral city, and not exceeding 500% a year in value. The rectory Under the statute 23 & 24 Vict. c. 142, and an was not situated in a cathedral city, and the order in council, an ancient church in the city

XXI. ECCLESIASTICAL COMMISSIONERS.

Jurisdiction.1—The creation of a church is an affair of the church, so as to be within the exception of 19 & 20 Vict. c. 118, s. 5a, did not apply to the church control of the church so as to be within the exception of 19 & 20 Vict. c. 118, s. 3a, and is, therefore, commissioners the whole rectory, involving the patronage, cure of souls, and temporalities, and a clear intention was shewn, on looking to the whole statute, not to pass to them patronage or anything involving the cure of souls, nor to interfere when such matters were involved, without express mention and proper provisions respecting them; that 13 & 14 Vict. c. 94, s. 19, also did not apply, as the dean had no option as to accepting the rectory; and that therefore the statute of Anne was not affected and the dean was entitled to the rectory. Reg. v. Champaeys, 40 L. J., C. P. 95; L. R. 6 C. P. 384; 24 L. T. 181; 19 W. R. 386.

> Commonable Lands.]—The 51 Geo. 3, c. 115, does not empower the ecclesiastical commissioners as lords of the manor to discharge commonable lands from common or customary rights not strictly manorial-as, e.g. the right of parishioners to their village green. Forbes, v. Ecclesiastical Commissioners, 42 L. J., Ch. 97; L. R. 15 Eq. 51; 27 L. T. 511; 21 W. R. 169.

Application of Purchase-Money of Lands, not used under Church Building Acts, compulsorily sold.]—The ecclesiastical commissioners may, in exercise of the powers given to them by the Church Building Acts, 1822 (s. 34) and 1840 (s. 19), apply part of the purchase money of land conveyed to them, but not used for the purposes of those acts (which has been taken from them by a public body under the powers of the Lands Clauses Act, 1845), in paying off a charge upon the living for money borrowed from Queen Anne's Bounty and in structural repairs to the church. These powers may be exercised. although the land has, by reason of the consecration of the church, vested in the vicar. Christ. Church, East. Greenwich (Ficar), Every parte, 65 L. J., Ch. 331; [1896] 1 Ch. 520; 74 L. T. 18; 44 W. R. 520.

Statute of Limitations.]-In 1854, the ecclesiastical commissioners succeeded to the estates of the dean of A., and in 1877 they brought an action to recover part of those estates which had been possessed adversely to them and their predecessors, the deans, for more than twenty, but less than sixty, years :-Held (dissentiente Lord) Blackburn), that, under the words of the 57th section of 3 & 4 Vict. c. 113, the commissioners. had the same time within which to enforce their claim to the property that the dean would have had under the 29th section of 3 & 4 Will. 4, c, 27. mat unter the zant section of 3 & 4 with 3, 6, 2 J., Ecclesiastical Commissioners v. Rowe, 49 L. J., Q. B., 771; 5 App. Cas. 736; 43 L. T. 353; 29 W. R. 159; 45 J. P. 36—H. L. (E.)
Per Lord Blackburn:—There are no words in

the 57th section of 3 & 4 Vict. c. 113, which as to time render the 29th section of the 3 & 4 Will. 4, c. 27, applicable to the commissioners.

Ib. Held, also, that the right of action to recover the land accrued at the surrender of the lease current when the allotment was made. Ib.

Power to Sell Site with all Essements.] Under the statute 23 & 24 Vict. c. 142, and an of London was vested in the ecclesiastical com- | which had been bought under the power thereby missioners, upon trust to pull down the building, dispose of the materials, and sell the site. They pulled down the church, and the site was still vacant. The defendant who had become the owner of land, formerly part of the glebe of the church, on which some low buildings had stood, commenced the erection of buildings which, if completed, would have materially obstructed the access of light to windows occupying the same position as those of the late church :-Held, that the ecclesiastical commissioners had power to sell the site, with all the easements which had been enjoyed by the church, so that, if the church had ancient lights, the purchaser would have the benefit of them. Ecclesiastical Commissioners V. Kino, 49 L. J., Ch. 529; 14 Ch. D. 213; 42 L. T. 201; 28 W. R. 544—C. A.

Consent to use of Parish Land for Cemetery.] -A proposal for the making over to the burial board of a place, of a piece of land belonging to the parish to be used as a cemetery, will not be sanctioned by the court without the previous approbation of the application by the charity commissioners. Watford Burial Board, Ex parte, 2 Jur. (N.S.) 1045.

Glebe Lands-Drainage and Improvement Company.]-A rent-charge for a certain period of time, in arrear, charged by an order made by the inclosure commissioners upon the inheritance of glebe lands of a rectory, under the provisions of the General Land Drainage and Improvement Company's Act of 1849 (12 & 13 Vict. c. 91), was, under the provisions of the same act, ordered to be raised by a sale of the glebe lands. In an action by the owners of a rent-charge, in arrear, charged on glebe lands, for a declaration that they were entitled under the order made by the inclosure commissioners to a charge on the lands for the sums due and to become due of the rent-charge, and asking for a sale of the lands, the ecclesiastical commissioners were made defendants:—Held, on demurrer, that they were not necessary parties. Soutish Widows' Fund v. Craig. 51 L. J., Ch. 363; 20 Ch. D. 208; 30 W. R. 463.

Site for Church—Vesting in Incumbent— Liability for Paving.]—Land having been conveyed under the church building acts to the ecclesiastical commissioners as a site for a church, a church was afterwards erected on a part of the land, and the church and part only of the land were consecrated :- Held, that, upon such consecration, the whole of the land so conveyed to the commissioners vested in the incumbent under s. 13 of 8 & 9 Vict. c. 70 (Church Building Acts Amendment Act); that the commissioners ceased to be the owners of it, and were therefore not liable under the Metropolis Management Acts, 1855 and 1862, to contribute in respect of it towards the cost of paving a new street. Plumstead Board of Works v. Eccle-siastical Commissioners, [1891] 2 Q. B. 361; 64 L. T. 830; 39 W. R. 700; 55 J. P. 791.

Site of Parsonage-house-Power of Re-sale.] —Under the powers contained in s. 9 of 1 & 2 Vict. c. 107, land was purchased by the commissioners; but, such land not being required

conferred into the same category as land which had been bought under the powers of 58 Geo. 3, c. 45; and that therefore the commissioners could make a good title. Semble that 8 & 9 Vict. c. 70, s. 25, might also enable the commissioners, in a case like the present, to make a good title. Evelesiastical Commissioners and King, In re, 62 L. T. 535; 38 W. R. 473.

- 58 Geo. 3, c. 45-Petition-Costs.]-Where a sum of money, applicable to the purposes of a vicarage, had been paid into court under the Church Building Act, 58 Geo. 3, c. 45, and a petition was presented by the vicar for payment of the fund to the governors of Queen Anne's Bounty, who were contributing to the erection of a new vicarage-house, the ecclesiastical commissioners, as representing the church building commissioners, had to pay the cost of the peti-tion, excepting the costs of the governors of Queen Anne's Bounty, which had to be paid by the petitioner. Margate (Vicar), Ex parte, 12

On a petition for the transfer of purchase-money paid into court by the ecclesiastical commissioners, the court ordered the costs of all parties to be paid by the commissioners. Clarke v. Johnson, Cosmi Truppo, In re, 22 L. T. 570; 18 W. R. 800.

# XXII, CHURCHWARDENS.

See Local Government Act, 1894 (56 & 57 Vict. c. 73).

# 1, ELECTION AND APPOINTMENT.

Mandamus to compel Inhabitants to elect. 7-The court will grant a mandamus to the inhabitants of a parish liable to contribute to the church-rate, to meet and assemble together, with the minister, to elect churchwardens. Rew v. Wia, 2 B. & Ad. 197; 1 L. J., M. C. 36,

Custom.]-The return to such mandamus stated an immemorial custom in the parish to have no churchwarden, and that the duties appertaining by law to the office of churchwardens had been, from time out of mind, discharged by the over-seers of the poor :—Held, that, masmuch as overseers had not existed time out of mind, and as there were necessary duties appertaining to churchwardens, and there must have been some persons bound by law to discharge those duties, the custom set out in the return was bad. Ib.

Where, by a custom in a parish, the rector nominates one churchwarden, and the parishioners the other, and the rector nominated as churchwarden a person who was not resident, nor the occupier of any house or land in the parish, and the person so appointed was afterwards sworn into office; and it was desired to question the validity of the appointment, on the ground that the person appointed was not legally qualified:—Held, that an application for a mandamus to the rector to nominate a churchwarden was a proper course for that purpose, and the court made absolute a rule for such a mandamus. Barlow, In re, 30 L. J., Q. B. 271; 5 L. T. 289.

A custom in a parish was that two churchwardens should be chosen annually by a select musicines; out, such that no being requires for the purpose of asite for a residence, they had contracted to sell the same:—Held, that the centracted to sell the same:—Held, that the diffect of a 90 of the latter act was to bring land to the office of churchwarden, or had served such records of the parish it appeared that, from their commencement in 1648 to 1734 (with the exception of an interval after the great fire of London in 1666), one fresh churchwarden was chosen annually from the parishioners at large, who was elected to the office of junior churchwarden for one year, and who was elected to the office of senior churchwarden for the next. From 1734 to 1775 there were no records, but from 1775 to 1824 the same course was pursued, except in four instances; and shortly after the great fire of London, in 1666, two persons acted as junior and senior churchwardens respectively, for the space of five years :- Held, that it was part of the enstom, by which the number of the select vestry was regulated, that a new person should be elected every year to the office of junior church-warden, who should serve the office, and the following year should succeed to the office of senior churchwarden. Gibbs v. Flight, 3 C. B. 581; 16 L. J., M. C. 73: 11 Jur. 19.

A parish consisted of six townships; in five of them the parishioners in each township had been in the habit of selecting two persons, one of whom was appointed churchwarden by the rector, and in the sixth township, the outgoing churchwardens nominated two, of whom the rector appointed one. In 1848, by order in conneil under 3 & 4 Vict. c. 113, one of the townships was constituted a separate parish :-Held, that the custom was a good custom, and that the separation of one township did not That the separation of new towns and not are affect it in the remaining five. Bremner v. Hull, 35 L. J., C. P. 332; L. R. 1 C. P. 748; 12 Jur. (N.S.) 648; 15 L. T. 352; 14 W. R. 964.

By 1 Jac. 2, c. 22 (1685), the parish of St.

James, Westminster, was created by dividing a district from the parish of St. Martin; and it was enacted, that the inhabitants of St. James's shall be from time to time subject to the laws and statutes now in force, or hereafter to be made for the choice of churchwardens, and such other like parish officers, and other parochial duties within the parish in like manner as the inhabitants of the parish of St. Martin's are or might be subject and liable unto." St. Martin's had been governed by a select vestry, and provision was made for continuing such a vestry in St. James's. Before 1685, the practice in St. Martin's, on the election of the two churchwardens, had been that the vestry chose them by seoring certain prepared lists (the greatest number of scores carrying the election); but, by usage, the junior churchwarden of the preceding year was re-elected of course. It did not appear how or when this practice originated, power of the select vestry to choose the churchwardens was often disputed in St. Martin's after 1685; and for the last two years the elections by them were discontinued, and the officers chosen according to 58 Geo. 3, c. 69. No alteration was made in St. James's :- Held, that the mode of election, practised in 1685, was one of the laws then in force, by which, under I Jac. 2, c. 22, the parish of St. James's was to be governed; and that the abandonment of the custom by St. Martin's did not oblige St. James's to discontinue it also. Rew v. St. Jumes's, Westminster, Churchwardens, 5 A. & E. 391; 2 H. & W. 253.

— Evidence of ]—The 58 Geo. 3, c. 69, giving a plurality of votes to rate-payers, according to their rating, exempts from its provisions | See also cases supra.

office, or had paid a fine for not doing so. By the any vestry holden by virtue of any special act, or of any usage or custom. A local act for Paddington enacted that the election of churchwardens should be conducted, from year to year, in such manner as had been usual in the same parish. It was proved that the mode of electing churchwardens had been by a shew of hands, no poll ever having been demanded:-Held, that this was no evidence of a eastom to exclude the granting of a poll when properly demanded. Campbell v. Maund, 5 A. & E. 865; 1 N. & P. 558; 2 H. & W. 457; 6 L. J., M. C. 145.

> Election of Person claiming Exemption-Confirmation of Appointment.] — The election by parishioners of a churchwarden, who claims exemption from, and refuses, the office, caunot be revived by a vestry meeting after the due election of another person, although the latter resigns on condition that the former will accept the office, and neither of them has been admitted by the archdeacon. Reg. v. Freeman, 18 L. T.

> Where Perpetual Curate. ]—A perpetual curate is the minister of a parish within the general custom, by which (in conformity with cauon 89) the churchwardens are chosen by the joint consent of the minister and parishioners, and, if they cannot agree, the minister chooses one and the Q. B. 37; L. R. 8 Q. B. 69; 27 L. T. 707; 21 W. R. 190.

And a perpetual curate has, therefore, a right to take part in the election of churchwardens, in the absence of proof of any other custom. Ib.

On Formation of New Parishes.]—The parish of D. consisted of four townships, D., W., B., and M. The parish church was in D., and churchwardens were appointed at D. in the usual manner, who acted for the whole parish except M., where there was a chapel, and a special custom that the parishioners should elect two churchwardens to act for the hamlet of M. private act was passed to divide the parish into three, D, and W, to be one parish, B, another, and M. a third. The act contained a provision that after the contemplated division had taken effect, two persons should be chosen churchwardens for each of the new parishes, "in the same manner as churchwardens are now chosen and appointed for the parish of D." :- Held, that, the object of the act being to create three entirely new parishes for ecclesiastical purposes, formed upon the model of the mother parish of D., the previous right of the parishioners of M. to elect both churchwardens was taken away. Green v.

Reg., 1 App. Cas. 518; 35 L. T. 495.

A district which, by order in council, under 59 Geo. 3, c. 184, s. 16, is assigned to a chapel in a parish, becomes a separate parish for all ecclesiastical purposes, but continues a part of the parish for other parochial purposes, and therefore the inhabitants of the district are entitled to vote in the election of churchwardens for the parish. Reg. v. Stevens, 3 B. & S. 333; 32 L. J., Q. B. 90; 11 W. R. 262.

So the ratepayers of a district parish established under 58 Geo. 3, c. 45, 6 & 7 Vict. c. 37, and 19 & 20 Vict. c. 104, have a right to vote at elections of churchwardens for the original or mother parish. Reg. v. Exeter (Archdeacon), 11 W. R. 262.

trying the right of naming a churchwarden in the court Christian. Williams v. Vaughan, 1

Demanding a Poll.]-The right to demand a poll is by law incidental to the election of a parish officer by shew of hands, where there is no special custom to exclude it. Campbell v. Maund, 5 A, & E, 865; 1 N. & P, 558; 2 H. & W. 457; 6 L. J., M. C. 145.

A poll, at an election, need not be demanded until after the decision of the chairman upon a shew of hands. Ib.

Where a poll has been demanded to be held according to a particular mode, and has been held accordingly, without any objection being made, any irregularity in the mode demanded is waived. Ib.

A candidate for the office of churchwarden having been named, a shew of hands was demanded, and refused by the rector, on the ground that the election was to be decided by a majority of votes. The polling books remained open, and then the rector ordered the poll to be closed, contrary to general expectation, and declared the candidate elected. A mandamus issued, commanding the rector and churchwarden to elect a churchwarden. Rex v. Birmingham (Rector), 7 A. & E. 254; 1 Jur. 754.

At an election of churchwardens in open vestry a poll of the parishioners was demanded, under Sturges Bourne's Act, 58 Geo. 3, c. 69 :- Held. that this was a legal demand, and meant a poll of such parishioners as were entitled to vote, and Into to fall the parishioners. Reg. v. 8t. Mary's, Lambeth, Churchwardens, 3 N. & P. 416; 8 A. & E. 356; 1 W. W. & H. 398; 2 Jur. 566.

Every rated inhabitant, whether previously present at the vestry or not, has a right to come in and vote; and the closing of the vestry doors during the poll, so as to exclude voters, is illegal.

Upon the poll being demanded, it was resolved that it should be confined to the persons who were present at the show of hands which had already been made, and not to be extended to the other parishioners who were entitled to vote: - Held, that this, though illegal, could only render the election void in case persons entitled to vote were prevented from voting; and, that not being shewn, the election with locked doors was a valid election. Ib.

Closing of Poll. -On the Friday after Easter a vestry meeting of a parish, of which meeting notice had been posted on the church door on Easter Sunday, was held for the election of churchwardens. The rector nominated one churchwarden, and there were two candidates for the office of parishioners' churchwarden, one being the existing churchwarden, and the other a candidate put forward by a party dissatisfied with the administration of the parish charities. The shew of hands was in favour of the last-named candidate. The poll was closed by the rector at five o'clock on the day of the election. when there appeared a majority of votes for the existing churchwarden. The validity of the election was questioned by a rule, made on the 5th July, for a mandamus to the rector and churchwardens to hold a new election. The court discharged the rule on the ground that the

Right of Naming.]-A prohibition lies for unreasonably exercised; that it had not been shewn that had the poll been kept open the result of the election would have been different; and that there had been too great delay in questioning the election. Reg. v. Handborough Churchwardens, 37 L. T. 400.

The chairman of a vestry meeting, held for the purpose of taking a poll for the election of a churchwarden, has no power to close the poll on account of disturbance. Reg. v. Grahum, 9 W. R. 738.

The validity of a resolution of a vestry to close the poll for the election of churchwardens at a particular hour, is a fit question to be tried upon a mandamus. Rev v. Winchester (Bishop), 7 East, 573.

Adjournment of Meeting. - Where a meeting for the election of churchwardens takes place in the parish church, in pursuance of a notice that such meeting would be held at the parish church, and that in ease a poll should be demanded, the meeting would be immediately adjourned to the town-hall, the chairman may, upon a poll being demanded, adjourn the meeting to the town-hall. although a majority of the voters present object to such adjournment. Rev v. Chester (Arch-deucon), 3 N. & M. 413.

Validity of Election. ]-On the 6th of April, notice was posted on the church door for a vestry meeting to appoint churchwardens on the 10th of April, which was Easter Tuesday. On that day A. and B. were elected churchwardens. Doubts having arisen as to the sufficiency of the notice, it not having been published in church on the Sunday, another notice was duly given and read during service on the following Sunday that a vestry meeting would be held to elect churchwardens on the ensuing Thursday, on which day A, and B, were again elected :- Held. that A. and B. were duly elected churchwardens, as one or the other of the two elections was valid. St. Faith Churchwardens, In re, 25 L. J., Q. B. 168; 2 Jur. (N.S.) 212; 4 W. R. 267,

Presumption that Election was Lawful . ]-Proof that a party holds the office of church-warden is prima facie evidence of his having been lawfully appointed, even where the question turns on his title to the possession of land in his capacity of churchwarden. Ganvill v. Utting. 9 Jur. 1081.

Improper Rejection of Votes. ]-Where, upon an election of a churchwarden, the chairman of the vestry meeting had rejected votes which were alleged to be admissible, but it did not appear that the rejection had caused any difference in the result, the court refused to grant a mandamus ordering a fresh election, though the persons whose votes had been rejected were parties to the application. Mawby or Juyee, Exparte, 3 El. & Bl. 718; 23 L. J., M. C. 153; 18 Jur. 906; 2 W. R. 473,

Refusal to take Shew of Hands.]—Where the chairman refused to take a shew of hands, but proceeded to write down the names of the ratepayers present and the number of votes they were entitled to, and then declared one of two candidates elected, the proceedings were pro-tested against and a poll was demanded, but was closing of the poll was a matter in the discretion refused by the chairman. The court refused to of the rector, which had not been shown to be grant a mandamns commanding a new election,

it not appearing that anyone had been by the irregularity of the proceedings prevented from voting, or that any practical injustice had resulted from it. Reg. v. Goole, 4 L. T. 322.

Refusal to put Amendment.]—At a meeting of the vestry to elect churchwardens, D. was proposed to be re-elected, when parisioners moved an amendment that before electing a churchwarden a certain correspondence between the charity commissioners and the churchwardens as to some parish charity fund should be produced. The view refused to put the amendment, and declared D. duly elected:—Held, on a rule for a mandamus, that the view was wrong in refusing to put the amendment, and that he was wrong in not putting to the needing whether D. should be elected. Reg. v. Hagbaurne (Vinney), 51.4, P. 276.

## 2. Legal Position.

Qualification.]—In order that a person may be qualified to be elected a churchwarden of a district church under 1 & 2 Will. 4, c. 28 s. 16, he must reside within the parish.

\*\*LT 556; 57 J. P. 72.

\*\*LT 556; 57 J. P. 72.

— Declaration.]—A churchwarden, who has made the declaration in a preceding year and continues in office without renewing the declaration, though compellable to do so, may do declaration, though compellable to do so, may do legal acts by virtue of his office, which will be binding on himself and parishioners. Edney v. Smallbanes, 21 L. T. 506.

Ceasing to reside in Parish.]—Semble, that a churchwarden, who, during the continuance of his office, ceases to reside in the parish, does not ipso facto cease to be churchwarden, although it is a good ground for appointing another in his place. Ganvill v. Uting, 9 Jun. 1081.

Usurping Office of.]—A quo warranto does not lie for usurping the office of churchwarden. Barlow, In re. 30 L. J., Q. B. 271; 5 L. T. 289, S. P., Rev v. Shephard, 4 Term Rep. 381; 2 R. R. 416.

Authority.] - A ledge or a super-altar was placed on the communion table in a church by the incumbent without obtaining the formal or informal consent of the ordinary. Nearly two years afterwards, the church wardens were directed by a resolution of the vestry to remove it. One of the churchwardens therenpon had the lock of the church door picked, and violently removed the super-altar. The incumbent refused to give up the custody of the keys of the church, but offered access to the churchwarden at reasonable times. The incumbent having instituted criminal proceedings against the churchwarden :- Held, that the vestry had no power to authorise the churchwardens to do these acts; that the churchwardens are the officers of the ordinary and the parish, and their authority, even in matters most within their special eognisauce, must be exercised under the control of the ordinary, and without reference to extreme and exceptional cases.

Ritchings v. Cardingley, L. R. 3 Ecc. 113; 19 L. T. 26.

Held, also, that even had the proceedings been otherwise legal, one churchwarden could not have so acted without the concurrence of the other, and the court admonished the defendant

it not appearing that anyone had been by the to abstain from such conduct in future, and conirregularity of the proceedings prevented from demned him in certain costs. Ib.

Parties to Suits.]—Where there is more than one churchwarden, one churchwarden cannot maintain a suit in his own name alone without that of his co-churchwarden. Fry v. Treasure, 2 Moore P. C. (x.s.) 539: 11 Jur. (x.s.) 205; 11 L. T. 753; 13 W. R. 476; 5 N. R. 383.

Semble, that, if one churchwarden perversely and vexationsly refuses to allow his name to be joined as a co-plaintiff, means may be taken to procupe his removal. The

proenre his removal. Ib.

Oue churchwarden has no implied authority to give a proxy for the other, or to join him in a suit. Nor can the court compel or dispense with the joinder of the nuwilling churchwarden. Ib.

A churchwarden, chosen after the commencement of a suit, is cutified whits in office to join himself as co-plaintiff in a supplemental bill with the former churchwarden, for the purpose of putting in issue facts that have arisen since the illing of the original bill, he having an interest in the proceedings, and in the decree to be made at the hearing. Marriattv. Turplen, 9 Sim. 279; 7 L. J., Ch. 245; z Jur., 464.

No power is given to the court by the Public Worship Regulation Act, 1874, to substitute succeeding churchwardens for a churchwarden who has instituted a suit under s. 8 of the act for acts committed during the time that he was churchwarden, but has ceased to be so before the termination of the suit, and in such a case the succeeding churchwardens have no interest time matter which cattlets them to intervene in the suit. \*\*Marrie v. Perkins, 51 L. J., P. C. 83; 7 P. D. 161; 47 L. T. 69; 47 J. P. 100.

Demise of Lands to.] — Churchwardens and overseers are not, by 59 Geo. 3, c. 12, s. 17, made a complete body corporate, but are only empowered to accept, take and hold in the nature of a body corporate; and therefore it is not necessary that the acceptance of a demise of lands by them should be by an instrument under a common scal. Smith v. Jdkins, 8 M. & W. 236; 1 D. (N.S.) 129; 11 L. J., Ex. 83.

59 Geo. 3, c. 12.]—The 59 Geo. 3, c. 12, was not intended by the legislature to vest copyhold hauls in churchwardens and oversexes. Att. Gen. v. Levin, 8 Sim. 366; 1 Cox. C. C. 51; 6 L. J., Ch. 20; 1 Jln. 234. S. P. Paddinyton Charrities, In re, 8 Sim. 629; 7 L. J., Ch. 34; 2 Jun. 344.

Ejectment by.]—But in an ejectment by churchwardens and overseers, under 59 Geo. 3, c. 12, s. 17, to recover lands belonging to the parish, proof that they have acted in that capacity is sufficient, without proof of their actual appointment. Due d. Boucley v. Barnes, 8 Q. B. 1037, 15 L. J., Q. B. 293; 10 Jun. 250.

A Gorporate Body.]—Churchwardens are a corporation for the purpose of the costody of the ornaments of the church, *Liddell v. Bedi*, 14 Moore, P. C. 1; 3 L. T. 218; 8 W. R. 569.
A monition may be addressed to church or

A monition may be addressed to church or chapelwardens for the time being by their official designation only. *Ib*.

Churchwardens are a corporation to take personal things in the same manner as the parson is for land. Att.-Gen. v. Ruper, 2 P. Wms. 125.
Under what circumstances churchwardens and

overseers of a parish are, under 59 Geo. 3, c. 12, s. 17, a corporation within 16 & 17 Viet. e. 137, 5. 14. Hackney Charities (Poole & White's (harities), In re, 5 N. R. 295; 10 Jur. (N.S.) 941; 11 L. T. 34; 12 W. R. 1129.

Semble, that churchwardens and overseers, having no corporate seal, have no power to execute a power of attorney, authorising a party to continue receiving the dividends of stock notwithstanding fluctuations in the number and Annesley, Ex parte, 2 Y. & Coll, 350; 6 L. J., Ex. Eq. 81.

Property of Bell-ropes.]—The property of the bell-ropes of a parish church is in the churchwardens of the parish. Jackson v. Adams, 2 Scott, 599; 2 Bing. (N.c.) 402; 1 Hodges, 339; 5 L. J., C. P. 79. See Harrison v. Round, 2 H. & W. 18; 6 N. & M. 422; 4 A. & E. 799.

Custody of Keys of Church. ]-Churchwardens have a right of access to the church at proper seasons, but they are not entitled to the custody of the keys of the church. Ritchings v. Cordingley, L. R. 3 Ecc. 113; 19 L. T. 26.

Property in Military Colours. ]-Semble, the churchwardens of a parish church to which military colours, no longer required for use in her Majesty's service, have been presented, have vested in them the legal property in the colonrs for the purpose of safe custody in all cases where the colours are not affixed to the freehold. Vincent v. Eyton, [1897] P. 1.

### 3. SWEARING IN.

Duties commenced by.]—A churchwarden remains in office, and is liable for the nonperformance of the duties, until his successor has made and subscribed the declaration required under 5 & 6 Will. 4, c. 62, s. 9. Bray v. Somer, under 5 & 5 Wil. 4, C. 62, S. 9. Bray V. Somer, 2 B, & S, 374; 31 L. J., M. C. 135; 8 Jur. (N.S.) 716; 6 L. T. 49; 10 W. R. 854. S. P., Breumer v. Hull, 1 H. & R. 800; 35 L. J., C. P. 332; L. B. 1 C. P. 748; 12 Jur. (N.S.) 648; 15 L. T. 352; 14 W. R. 964.

Duty of Ordinary.]—The court will grant a mandamus by rule absolute in the first instance, to compel the official to administer the declaration to a party claiming to have been elected as chapelwarden of a chapel (under a local act, conferring upon the officer elected the power of a churchwarden for the purposes of the chapel), though other parties claim to have been elected. Duffield, Ew parte, 6 N. & M. 865; 3 A. & E.

Where two sets of persons have each a colourable title to the office of churchwarden, both ought to be sworn in. The ordinary is bound to swear in churchwardens elect immediately upon their applying to be sworn in, notwithstanding a usage not to swear in until the first visitation after Easter. Rex v. Middlesex (Archdeacon), 3 A. & E. 615; 5 N. & M. 494; 5 L. J., M. C. 12.

Refusal to swear in—Practice.]—A rule for a mandamus commanding the ecclesiastical authorities to swear in a churchwarden duly appointed is absolute in the first instance. Lowe, Ex parte, 4 D. P. C. 15.

and refusal, and of notice to the archdeacon of the application to the court; the ground of refusal not appearing by the affidavit in support of the rule. Winfield, Ex parte, 3 A. & E. 614; 5 N. & M. 42.

Lis pendens is not a good return to a mandamus to swear in churchwardens, though accompanied with very special circumstances. Rew v. Harris, 3 Burr, 1420; 1 Wm. Bl. 430.

# 4. DUTIES, RIGHTS AND LIABILITIES.

Duties-To call Meeting. ]-Where the inhabitants of part of a parish, being an ecclesiastical district, and having churchwardens under 1 & 2 Will. 4, c. 38, are desirous of adopting the Lighting and Watching Act, 3 & 4 Will. 4, c. 90, the proper officers to call the meeting for that purpose are the churchwardens of the whole parish, and not the churchwardens of the district, because the latter are not persons "usually calling any meeting on parochial business" within s. 77. Reg. v. Kingswinford Overseers, 2 El. & Bl. 689; 23 L. J., M. C. 172; 18 Jur. 1073; 2 W. R. 453.

- To supply Estimates of Rates required. -Churchwardens are bound to supply estimates to the parishioners in vestry of the probable amount required for church rates. Reg. v. St. Margaret's, Leicester, 2 P. & D. 510; 10 A. & E.

- Provision for Divine Service during Vacancy. ]-It is no part of the office of a churchwarden, as such, to perform or provide for the service of a church during a vacancy in the incumbency. Att. Gen. v. St. Cross Hospital, 8 De G. M. & G. 88; 25 L. J., Ch. 202; 2 Jur. (N.S.) 336; 4 W. R. 310.

The course to be pursued is for the churchwarden to act under a sequestration to provide for the services, and in so doing he acts as officer of the bishop and not as churchwarden.

- Interference with Divine Service. - After a receiver of charity property had been appointed.
W. H., the alleged churchwarden of St. F., insisting that the chapel within the hospital was the parish church of St. F., and in order, as he alleged, to try the right, forcibly prevented the chaplain performing divine service therein, as he had usually been accustomed. The court re-strained W. H. from interrupting or interfering with the performance of divine worship in the chapel. S. C., 18 Beav. 601; 24 L. J., Ch. 148.

· Preserving Order in Church. ]-A parish clerk having been dismissed from his office by though irregularly, and another the rector, appointed, the former entered the church before divine service had commenced, and took posses-sion of the clerk's seat :-Held, that the churchwardens were justified in removing him from the clerk's desk, and also out of the church, if they had reasonable grounds for believing that he would offer interruption during the celebration of divine service. Burton v. Henson, 10 M. & W. 105; 11 L. J., Ex. 848.

Quære, whether a churchwarden can justify turning out of a church a party who commits a trespass there on a week-day, when divine service is not going on, or whether he ought not to And on an affidavit of due election, demand justify under the rector, and aver a request to the party to leave the church. Worth v. Terrington, 13 M. & W. 781; 14 L. J., Ex. 133.

— Distribution of Seats.]—Churchwardens of a church with free seats have authority to direct, for the maintenance of order and decorane, in which of those seats certain classes of the congregation may and others may not sit. A person may be convicted by justices, under 23 & 24 Vict. c. 32, s. 2, of violent behaviour in a church, although such behaviour was in assertion of a bond idee claim of right. Asher v. Culcryff, 56 L. T. 49, L. J., M. C. 67; 18 Q. B. D. 607; 56 L. T. 49, 55 W. R. 61; 51 J. F. 598.

— Preventing Inhabitant from attending Service,]—There is no right on the part of a churchwarden forcibly to prevent an inhabitant of a parish or district from entering the church for the purpose of attending service, even though the churchwarden may be of opinion that he cannot be conveniently accommodated. The temporal courts have jurisdiction over an action against a churchwarden for forcibly preventing an inhabitant from entering the church for the purpose of attending divine service. Taylor v. Timson, 57 L. J., Q. B. 216; 20 Q. B. D. 671; 52 J. P. 135.

Regulation of Pews.]—See PEWS, post, XXVI., col. 1357.

\_\_\_\_ Transfer of Non-ecclesiastical, to Parish Council.]—See 56 & 57 Viet. c. 78, s. 6.

Rights-Action against Vestry Clerk for misapplying Rate. ]—The vestry elerk of a parish upon his appointment to the office was told that it would be part of his duty to collect the churchrate and poor-rate, and to apply them as his predecessor had done. In pursuance of these instructions, and in accordance with a practice which had prevailed in the parish for fifty or sixty years. the vestry clerk applied a portion of the money arising from a church-rate made in the plaintiff year of office as churchwarden to the payment of parochial charges not legally payable out of the church-rate :- Held, that, juasmuch as one of the churchwardens was aware of the manner in which the money was about to be disposed of, he having previously filled the office of overseer, and also of auditor of the parish accounts, and did not object, the two were precluded from sning the vestry clerk for this misapplication of the rate. Cooper v. Law, 6 C. B. (N.S.) 502; 28 L. J., C. P. 282; 5 Jur. (N.S.) 1268.

— Evidence of Parish Book.]—Held, also, that (one of the plaintiffs being a vestryman) the parish books were admissible to shew the asage of the parish as to the appropriation of the rates. Th.

— Action by Order of Parish.]—Where clurchwardens, by order of the parish, commence a suit, the consent of the parish shall bind it; and the vestry book shall be allowed as evidence of the consent. Radnor Parish Cuse, 4 Vin. Abr., 259, pl. 10.

Action against former Churchwarden. — Churchwardens de facto may maintain an action against a former churchwarden for money received by him for the use of the parish, though the validity of their election to the office is doubtful, and though they are not the immediate successors of the defendant. Turner v. Baynes, 2 H. Bl. 559; 3 R. R. 506.

A parish may have two divisions, with churchwardens, keeping separate accounts, for each division : therefore, where, in a parish consisting of a township and several hamlets, two churchwardens were appointed by the township, and two others by the rest of the parish, who made separate rates for their own divisions respectively :- Held, that the acting churchwardens appointed for the township might maintain an action against their predecessors in office, to recover a balance remaining in their hands, without joining the other churchwardens, either as plaintiffs or defendants, and without proving that their appointment had been strictly legal. Astle v. Thomas, 3 D. & R. 492; 2 B. & C. 271; 1 C. & P. 103; 2 L. J. (o.s.) K. B. 8; 26 R. R. 348. And see Rea v. Gordon, 1 B. & Ald. 524; 19 R. R. 376.

Where in an ancient chapelry, divided into three districts by order in council nuder 18 & 14 Vict. c. 41, one district represents the ancient parish, the churchwardens appointed for the district may maintain an action of detinue against the late churchwardens of the ancient chapelry, to recover the church books; and the late churchwardens have no lien upon them for any expenses they may have interred by virtue of their late office. Moss v. Thereneley, 4 W. R. 514,

ehurchwarden taking a distress for a poor's rate nucler a warrant of magistrates is entitled to the protection of the 24 Geo. 2, c. 44, in having the magistrates made defendants with him in an action of trespass. Harper v. Curr, 7 Tera Rep. 270; 4 R. R. 440,

— Reimbursement.]—Bill by the executrix of a late churchwarden against unnety parishtoners, to be reimbursed what her testator had advanced for parish:—Held, that defendants should reimburse plaintiff with costs, and that the money should be raised by a parish rate. Nicolson v. Masters, 4 Vin. 529, pl. 9.

Bill by a former churchwarden (trustee for an estate of the poor of the parish and forty-five inhabitants) against the parish officers to be reimbursed money laid ont on account of the trust under an order of vestry, his accounts being passed and ordered to be paid on demand; Lowd Chancellor expressed a strong inclination against the bill, and, it not being signed by comisel, it was taken off the file. Plaintiff to pay costs. French v. Deur. 5 Ves. 547.

— Contribution.]—Persons being church-wardens, overseers, and trustees of the poor, directed, in consequence of a resolution of the vestry, a presention to be instituted against certain persons accused of having concerned in the insapplication of parochial moneys: one of them, having been compelled to pay the bill of costs of the attorney employed in the presention is entitled to contribution from the others. Wrightstow v. Masterman, 5 L. J. (0.8.) Ch. 14,

— Opposing Charity Scheme — Newlyappointed Churchwarden. — On an application for the confirmation of a report approxing a scheme for the administration of a charity estate, of which the churchwardens and overseers of the parish were the trustees (one of the purposes of which scheme was to provide for the repair of the church); it was held that a churchwarden who had been newly appointed, and had not been served with the proceedings, was at liberty to present a cross-petition for the purpose of opposing the confirmation of the report, upon grounds not appearing upon the report nor brought before the master. Lappington Parish, In re, 8 Hare, 198.

— Restraining Trespass.]—The court has purisdiction to restrain at the suit of the churchwardens any trespass committed on the churchyard, though in assertion of an allegad right of way, because, though the churchwardens might not be able to maintain an action at law for such trespass, they might, after the injury was done, have redress in the Ecclesiastical Court. Murriett v. Terplen, 9 Sim. 279; 7 L. J., Ch. 24. J.

— Proprietary Chapel in Parish.]—A churchwarden, as such has no rights over a proprietary-chapel in the parish devoted to the performance of divine service according to the rites of the established church. Bosanquet v. Heath, 3 L. T. 290; 9 W. R. 35.

Liabilities—Action against Churchwarden.]—Where an ecclesiastical offence is alleged against a parishioner who is also churchwarden, it is not necessary to make his co-churchwarden a codefordant, although, from the tenor of the charge, it appears that the alleged offence was committed in his official capacity. Addian v. Culthours, 36 L. J., Ecc. 14; 15 L. T. Csi.

An information was filed against A, and B, by name, they being churchwarlens of a certain parish; the object of the information was for inquiries into the application of the rents and profits of the property of the parish, and for a scheme for the future unangement of the estate. The court made the order, notwithstanding that the churchwarlens were not parties in their official character. Lett.-eten.v. Notbeld, 16 Beav. 554; 22 L. J., 05, 174; 17 Jur. 173.

An action does not liengainst a churchwarden, presiding (under 18 & 19 Vict. c. 120) at the election of vestrymen and auditors, for refusing the vote of a party entitled to vote for vestrymen and auditors, or for refusing to allow as a candidate a party cutified to be candidate, unless malice is alleged and proved. There v. Child, 7 El. & Bl. 377; 26 L. J., Q. B. 151; 3 Jur. (x.8, 774; 5 W.R. 287—Ex. Ch.

— Reclesiastical Offence.]—One of the churchwardens of a parish, accompanied by another parishioner, acting upon a resolution of the vestry, but against the express prohibition of the rector, and without any lawful authority from the bishop, broke open the principal door of the church and proceeded, with the assistance of workmen, to alter the position of the pulpit and to pull down and re-arrange certain of the seats of the church:—Held, that all who took part in these proceedings were guilty of an ecclesiastical offence. Devriney v. Gond, 7 Jur. (N.S.) 637.

The offenders were ordered to restore that which had been altered, and to pny the costs of suit, and the churchwarden was further ordered to give up to the rector a new key he had fitted to the door of the church. *Ib.* 

To pay Persons employed by them.]—A churchwarden was held individually liable to a person whom he had employed to draw plans of a church for the inspection of the parliamentary commissioners for building new churches. Brook v. Guest. 3 Bing. 481, note c.

- A churchwarden has no authority to pledge the credit of his co-churchwardens for repairs to the church. If he orders such repairs without the knowledge of the other churchwardens, he is liable individually. Northwedte v. Bennett, 2 C. & M. 316; 4 Tr., 236; 3 L. J., M. C. 31.

By indenture between the plaintiff of the first part, two sureties of the second part, and the defendants of the third part, the plaintiff undertook to do certain repairs to a parish church, and in consideration of the covenants and agreements on his part, the defendants, churchwardens and overseers of the poor of the parish, for themselves and for their successors, churchwardens and overseers of the parish, and their assigns, did thereby covenant and promise with and to the plaintiff, that they the churchwardens and overseers of the poor, their successors or assigns, should and would well and truly pay, or cause to be paid unto the plaintiff, the sum agreed upon, by instalments. The indenture contained upon, by instalments. a proviso, that "nothing in those presents contained should extend or be deemed, adjudged, construed, or taken to extend to any personal covenant of or obligation upon the several persons, parties thereto of the third part, or in anywise personally affect them, any or either of them, their or any or either of their executors, administrators, goods, effects or estates, in their private capacity: but should be, and was-intended to be, binding and obligatory upon churchwardens and overseers of the poor of the parish, and their successors for the time being, as such churchwardens and overseers of the poor, but not further or otherwise":-Held, that the original covenant was a personal covenant by the defendants to pay the money; and that the proviso was repugnant thereto and inconsistent therewith, and therefore void. Furnicall v. Combes, 5 Man. & G. 736: 6 Scott (N.R.) 522: 12 L. J., C. P. 265,

To Contribute — Fraud of Officers of Union.]—Climerhwardens of a parish in a union are Hable, under the head of extraordinary charges, to contribute to the deficiency occasioned by the frauds of the collector of certain other parishes within the union, and of the deputy clerk to the guardians of the union. Waddington v. City of London Guardians, 6. W. R. 599.

For Rates.]—Under a local act for purposes of lighting and paving, which empowers to make rates and assessments in respect of any cathedral, church, chapel, &c., and under which the rates and assessments were to be paid by the churchwardens, chapelwardens, trustees, or owners or propietors:—Held, that the churchwardens were personally liable to the commissioners for the rates, and the want of parechial funds did not exempt them from that liability. Hopkinson v. Puncher, 3 Ex. 95; 18 L. J., Ex. 6.

— For Archdeacon's Visitation Fees.]—lly immeunorial custom, churchwardens may be bound to pay visitation fees to the registrans of the archdeacons. Shepherd v. Payne, 16 C. B. (N.S.) 132; 33 L. J.. C. P. 158; 10 Jur. (N.S.) 40; 12 W. R. 581—Ex. Ch.

Churchwardens who are without funds or the means of obtaining funds for the expenses ineidental to their office are not personally liable to pay visitation fees to the registrars of archdeaconty courts, as the services in respect of which the fees are payable are rendered to the by the parishioners and the rector, after the parish and not to the churchwandens. Feley v. union an appointment by the rector alone is Perture. 39 D. J., Q. B. 195; L. R. 5 Q. B. 573; M. & Sc. 230; 5 Car. & P. 441; 2 L. J., C. P. 141.

— To account.]—The spiritual court may compel the churchwardens to deliver in their account, but cannot decide on the propriety of the charges. Leman v. Goulty, 3 Term Rep. 3; I R. R. 624.

The Ecclesiastical Court has power to compel churchwardens to deliver in their accounts, but has no jurisdiction to examine them. Hooper v. Leach, 3 Dougl. 435.

The spiritual court shall not proceed against a chnrehwarden, to account on oath, after his accounts are allowed by the vestry. Nuthins v. Robinson, Bunb. 247; Snowden v. Herring, id.

If a governor of a colony has the anthority of the ordinary, he has no power to commit a churchwarden who refuses to account : he ought to proceed upon a citation, and must excommunicate. Basham v. Lumley, 3 Car. & P. 489.

- Refusing to sign Cheques. ]-Semble, for unreasonably refusing to sign a joint cheque, on account of moneys on which it is properly drawn, for the payment of proper church expenses, a churchwarden is liable to be articled in a criminal suit in the Ecclesiastical Court. Howell v. Holdroyd, [1897] P. 198.

Right of Parishioners to inspect Books. —There is no general right in parishioners to inspect the churchwardens' books. Reg. v. Durentry Churchwardens, 5 Jnr. (N.S.) 940 : 7 W. R. 445.

Alleged Nuisance. -A bill was filed by a single parishioner against some of the churchwardens of the parish, alleging an intention on the part of the defendants to execute works in the church which would be injurious to himself, and praying an injunction. The plaintiff did not allege any right of property in a particular pew, but did allege that he was a parishioner, and that he was in the habit of attending divine service in the parish church. follow me in funerals and marriages" :- Held, Quere, whether this is a private unisance, and whether such a bill can be sustained. Woodman v. Robinson, 2 Sim. (N.S.) 204.

- For acting as Vestryman after Bankruptoy. —A churchwarden of a parish named in schedule B of the Metropolis Local Management Act, 1855, is a member of the vestry of that parish within the meaning of s. 54, and is liable to a penalty if, after becoming bankrupt, he acts as a member of such vestry. Leftly v. Monning-ton, 48 L. J., Ex. 543; 4 Ex. D. 307; 40 L. T. 850 ; 27 W. R. 787.

# XXIII, PARISH CLERKS.

Nature of Office. ]-The office of parish clerk is a temporal and not a spiritual office. Lawrence v. Edwards (No. 1), 60 L. J., Ch. 336; [1891] 1 Ch. 144; 64 L. T. 77; 39 W. R. 411.

Appointment of-By whom, |-A mandamus lies to a rector to appoint a parish clerk. Rew v. St. Ann's, Soho, 3 Burr. 1877.

Two parishes having been united, in which, before the union, the parish clerk was appointed granted.

Under 59 Geo. 3, c. 134, s. 29, the appointment of elerk to a district chapel is in the incumbent of the chapel. The possession of the vestry-room is in him, and he may turn out of it a clerk who has been prohibited from entering it, though he has not been legally dismissed from his office. Jackson v. Courtenay, 8 El. & Bl. 8; 27 L. J.; Q. B. 37; 3 Jur. (N.s.) 889; 5 W. R. 752. By the 91st of the canons of 1603, the parish

clerk is to be appointed by the parson or vicar, or where there is no parson or vicar, by the minister of the place for the time being. Accordingly, during the suspension of a vicar, the minister licensed and authorised by the bishop to perform the office of stipendiary curate in the parish has the right, in the event of the office of parish clerk falling vacant, to appoint a parish clerk to hold office during the suspension. Pindar v. Barr, 4 El. & Bl. 105; 2 C. L. R. 1613; 24 L. J., Q. B. 30; 1 Jur. (N.S.) 205; 2 W. R.

- During Sequestration of Benefice. ]-Sequestration, unless accompanied by suspension or inhibition, does not deprive a parson of his right to appoint the parish clerk. *Leuerence* v. *Edwards* (No. 1), 60 L. J., Ch. 336; [1891] 1 Ch. 144; 64 L. T. 77; 39 W. R. 411.

A vacancy having occurred in the office of parish clerk during a sequestration of the profits of the benefice, the court, at the instance of the incumbent, granted an injunction restraining a person appointed by the curate-in-charge from acting as and receiving the fees and emoluments of parish clerk. Lawrence v. Edwards (No. 2), 60 L. J., Ch. 336; [1891] 2 Ch. 72; 64 L. T. 343.

- Validity.] - A panper was appointed parish clerk by a rector of a parish, in the following manner:—The rector sent for the panper on a Sunday, and requested him to perform duty on that day; and, on coming out of the desk, the rector said to the pauper, "I shall appoint you my regular clerk and sexton, and to that this was a proper appointment of the panper as parish clerk. Rev v. Bobbing, 1 N. & P. 166; 5 A. & E. 682; 6 L. J., M. C. 13.

The appointment of a parish clerk need not be by deed. Roberts v. Drewitt, 18 C. B. (N.S.) 48; 1 H. & P. 132.

Restoration of ]—A mandamus will lie to restore a parish clerk. Rev v. Wurren, Cown. 370. S. P., Anon., 2 Chit. 254.

But not to restore one to the office of deputy

parish elerk. Anon., Lofft, 434.

If a parish clerk has been deprived of his office, the mandamus to restore him must be directed to the incumbent and not to the churchwardens. Cirketh, Ex parte, 3 D. P. C. 327.

Where a vicar, after summons to the parish clerk to attend and answer a charge of intoxication, removes him upon insufficient evidence of the intoxication, the court will issue a mandamus requiring the vicar to restore the clerk. Rew v. Neule, 4 N. & M. 868. And see Bowles v. Neale, 7 Car. & P. 262.

A prohibition to the spiritual court to stay proceedings for restoring a parish clerk was granted. Turrant v. Haxby, 1 Burr. 367. of parish clerk. Return, that A, had on several the clerk had a freehold interest in his share, in occasions misconducted himself by designedly respect of which he was cutilled to be registered. irreverent and ridiculous behaviour in the performance of his duty, by appearing in the church drunk, so as to be incapable of performing it. and by indecently disturbing the congregation during the administration of the sacrament. The return stated that the alleged acts were done in the view and presence of the vicar, and after repeated reproof; wherenpon he removed him from his office of clerk. Plea, that A. had not been summoned to answer for his conduct before his removal :- Held, that the return was bad for not shewing such summons. Reg. v. Smith, 5 Q. B. 614; D. & M. 564; 13 L. J., Q. B. 166; 8 Jur. 599. See Newman, Ex parte, 9 Jur. 959.

Dispute as to Title—Jurisdiction of County Court.]—The office of parish clerk is a hereditament within the meaning of that word as used in 9 & 10 Viet, c. 95, s, 58, and a county court has not jurisdiction to try a plaint in which title to that office comes in question. Stephenson v. Raine, 2 El. & Bl. 744; 2 C. L. R. 234; 23 L. J., Q. B. 62; 18 Jur. 176; 2 W. R. 77.

Office cannot be assigned.]—The office of parish clerk cannot be assigned. Nichols v. Davis, 38 L. J., C. P. 127; L. R. 4 C. P. 80; 17 W R 291

A., who, in 1818, had been appointed for life to the office of parish clerk of the eathedral and parish church of M., with power to nominate a deputy, executed a deed in 1833 by which he purported to assign such office to B., and after that time he ceased to act as such parish clerk. In 1850 an act was passed for the division into districts of the parish of M., by which it was provided that, during the continuance in office of the chaplains or minor canons and clerks then holding office in the cathedral and parish church of M., the fees for marriages, &c., at such church were to be paid to the district rector, who was to pay them to the chaplains or minor canons, to be by them paid to the persons entitled thereto: -Held, that the deed executed by A. in 1833 could not by law operate as an assignment of his office, and therefore he still continued to be the parish clerk of the church. Ib.

Right to sue for Fees. - Held, also, that A. had a right to sue the district rector for the marriage fees due to him as parish clerk, notwithstanding s. 6 of the statute, and notwithstanding that the chaplains and minor canons, to whom the rector was by that section to pay such fees, had eeased to exist, inasmuch as such clause was only to provide a machinery for the distribution of the fees, and did not affect the rights of A. Ib.

Right to vote.]-A parish clerk, receiving more than 40s. a year from parcchial burial fees, is not entitled to vote for a county, either as holding a freehold office, or as having an interest in freehold land by virtue of his receipt of such Hereact and by virtue of an accept to soon fees, Bushell v. Eusten, 11 C. B. (N.S.) 106; K. & G. 484; 31 L. J., C. P. 44; 8 Jur. (N.S.) 645; 5 L. T. 491; 10 W. R. 158.

A parish clerk, by virtue of his appointment, was entitled to a twelfth share of twenty-six acres of freehold land in the parish (of sufficient value to confer a vote for the county) so long as

Mandamus to a vicar to restore A to the office, office had always enjoyed the same :- Held, that Roberts v. Drewitt, 18 C. B. (N.S.) 48; 1 H. & P.

> Acquirement of Settlement in Township. ]-A curate of a district church in a township established under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, dismissed the clerk of the district church and appointed A. in his stead. A. continued to act as such clerk for eight years, with the full knowledge of the vicar, who, during that time, held the cure of the parish in which the district lay; at the time of the appointment the vicar denied the power of the curate to appoint, but he took no further or subsequent objection :-Held, that the office was a public armual office, within 3 & 4 Will. & M. c. 11, s. 6, and that A. acquired a settlement in the township. Reg. v. Ossett, 16 Q. B. 975.

# XXIV. ORGANIST.

Organist — Election of ]—A mandamus will not lie to compel the vicar, churchwardens and parishioners of a parish to meet for the purpose of electing an organist to the parish church : although within the time of living memory there has always been an organist, who has been paid a stipend out of the church rates. Le Creek, Exparte, 2 D. & L. 571; 9 Jur. 255.

Cannot play contrary to Incumbent's Orders.]—The organist of a parish church, although appointed and paid by the vestry, is guilty of an ecclesiastical offence if he plays on the organ immediately before, or during, or immediately after divine service, contrary to the directions of the incumbent. Wyndham v. Colv. 1 P. D. 130.

Lien for Price of Organ. |-A. agreed to build an organ for B. and fix it in the parish church for a sum to be paid by yearly instalments. The agreement provided that, on default of payment of the instalments, the whole sum should become payable, and A. should have, until payment, a lien on the organ for the amount unpaid, and might dispose of or remove the organ as he should think proper. The instalments being unpaid, A. demanded the organ of the vicar and the churchwardens. The vicar kept the church door locked, and refused to allow the organ to be removed, claiming a lien upon it. churchwardens did nothing:-Held, that the vicar was liable in trover, and not the churchwardens. Walker v. Clyde, 10 C. B. (N.S.) 381.

# XXV. SEXTON.

Appointment. ]—The appointment to the office of sexton prima facie is not vested in the inhabitants of a parish at large. Conspield v. Blenkinsop, 4 Ex. 284; 18 L. J., Ex. 361.

Where the duties of that office consisted in the care of the sacred vestments and vessels, in the care of the church by keeping it clean, in ringing the bells, and in opening and closing the doors for divine service, the presumption is that the churchwardens have the right of appointment, and, where the duties are confined to the churchhe continued clerk, and his predecessors in the yard in digging graves, &c., the presumption is

that the appointment is in the incumbent; and parish. Lousley v. Hayacard, 1 Y. & J. 583; 30 where the office embraces both the above- R. R. 533. S. P., Davis v. Witts, Forrest, 14; 5 mentioned duttes, the presumption is that his R. R. 798. appointment is vested in the churchwardens and incumbent jointly. Ib.

Right to Fees.]—See cases post, XXXI., BURIAL, 6, col. 1452.

## XXVI. PEWS.

Regulation of ]—Churchwardens have a dis-cretionary power to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appro-Remolds v. Monkton, 2 M. & Rob.

The churchwardens alone have the regulation of the pews in a parish church, even if it also is a cathedral, subject to the control of the ordinary. St. Columb, Londonderry, In re, S L. T. 861.

Right to. - Every parishioner has a right to be scatted, but not to a pew. Ib.

Rights to pews annexed to messuages by pre-

scription cannot be severed from the occupancy of the messnages. Ib.

In a cathedral, not being a parish church, semble, there can be no allocation of seats unless by the bishop. Ih.

Persons not parishioners have no right to a pew or a sitting. Ib.

An ecclesiastical court cannot entertain a suit as to the allotment of seats in a place for divine worship, muless such place is a legally-conscerated building, Battiscombe v. Ecc. 9 Jur. (N.S.) 210 ;

- In Chancel.]-A pew in a chancel may legally belong to a party in respect of the owner-ship of a house. Purker v. Leach, 4 Moore, P. C. (N.S.) 180; 36 L. J., P. C. 26; L. R. 1 P. C. 312; 12 Jur. (N.S.) 911; 15 L. T. 870; 15 W. B. 204

A mere temporary intermission of the user of the right to sit in a part of the chancel, anaecompanied by any intention to renonnce the right, does not amount to an abandonment of the right. The lay rector's right in respect of chancel seats discussed. Stileman-Gibbard v. Wilkinson, 66 L. J., Q. B. 215; [1897] 1 Q. B. 749; 76 L. T. 90 ; 61 J. P. 214.

By Faculty or Prescription. ]--A right to a pew in a church can only exist by faculty or by prescription. Where, however, the prescription is interrupted, the jury is not bound to presume a faculty from long undisturbed possession. Morgan v. Curtis, 3 M. & Ry. 389. A faculty to a man and his heirs is not good.

Stocks v. Booth, 1 Term Rep. 432; 1 R. R. 244. Possession for thirty-six years of a pew, claimed by the plaintiff as appurtenant to a messuage, and acquiesced in by the defendant, is good presumptive evidence of a faculty. Rogers v.

Brooks, 1 Term Rep. 431, n. See 1 R. R. 245, n. Uninterrupted possession of a pew in the chancel of a church for thirty years, is pre- 637. Affirmed sub non. Phillips v. Halbids, sumptive evidence of a prescriptive right to the 61 L J., Q. B. 210; [1891] A. C. 228; 64 L. T. pew in an action against a wrongdoer; but that 743; 55 J. P. 741—H. L. (B.) presumption may be rebutted by proof that the pew had no existence thirty years ago. Griffith v. Matthews, 5 Term Rep. 296; 2 R. R. 598.

A pew in the body of a church may be pre-

scribed for as appurtenant to a house out of the possession must be proved against the ordinary.

A non-parishioner, whether extra-parochial or residing in another parish, can have no right to a pew in the body of a parish church, except by prescription. Byerley v. Windus, 7 D. & R. 564; 5 B. & C. 1; 4 L. J. (o.s.) K. B. 102; 29 R. R. 167.

Prohibition lies to restrain the spiritual court from proceeding in a suit brought by an extraparochial person for a pew in the body of a parish church; also, where a pew is claimed by any other title than prescription; or if it is claimed by that title, and the prescription is denied by the defendant. Ib.

Semble, that s. 2 of the Prescription Act (2 & 3 Will. 4, c. 71) does not apply to a claim by prescription to a pew in the nave of a parish church. Crisp v. Martin, 2 P. D. 15.

Long User-Exclusive Possession.]-In 1782 a subscription was raised by the inhabitants of a parish for the purpose of providing more church accommodation, and leave was obtained to use a room in a school for service. The school was pulled down and a new chapel was erected on the site, and duly consecrated in 1848. Those persons who had been holders of pews in the old room had pews allotted to them in the new chapel in substitution therefor. These pews, and others which were substituted for them upon the repewing and repairing of the chapel under a faculty granted in 1867, were exclusively used by the persons to whom they were allotted and their successors in title down to the commencement of the action, and were dealt with by them by way of assignment and devise. There was no evidence of the pews having ever been repaired by the plaintiff or his predecessors in title :- Held, that on the consceration of the chapel the jurisdiction to dispose of the seats accured to the ordinary; and that the plaintiff, not having established anything beyond exclusive possession of the pews, failed to shew any title which could prevail against the general jurisdiction of the ordinary. Provid v. Price, S. L. J., Q. B. 61; 9 R. 40; 69 L. T. 664; 42 W R. 102-C, A.

\_\_\_ Right appurtenant to House \_\_ Long User and Acts of Ownership.]\_\_A pew may be annexed to a dwelling-house in a parish by a faculty, and a faculty may be presumed upon evidence of exclusive possession and repair. for a long period. Where the successive owners, of a house have had a long-continued enjoyment of a pew in a parish church, and have done a number of acts with regard to it incousistent with mere possession by permission of the churchwardens, the grant of a faculty at some time should be presumed, although no evidence is given of such grant, and although there may be evidence that the pew was originally acquired under circumstances that would not confer a legal right. *Halliday* v. *Philipps*, 58 L. J., Q. B. 404; 23 Q. B. D. 48; 37 W. R. 776; 53 J. P.

In order to support a claim by prescription, in respect of ownership and occupancy of an ancient house, to a freehold interest in the site of an ancient pew, something beyond mere undisturbed proprietary right, and, if he can do so, then some rightful origin of the undisturbed enjoyment ought to be presumed against the ordinary and his officers. In other words, a lost faculty ought to be presumed whereby the occupiers of the particular messuage have had the pew or pews granted to them upon condition of their undertaking, in relief of the parish, the burden of repair. Proof of repair is, however, not essential where repair has not been necessary, and other acts are proved to have been done with regard to the new inconsistent with mere possession by the permission of the churchwardens. Stilement-Gibbard v. Wilkinson, 66 L. J., Q. B. 215; [1897] 1 Q. B. 749; 76 L. T. 90; 61 J. P. 214.

As entitling Owner to County Vote.]-By a statute trustees were empowered to take down and rebuild a chapel, and to appropriate the pews to persons who had subscribed to the building, and such persons were to be deemed proprietors, and the pews or scats were vested in them and their heirs for ever. It did not appear in whom was the freehold of the land upon which the chapel was built:-Held, that the proprietors of the pews had not such a freehold interest in any portion of the soil of the chapel, or in any profit arising thereout, as to entitle them to votes for the county. Granuay v. Hackin, 39 L. J., C. P. 103; L. R. 5 C. P. 235; 22 L. T. 804; 1 Hopw. & C. 403.

A person claimed a vote for the county in respect of a freehold pew in a church. A private act recited that the subscribers and promoters of the church had purchased the freehold reversion and inheritance in fee of the said church, and trustees were empowered to convey the unappropriated pews for the purpose of attending divine service. By a subsequent private act the fee-simple of the pews was rested in the subscribers or the proprietors, for the time being, their heirs and assigns for ever, and they were anthorised to sell and convey the fee-simple of the same. A pew was conveyed to H. by deed subsequently to the last statute, and by him to the claimant and his heirs, with the sole right of using the same during service and at other reasonable times :-Held, that he took an interest in the nature of an easement only, and not a freehold interest in the Land. Brunfitt v. Roberts, 39 L. J., C. P. 95; L. R. 5 C. P. 224; 22 L. T. 301; 18 W. R. 678; 1 Hopw. & C. 387.

By an act of parliament, trustees were appointed for the purpose of pulling down and rebuilding a parochial church, the materials of which, and those required for rebuilding it, were vested in them. The act empowered them to sell the fee-simple and inheritance of the pews to inhabitants or residents, such pews to be vested in the purchaser, his heirs and assigns for ever, with power to sell to any other person being an inhabitant or a resident. The form of conveyance specified in the act purported to grant the specified in the act purported to grant the pew to the purchaser, his heirs and assigns, and all the right, title, and interest of the trustees to and in the same, to hold to the purchaser, his heirs and assigns for ever; and it was declared that such conveyance should be good to all intents and purposes, and against all persons. An inhabitant bought a pew under the act, and let it for more than 40s, a year :- Held, old, was in the rector for the time being, and tion was bad, because it professed to divide the had not passed to the trustees; and that the plea, and was replied to part only of the plea,

The claimant must shew some acts of user or person, by purchasing a pew, only acquired a proprietary right, and, if he can do so, then some right to use it for attending divine service, and did not acquire any freehold land or tenement so as to entitle him to be on the register of county voters. Hinde v. Chorlton, 36 L. J., C. P. 79; L. B. 2 C. P. 104; 12 Jur. (N.S.) 1008; 15 L. T. 472; 15 W. R. 226.

> Disturbance of Possession, ]-Churchwardens are not justified in dispossessing anyone of a sitting which he has enjoyed for a time, without giving notice of their intention and offering an opportunity for objection and explanation, Horsfull v. Holland, 6 Jur. (N.S.) 278.

> Where, in a suit for disturbance of the plaintiff in the occupation of a pew appurtenant to a messuage, the sole title set up and disputed in the libel and responsive allegation was by prescription, which was not proved by the evidence, the court held that the question whether the plaintiff had any title on the ground of mere possession could not be inquired into. Ib.

> An action cannot be maintained for disturbing another in the possession or enjoyment of a pew, unless it is annexed to a house, or some other messuage in the parish. Mainwaring v. Giles, 5 B. & Ald. 356; 24 R. R. 417.

Possession for above sixty years of a pow in a church is not a sufficient title to maintain an action for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration as apportenant to a messnage in the parish. Stocks v. Booth, 1 Term Rep. 428; 1 R. R. 244.

Upon a libel in the consistorial court for disturbance of the plaintiff's right to a pew, the court adjudged the right to be in the plaintiff, and admonished the defendant not to sit in the pew; the Court of Arches reversed the sentence, but admonished the defendant not to use the pew again : these sentences were held not conclusive evidence of the plaintiff's right in an action for a disturbance between the same parties, Cross v. Salter, 3 Term Rep. 639.

In an action against a stranger for disturbing the plaintiff in his pew, he need not allege or prove that he repaired it : otherwise in a dispute

with the ordinary. Kenrick v. Taylor, 1 Wils, 326.

A declaration stated that the plaintiff was possessed of a messuage in a parish, and by reason thereof had the use of a pew in the parish church; and that the defendant disturbed the plaintiff in the enjoyment thereof. Plea, that the pew was larger than was required for the accommodation of the plaintiff, and the rest of the church was too small to contain the other parishioners; and that it was agreed between the plaintiff and the defendant, and the churchwardens, that they should erect a partition across the pew, and divide the same into two small pews, and that in consideration thereof the churchwardens for the time being should have licence from the plaintiff to enter, and cause other persons being parishioners resident in the parish, to enter and continue in one of the smaller pews during divine service; and justified under the agreement and licence. Replication. as to the grievances before a certain day. that there was no such agreement as alleged, and as to the residue of the grievances, that before they were committed the plaintiff revoked the licence :- Held, that the plea was indivisible, that the freehold of the new church, as of the and, therefore, that the first part of the replica-

whereas, if true, it was an answer to the whole; the period of anyone living. Knapp v. St. Mary, and that the latter part of the replication was | Willesden, 2 Rob. Ecc. Rep. 358; 15 Jur. 473. had, as a replication for the same reason, and as a new assignment for informality. Adams v. Andrews, 15 Q. B. 284; 20 L. J., Q. B. 33; 15 Jur. 149.

Held, also, that the plaintiff had a right to revoke the licence or agreement, not withstanding the expense incurred by the defendant. 1b.

A prohibition was awarded in a spiritual suit for a disturbance of a seat in a church, where it appeared that the temporal right was in question. Witcher v. Cheslam, 1 Wils. 17.

- Action for Assault and False Imprison--A. entered a church during divine service and, though offered a seat by the churchwarden, went into another which was allotted to a parishioner and refused to leave it notwithstanding the churchwarden's remonstrances. The defendant, who was a magistrate present, thereupon took him into custody until the clergyman and churchwarden should swear an information against him (which they did) and, on his not getting two sureties as provided by 6 (ico. 1, c. 5 (Irish), committed him to gaol :- Held, in an action by A. for assault and false imprisonment, that the above facts pleaded in defence must, on demirrer, be set aside as not justifying the assault or even the false imprisonment, as defendant had not brought the offence charged against plaintiff within the provisions of the act. King v. Poe, 15 L. T. 37.

Authority of Perpetual Curate as to.]-A chapelwarden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without the consent of the perpetual curate. Jones v. Ellis, 2 Y. & J. 265; 31 R. R. 589.

The perpetual curate of an augmented parochial chapelry has a sufficient possession whereon to maintain an action for breaking and entering the chapel and destroying the pews, even against the chapelwarden. Ib.

Grant of Faculty to appropriate. ]-The grant of a faculty to appropriate certain parts of a parish church, is within the jurisdiction of the ecclesiastical court; and the Conrt of Queen's Bench will not presume that that jurisdiction will be improperly exercised, and therefore will not prohibit the ecclesiastical court from proceeding to judgment, although the faculty prayed for is larger than that court has power to grant. Hal-lack v. Cumbridge University, 1 G. & D. 100; 9 D. P. C. 583; I Q. B. 593; 10 L. J., Q. B. 206; 6 Jur. 10.

Apportionment of Right to.]—The right to sit in a pew may be apportioned; and therefore where, by a faculty reciting "that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house," a pew was granted to him and his family for ever and the owners and occupiers of the dwelling-house ; and the dwelling-house was afterwards divided into two :- Held, that the occupier of one of the two (constituting a very small part of the original messuage) had some right to the pew, and in virtue thereof might maintain an action against a wrongdoer. Harris v. Drewe, 2 B. & Ad. 164,

Evidence.] - Evidence of repair to a pew claimed by prescription is not absolutely neces- the parishioners in vestry assembled, and, if the sary, as no repair may have been made within majority should refuse to make a rate for the

It is necessary, in a claim of prescriptive right to a pew, to allege and prove reparation. Churtan v. Frewen, 35 L. J., Ch. 692; L. R. 2 Eq. 634; 12 Jur. (N.S.) 879; 14 L. T. 846.

A parishioner who claims a legal right by prescription to a pew in the nave of his parish church must, in order to displace the general right of the ordinary, not only shew that the pew has been occupied by him or his predecessors in title in respect of an ancient house in the parish for a period more or less extended, but must also prove, if any alteration or repair of the pew has been necessary, that such repairs or alterations were executed at the expense of those who at the time claimed the prescriptive right to it. Crisp v. Martin, 2 P. D. 15.

A pew in a parish church was claimed in respect of an ancient messuage; and it was proved, that, so far as living memory extended, the pew in question had been one of three pews adjoining each other, used under one and the same claim of right, viz. in respect of the ancient messuage :- Held, that proof of repairs done to one of the pews, not that in question, was evidence as to all, and, therefore, as to that in question. Popper v. Barnard, 12 L. J., Q. B. 361; 7 Jur. 1128.

The amount of evidence of possession and use necessary to establish a claim to a seat or a pow in a church varies in each particular case. Ib.

Grant of .]-A grant of part of the chancel of a church, by a lay impropriator, to A., his heirs and assigns, is not valid in law, and therefore such grantee, or those claiming under him, cannot maintain an action for pulling down pews there erected. Clifford v. Wicks, I B. & Ald, 498; 19

Repair of ]—Where the members of a corpora-tion have, as such, occupied a particular pew in the parish church, the repairs of it may be properly charged on the borough fund. Reg. v. Warwick Corporation, 15 L. J., O. B. 306; 10

Pew-door.]-The door of a pew in a church hung upon hinges, removable without interfering with the staple, is a chattel, and not part of the freehold. Mant v. Collins, 10 Jur. 390.

Pew Rents, Mortgage of.]-Pew rents of a district church, constituted nuder the church building acts, are livings appointed for eccle-siastical ministers within 13 Eliz. c. 20, and a mortgage of them is therefore void. Lereson, In re, Arrowsmith, Ex parte, 47 L. J., Bk. 46; 8 Ch. D. 96; 38 L. T. 547; 26 W. R. 600—C. A.

In Roman Catholic Churches. ]-Bare possession, without title of a pew in a Roman Catholic church, justifies the occupier in defending by force the possession against the entry of a person having no title. Brett v. Mullarkey, Ir. R. 7 C. L. 120.

XXVII. CHURCH AND CHAPEL RATES. 1. MAKING.

a. Generally.

By whom. ]-A valid church-rate can only be made by an actual or a constructive majority of fabric of the parish church, such refusal would not 589. entitle the minority to make the rate. Gosling v. Veley, 4 H. L. Cas. 679; 1 C. L. R. 950; 17

Jur. 939.

Where parties are unduly elected churchwardens, but are admitted, and sworn in and act, they may convene a vestry for making a church-rate; and a rate made at such a vestry is valid. Reg. v. St. Clements, 12 A. & E. 177; 3 P. & D. 481; 4 Jur. 1059.

Validity.]-A rate to reimburse churchwardens such sums as they had expended, or might thereafter expend on the parish church, would be bad on the face of it, as in part retrospective. Rex v. Haworth, 12 East, 556.

Court will not decree rate to be paid to reimburse a former churchwarden moueys laid out whilst in office, in parsuance of a vestry order. Lanchester v. Thompson, 5 Madd. 4.

A church-rate made avowedly larger than was necessary for the current year, for the purpose of enabling the churchwardens to liquidate a debt incurred in former years, is excessive and there-Farlar v. Chesterton, 2 Moore, fore illegal.

A church-rate, made pursuant to a resolution of a vestry, was stated in the heading of the rate to be made "for and towards the repairs of the church, and other incidental charges of the parish":-Held, that the rate was bad, because it appeared to be made not exclusively to defray expenses to which a church-rate is applicable. Reg. v. Byron, 3 New Sess. Cas. 180; 12 Q. B. 321; 17 L. J., M. C. 134; 12 Jur. 479.

Where the resolution of the vestry granting a church-rate and the rate are both good, a defective title of the rate may be amended.

Items.]—Charges for "sidesmen, their salary and gowns," for ringers, and for insurance, are admissible items, in a church-rate, if the vestry assents to the estimate which includes them at the time the rate is granted. Rand v. Green, 6 Jur. (N.S.) 303.

A charge for the attendance of a legal adviser at the taking a poll, for legal assistance in making a church-rate, or for the salary of an organist in a wealthy town parish, if such charges have been sauctioned by the vestry, may be lawfully paid out of a church-rate, and a rate made to cover them will not be excessive. Tiarks v. Hutton, 85 L. J., Ecc. 11; L. R. 1 Ecc. 270; 12 Jur.

(N.S.) 1013.

Where a vestry meeting is held for the purpose of passing a church-rate, and the churchwardens produce an estimate containing items alleged to be illegal, such as an item for warming the church, the chairman ought to allow the question of these items, and of the quantum of the rate, to be first disposed of before the motion for a churchrate is put. Richards v. Birley, 10 L. T. 142-PC

# b. Under Local or Particular Statutes.

Assessment.] - Where churchwardens were required by a local act to levy a rate for the repair of a church "on the full annual rent or value" of all houses in the parish ratable for the relief of the poor of the parish, the rate must be made on the ratable value of the premises and not on the gross estimated rental. Rose v. Watson, 63 L. J., M. C. 108; [1894] 2 Q. B. 90; houses, . . . tenements and hereditaments within

purpose of discharging the duty of repairing the | 10 R. 255; 70 L. T. 906; 42 W. R. 523; 58 J. P.

Trustees for building Church-Production of Accounts. |-The trustees appointed under local acts for building a church, and authorised to levy rates upon the inhabitants of the parish, whose accounts were directed to be andited and allowed by the quarter sessions, are nevertheless compellable, under 1 & 2 Will. 4, c. 60, s, 34, toproduce their accounts for the last half-year before the auditors of the parish accounts, appointed under and in consequence of the adoption by the parish of the last-mentioned act. Rew v. St. Paneras Church Trustees, 1 N. & P. 507 ; 6 A. & E. 314.

Amount required.]-Where an act required a select vestry from time to time, as often as occasion required, to make rates for the relief of the poor, and the repair of churches and highways in the parish :- Held, that they were not com-pellable to make a church-rate upon demand, while the churchwardens refused to state the necessary amount, or to furnish any estimate of it, or to give to the vestry any information whereby they might ascertain it. Reg. v. 8t. Margaret's, Leicester, 10 A. & E. 730; 2 P. & D.

Alteration of Parish. |-By a local act the parish of St. Giles, Camberwell, is empowered to make a church-rate, and an appeal is given to persons aggrieved to the quarter sessions. that time certain districts of the parish have become separate and distinct parishes for all ecclesiastical purposes under 6 & 7 Vict. c. 37, and are not included in the church-rates for the parish of St. Giles, Camberwell:—Held, that the local act continued in force, and regulated church-rates for the part of the parish of St. Giles, Camberwell, not within such districts and new parishes. Reg. v. Surrey J.J., 32 L. J., M. C. 158; 7 L. T. 822; 11 W. R. 362.

Jurisdiction of Justices to inquire into Validity of. ]-By a local act the vestry of a parish was empowered to make rates for the maintenance of the church, and an appeal to the quarter sessions was given against any rate. By an amending act every rate was to be enforced by summons before justices, and, if the person summoned should not prove to the justice that he was not chargeable with or liable to pay such rate, he should pay it. A person summoned for nonpayment of a church-rate proposed to give evidence to show that the rate had not been duly made; which evidence the justices declined to hear :-Held, that they had no jurisdiction to inquire into the validity of the rate. May, Ex parte, 2 B. & S. 426; 31 L. J., M. C. 161.

For Ecclesiastical and Non-Ecclesiastical Purposes. ]—In the year 1817, by a local act (57 Geo 3, c. xxxiv.), the hamlet of P. was taken from the parish of S. and formed into a separate parish, with a separate church and incumbent, and by s, 12 the inhabitants of the parish of P. were discharged and exempt from the payment of small tithes, and the rector ceased to have the cure of souls over the new parish. By s. 61 of the local act it was provided that for the purposes of the act it should be lawful for the vestry to make a rate upon the occupiers of all lands.

the parish. There was also a clause in the act by applicable to ecclesiastical purposes could legally which the rate was to be applicable to other par-poses besides the payment of the incumbent, namely, purposes connected with the repair of the church and the celebration of divine service. The vestry of P. made a rate which they applied to eighteen different purposes, of which four were non-ecclesiastical, and fourteen were corlesiastical, purposes within the meaning of the Compulsory Church Rates Abolition Act, 1868, s. 10 :-Held, that the rate was not made in lieu or in consideration of the extinguishment or abolition of tithes, within the meaning of s. 5 of the Compulsory Church Rates Abolition Act, 1868, and therefore, that it came within s. 2: and that the rate might be treated as a valid rate only as a separate rate, and not as a church-rate, and it was consequently good for non-ecclesiastical parposes but bad for ecclesiastical purposes, and could not be enforced in respect of the latter. Watson v. All Saints, Poplar, 46 L. T. 201 : 46 J. P. 454

An arrangement embodied in a private local act, and which is based on good and valuable consideration, and provides for the levying of church-rates, though not in the strict form of an agreement between the parties affected is a "contract" within 31 & 32 Vict. c. 109, s. 5. and protects the rate levied in pursuance of it for ecclesiastical purposes. Watson v. All Saints, Poplar (supra) distinguished. Bell v. Bassett, 52 L. J., O. B. 22: 47 L. T. 19.

In consideration of Extinguished Tithes.]— The hamlet of Bethnal Green was made a separate parish by 16 Geo. 2, c. 28. By s. 35 of that act all garden pennies and small tithes arising within the hamlet were made payable to the churchwardens of the new parish to be applied for the maintenance and support of the rector "and such other uses as were thereby directed." In no part of the act was there any direction as to the purposes for which so much of the garden pennies and small titles as were not paid to the rector were to be applied, but by s. 25 the rector, churchwardens, and overseers, &c., were to be vestrymen, and were to meet from time to time, and appoint a lecturer, churchwardens, sidesnien, parish elerk, and other officers for the new parish. There never was any surplus of the garden pennies and small tithes after paying the stipend of the rector. By a subsequent local act the garden pennies, &c., were extinguished, and the churchwardens were required to make a composition rate on property within the parish to pay the rector's stipend and any deficiency in the rates and daties applicable towards maintaining divine service in the parish church, and repairing the church :- Held, that church, and repairing the church:—Held, that the effect of 16 (deo. 2, c. 28, was to direct and authorise the balance of the garden pennics and small tithes, &c. (after payment of the rector's stipend) to be employed in payment of the parish officers elected pursuant to s. 25; that such balance, although, in fact, it had never been so applied, was appropriated by law (within the meaning of s. 5 of the Compulsory Church Rate Abolition Act. s. 68) to the payment of ecclesiastical purposes; that the whole of the garden treal purposes; that the whole of the garden pennies, &c. (not only the part applicable to the rector's stipend), being extinguished, the compo-sition rate was levied in consideration of such extinguishment; and that, therefore, not only such part of the composition rate as was required to pay the rector's stipend, but also the part

appriatore to eccessistical purposes could legally be raised. 8t. Matthew's, Bethnal Green v. Perkins, 53 L. T. 634—H. L. (B.). Affirming S. C., sub nom. Reg. v. St. Matthew's, Bethnal Green, 50 L. T. 65; 48 J. P. 340.

Contract or Consideration - Abolition Act. 1868.]—In order to preserve a church-rate from abolition under the Compulsory Church Rates Abolition Act. 1868, on the ground that it is levied on the authority of a private act of parlia-ment on a contract made or for good or valuable consideration, the contract or consideration relied upon must be found in or gathered from the private act of parliament alone. Reg. v. St. Marylebone Vestry, 64 L. J., Q. B. 622; [1895] 1 Q. B. 771; 14 R. 172; 72 L. T. 11—C. A.

# c. Under Church Building Acts.

To repay Loan for building Church.] -Wherethe inhabitants of a parish have made an application to the commissioners for building new charches, conformably to 58 Geo. 3, c. 45, s. 14, and 59 & 60 Geo. 3, c. 184, s. 24, and have in consequence obtained a loan for the purpose of bnikling churches within the parish, the churchwardens may make a rate for repaying the interest and principal, without any further, consent of the parishoners to such rate. Rew v. St. Mary, Lumbeth, 3 B. & Ad. 651: 1 L. J., M. C. 93.

For Expenses of Church.] - In a district constituted under 58 Geo. 3, c. 45, and assigned to a church built under that act, it is competent to the churchwardens and inhabitants to make a rate not merely for the repair of the edifice, but also for the expenses necessary for the performand the expenses necessary for the performance of divine service therein. Bealt, En parte, 12 C. B. (N.S.) 220; 31 L. J., C. P. 237; 10 W. R. 524. S. P., Adams v. Bealt, 2 B. & S. 339; 31 L. J., Q. B. 106; 8 Jur. (N.S.) 1131; 5 L. T. 795; 10 W. R. 343.

Refusal to take Poll at Vestry.]-Under 59 Geo. 3, c. 134, s. 25, and B Geo. 4, c. 72, s. 26, if a parish wishes for an extension to be made to its churchyard, it is directed to express its desire to the ecclesiastical commissioners who may, upon the same being notified to them, authorise the parish to purchase the land by means of rates. to defray the expenses :- Held, that a resolution passed at a vestry meeting convened for the purpose, but which resolution had been passed by a majority of the meeting, when a poll, which had been demanded by a dissentient minority, was refused, did not legally express the desire of the parish; and that the order of the commissioners founded thereou, and all that had been done under that order, including a church-rate which had been laid in pursuance of it, was illegal and void. White v. Sleele, 12 C. B. (x.s.) 383; 31 L. J., C. P. 265; 8 Jnr. (x.s.) 1177; 6 L. T. 686.

Parish subdivided. - A parish had been subdivided into several new parishes, churches were erected within each new parish, and the incumbents were duly authorised to publish banns of matrimony, and to solemnise marriages, churchings, baptisms, and burials in their respective churches. They were also authorised, either by the order in council which constituted the new parishes, or by the voluntary concession of the the performance of such offices. All these new hes had been separated from the original parish after 19 & 20 Viet. c. 104. The churchwardens of the original parish made an ordinary church-rate on all the inhabitants of the parish, and on others ratable in respect of properties within the parish, but exclusive of the properties and inhabitants of the several new parishes :-Held, that the rate was properly made. Gough v. Jones, 9 Jur. (N.S.) 82; 7 L. T. 566; 11 W. R.

When a separate district has been constituted by an order in council in any parish, and a church consecrated therein, in which service is performed, and the incumbent receives the fees for his own benefit, such district becomes, under 19 & 20 Vict. c. 104, a separate and distinct parish for ecclesiastical purposes, amongst which is the making of church-rates, Ib.

# d. Notice of holding Vestry to make.

Sufficiency of . ]-A notice of a vestry meeting affixed on a parish church door, and addressed "to the churchwardens, overseers and principal inhabitants of this parish," is a valid notice, though it does not name the parish, and although it is addressed to the principal inhabitants. Rand v. Green, 9 C. B. (N.S.) 470; 30 L. J., C. P. 80; 7 Jur. (N.S.) 126; 3 L. T. 298; 9 W. R. 54. S. C. in Q. B., 3 L. T. 29.

Where a notice of vestry was for the purpose of granting a church-rate for and towards the repairs and expenses of the parish church, and the chief item in the estimate, 1001, nearly twothirds of the whole rate, was for the completion of windows already begun, the notice was held to be sufficient. Grough v. Jones, 9 Jur. (N.S.) 82; 7 L. T. 566; 11 W. R. 107.

It is essential to the validity of a church-rate that the notice required by the 58 (teo. 3, c, 69, s. 1, summoning the parishioners together, should clearly apprise them of the special purpose for which the vestry meeting is to be called. Smith v. Deighton, 8 Moore, P. C. 179.

# e. Voting at Vestry.

Who entitled to Vote. ]-A church-rate carried by a majority of one was questioned on the ground that the vicar and occupiers of the church lands were not cutitled to vote, as they are not liable to pay church-rate :- Held, that a vicar and occupiers of church lands are entitled to vote, and that there was nothing in this objection. Ranson v. Campkin, 1 Rob. Ecc. Rep.

In respect of what Property.]—In a parish in which 13 & 14 Vict. c. 99, had been adopted, and certain owners of small tenements had been rated to the poor-rate, instead of occupiers, a poll was taken on a proposed church-rate. In favour of the rate certain ratepayers claimed to vote (and their votes were admitted and recorded), not only according to the value of the property in their own occupation in respect of which they were assessed under the provisions of 58 Geo. 3. c. 69, but in addition and separately in respect of

incumbent of the mother church, to receive for recorded erroneously and illegally. Lambe v. their own use and benefit the fees arising from | Grieres, 8 Jnr. (N.S.) 288.

What a sufficient Quorum.]—The commissioners for building and enlarging churches having, pursuant to 58 Geo. 3, c. 45, and 59 Geo. 3, c. 30, appointed twenty-six persons to be a select vestry, for the care and management of a church, and all matters relating thereto :-Held, that in order to constitute a good assembly of the select vestry so appointed there must be present a majority of the number (viz. fourteen) named in the appointment; and therefore that a rate for the repair of the church made at a meeting where there was not such a majority was illegal, and that payment of such a rate could not be enforced in the Ecclesiastical Court. Blackett v. Blizard, 9 B. & C. 851; 4 M. & Ry. 641; 8 L. J. (o.s.) K. B. 103.

Proposal of Amendment at Adjourned Meeting to take Poll. |-The churchwardens of a parish gave notice that a vestry would be held on, &c., to make a rate for the purpose of repairing the fabric of the parish church; that a shew of hands would be taken upon each proposition and amendment which might be submitted to the meeting; that, if the poll should be demanded. the meeting would be adjourned to the 8th of July, when the poll would be taken on all the propositions and amendments made at such meeting at one and the same time, that the poll should be kept open till, &c., when the poll should close, and the result should be final and conclu-At the first meeting a rate of 2d, in the pound was proposed, and an amendment was moved that no rate should be granted; the majority was in favour of the amendment; and on a poll being demanded the meeting was adjourned and the poll taken upon the day named, upon the motion and the amendment. At the close of the poll, the chairman declared that there was a majority in favour of the motion, whereupon a voter proposed to move another amendment, but was not allowed to do so :- Held, that the amendment being, in fact, a negative of the original motion, there was no occasion to put the motion separately to the meeting, and that the proceedings were regular and the rate good. Rey. v. Roberts, 3 B, & S. 495; 32 L. J., M. C. 153; 7 L. T. 822; 11 W, R.

Irregularity.]—At a vestry meeting, a motion having been made and seconded that a rate be made, an amendment was proposed, that it was not legal or expedient to make a churchrate for the district. The amendment and, afterwards, the original question were put to the meeting; the first was negatived and the latter A poll was demanded on the aniendcarried. ment only, and the vestry was adjourned for that purpose. On the day to which the vestry had been adjourned, the chairman declared the state of the poll under the headings-the number for the amendment and against the rate-the number against the amendment and for the rate; and then dissolved the meeting without having put the original motion a second time :-Held, that the proceedings, though irregular, were not sufficiently so to vitiate the rute. Tiarks v. Hutton, 35 L. J., Ecc. 11; L. R. 1 Ecc. 270; 12 Jur. (N.s.) 1013,

At a vestry meeting, a majority, after a poll, was declared in favour of a church-rate for the aska hyperty to which they were assessed under purpose of defraying the expense of fencing in a 3 & 14 Vict. c. 99:—Held, that such votes were piece of land, purchased as an additional burialground for the parish; irregularities were alleged to have taken place in the proceedings which would render the rate void. The court nevertheless refused to grant a mandatus to the churchwardens to convene a vestry for the purpose of considering the propriety of making such a rate. St. John's. Cardiff, Churchwardens, In rg., 16 L. J., M. C. 54; 11 Jur. 183.

Refusal to accept Vote—Rates not paid by Voter himself.]—It is no legal ground for refusing a vote tendered at the poll that the voter's rates had been paid not by himself but by other persons in order to enable him to vote: but, in order to vitiate the vote on that ground, the rejected voter ought to have tendered his vote. Richards v. Eirley, 10 L. T. 142—P. C.

Refusal to grant Poll—Invalidity,]—Where, upon an amendment to a proposal for a church-rate being negatived on a shew of hands, a poll was demanded but was refused by the chairman and the original proposal was then put and carried, both on a shew of hands and on a poll:—Held, that all the proceedings subsequent to the refusal to grant a poll on the amendment were null, and that the original proposal was not validly carried. St. Michael, Oxford v. Laff, 7 W. R. 20.

## f. Refusal to make.

What is.]—A citation against a parishioner, charging him, that he wilfully and contamu-ciously obstructed, or at least refused to make, or join, or coneur in the making of a sufficient rate for providing funds to defray the expense of the necessary repairs of the parish church, 'does not contain a sufficient allegation of an offence cognizable by an ecclesiastical court. Francis v. Steward, D. & M. 748; 5 Q. B. 984; 8 Jur. 1066.

When the making a church-rate is enjoined on a special vestry by act of parliament, a colourable adjournment for the purpose of delay is equivalent to a distinct refusal. *Reg.* v. St. Marguret's, Leicester, S. A. & E. SS9; 1 P. & D. 115.

Mandamus to make Rate.]—Tames L granted a rectory to a corporation in trust to pay stipous, and to bear all the charges issuing out of the rectory. The 22 & 32 Car. 2 absolved the parisioners from payment of tithe, and enacted that a rate should be made yearly by the parish officers for the payment of stipends, and for church repairs. The 56 Geo. 8, c. 55, enacted, that it might be lawful for the wardens, overseers and inhabitants in vestry, to make a rate (to a large moont) for the payment of stipends, and for church repairs. On a vestry refusing to make a rate for the above purposes, the court issued a mandamus to them to call a vestry, and make a rate. They N.S. Nacioners, Sunthansh, Wardens, So, 1 N. & P. 496; 7 A. & E. 937, n. S.C., on argument of rule, 3 N. & P. 126; 7 A. & E. 935; 1 W., W. & H. 105; 2 Jun. 132.

Where a township, being part of a parish, is called upon by mandamus to pay a definite customary proportion of a church-rate made for the whole parish, it must appear that the inhabitaris were summoned to consider the rate; for, if the custom requires such summons, fulfilment of that requisite is essential; and, if it does not, it is a bad custom. Reg. v. Dutby, 3 Q, B, 602. S. C. nom. Reg. v. Forston, 7 Jur. 13.

Where a majority at a meeting, held in pursannee of a monition from the Consistory Court, to take steps for repairing a church, refused to make any church-rate, and thereupon the church-wardens and the minority made a rate, the court refused a mandanus to the chapelwardens of a township in the parish, to compel them to raise their customary proportion of the rate. \*\*Deg, v. Thomas, 3 G. & D. 485; 3 Q. B. 589; 6 Jnr. 1122.

A mandamus will not lie to churchwardens to make a church-rate, Rew v. Wilson, 5 D. & R. 602.

Because it is a subject of ecclesiastical jurisdiction. Rev v. St. Peter's, Thetford, 5 Term Rep. 364

Although a mandamns does not lie to the churchwardens to make a church-rate, yet it lies to the churchwardens of two united parishes, under 10 Anne, c. 11, to assemble a meeting for the purpose of agreeing upon and ascertaining the moneys and rates to be assessed for the repair of the church of one of those parishes. Rev. St. Margaret and St. John, Westminster, 4 M. & S. 250.

Where an act directs a body, created by the act, to levy church-rates, the count will compel them by mandamus to levy the rate, and will not confine the writ to ordering the body to assemble for the purpose of determining whether they will levy the rate or not. Rey. v. N. Marguret, Leiester, S. A. & E. 889; J. P. & D. 116.

Forfeiture and Penalty for not making Rate.]—By an old local act for a parish the vestry are to make a rate on the parish called a pound rate, for raising a sum of money for the payment in the manner therein mentioned of the rector's stipend, and in default to forfeit and pay to the rector a certain sum for every offence, recoverable in the manner in the said act mentioned. By the same act the vestry are empowered. if they think fit, out of the moneys so raised, to erect a suitable house within the parish for the rector's residence, the cost of which is not to exceed a certain sum; and, until they erect the same, they are to pay the rector a certain sum a year out of the moneys so raised :- Held, that the power of making the rate was, by the Metropolis Local Munagement Acts (18 & 19 Vict. c. 120, s. 90, and 19 & 20 Vict. c. 112, s. 3), transferred to the vestry elected under those acts, and that a prerogative writ of nundamus. lies against such vestry to compel them to make the rate for the purposes aforesaid, nothwith-standing the provision for the forfeiture and penalty above mentioned. Reg. v. St. George the Martyr, Southwark, 61 L. J., Q. B. 398; 67 L. T.

Refusal of Vestry—Subsequent making:]—
Where the churchwardens duly convene a parish
vestry, and propose a rate for the necessary
repair and expenses of the parish church, which
a majority of the assembled parishioners refused
to make, they have no power of their own soleauthority at a subsequent time to make such a
rate. Voley V. Barder, P. F. S. D. 475; 12 A. & E.
265; 1 Arn. & H. 196; 10 L. J., Ex. 582; 5 Jur.
1018—Ex. Cl

A resolution passed by the majority in vestry to declare that no church-rate is necessary, and to refuse any such rate, does not disentitle the persons composing that majority to vote upon. on it, such rate will be bad. Gasling v. Veley, 4 H. L. Cas. 679; 1 C. L. R. 950; 17 Jur. 989.

At a vestry meeting assembled under a monition from the Ecclesiastical Court, to consider of and make a rate for the repairs of the parish church, au estimate was produced by the churchwardens, and a rate of 2s. in the pound proposed by them ; no objection was made to the estimate, but an amendment was passed by the majority that church-rates were bad in principle and ought to be refused, and the vestry did refuse to make a rate accordingly. The vicar, church-wardens and certain others of the vestry, without taking any vote on the question, did afterwards produce and sign a rate of 2s. in the pound : Held, that the rate thus agreed to was invalid. Ib.

Refusal by Churchwardens. ] - Bill against churchwardens because they refused to make a rate for reimbursing the plaintiff according to a vote and order of vestry. They being out of their office, the decree was made against them and their successors. Battily v. Cooke, 2 Vern. 262 : Pre. Ch. 42.

## g. Chapel Rates.

When leviable.]-An inhabitant of a parish was libelled for nonpayment of rates imposed for the repair of the parish church, and of certain chapels built within the parish, under certain chapes built within the parish, under 58 Geo. 3, c. 45; 59 Geo. 3, c. 134; and 3 Geo. 4, c. 72. He declared in prohibition, alleging that the rate was improperly levied on a part of the parish only, excluding the township of H. Plea, that the chapels were built in aid of the parish church: that there has immemorially been a chapel in H., at which the inhabitants of H. have received all divine rites and services; that the costs of repairing the chapel have been immemorially defrayed by the inhabitants of H., and no others; that no rate for repairing the parish church has been laid on any person in H.; and that the inhabitants of H. have from time immemorial been exempt from contributing to the repairs of the parish church. A verdict having been given for the defendant :- Held, that the court must, after verdict, intend the chapel to have been coeval with the church, although that fact was not pleaded; and that, the chapel and church being coeval, and the inhabitants having always been exempt from the church-rate, no rate for repaircream rom the conditions of the imposed upon them. Cracen v. Sanderson, 7 A. & E. 880; 2 N. & P. 641; W. W. & D. 694; 7 L. J., Q. B. 81.

Held, also, that under 3 Geo. 4, c. 72, s. 20, which directs that chapels built under the two first-mentioned acts, or that act, shall be repaired by the parishes or places at large to which they belong, the new chapels were repairable by the district which repaired the church; viz. the parish of W., minus the township of H. Ib.

Held, also, that the mere fact of a district in a parish having kept up a chapel of its own, without coming on the parish rates, did not show a custom in such district to maintain its chapel by rates levied on its own inhabitants. Ib.

the question of any particular proposal for a rate; the holders and occupiers of mills and houses: made by any of the minority; and, if a rate —Held, that an occupier of land within the should be made by the minority alone, the votes chapelry, who did not object to the rate before of the other persons present not having been taken the justices when smunoned for nonpayment, could not question its validity in replevin, after distress on his goods under the justices' warrant. Ramsbottom v. Duckworth, 1 Ex. 506; 19 L. J., M. C. 74.

A chapel-rate, duly made, but objected to from extrinsic circumstances, can only be questioned in the Ecclesiastical Court. Ih.

### 2. PUBLICATION OF.

Sufficiency of. ]-Under 7 Will, 4 & 1 Vict, c. 45, it is a sufficient publication of a rate if a copy of it is affixed, before divine service on the Sunday next after its allowance, on the principal or most usual door of all the churches and chapels of the established church within the parish, in which divine service is performed. It is not necessary to publish it on all the doors of any church or chapel, nor on the door of a church or a chapel in which divine service had ceased to be performed; nor on the door of any building not . being a church or a chapel in which divine service is performed. Ormerod v. Chadwick, 16 M. & W. 367; 16 L. J., M. C. 143.

# 3. PROPERTY RATABLE.

What. ]-Where a local act empowered the trustees therein named to raise a sum of money for rebuilding a parish church, and to make a rate for defraying the principal and interest of the sum borrowed on the "houses, warehouses, shops, buildings, lands, tenements and heredita-ments, rated or ratable to the poor":—Held, that titles were ratable under these worls. Rea v. Buckinghamskire JJ., 1 N. & P. 503; 6 A. & E. 388; W., W. & D. 162; 6 L. J., M. C. 89.

The London Missionary Society occupied a house under a lease for religious and charitable purposes. The treasurer attended at the house one day in the week to superintend the society's affairs, but no person ever slept there. The treasurer received no remuneration for his services, and neither he, nor any other person connected with the society, derived any profit from the occupation of the premises :- Held, that the treasurer was properly assessed to a charelirate, under an act extinguishing tithes in the parish, and authorising a yearly church-rate to be made, in order to raise money for the purpose of compensation to the parson in lieu of tithes, and for the repairs of the church, upon all inhabitants and occupiers, because beneficial occupation was not material in this case. Reg. v. Wilson, 12 A. & E. 94; 4 P. & D. 180; 9 L. J., M. C. 102; 4 Jur. 1128.

At common law, impropriate tithes (now represented by titlie rent-charge) are not ratable to ordinary church-rates, and this exemption must hold also with regard to rates made, under 5 Geo. c. 36, to repay mouey advanced by the commissioners of public works. Edney v. Small-bones, 21 L. T. 506.

Rights of common connected with possession are liable to be rated, as also is a towing-path, for the profits derived therefrom, and earned within the parish, although no tolls be taken there. Medland v. Paine, 4 Jur. (N.S.) 1283; 7 W. R. 357.

Questioning.]—A chapel-rate was laid on the Mode of assessing Property.]—Land must be landholders of the chapelry only, exclusively of rated according to the rent it could reasonably Mode of assessing Property. ]-Land must be be let for, and other property according to the dismissal of a suit for subtraction of church-rate,

of rating. Ib.

Though a church-rate is often made according to the assessment for the poor-rate, it acquires no validity from that circumstance, and the poorrate may be void, and yet the church-rate good. A church-rate does not require to be upon the full ratable value, it merely requires to be just and equal. Yet the acquiescence of a parish in a poor-rate is presumptive evidence that a churchrate made upon the same basis is just and equal. The substantial inequality which will render a church-rate invalid may be either the omission of property that ought to be rated, or the underrating some and the overrating other property. Attenbarough v. Kemp, 14 Moore, P. C. 7 Jur. (N.S.) 665; 5 L. T. 67; 9 W. R. 771.

A church-rate differs from a poor-rate in three things; it need not be upon the net annual value; if just and equal, it cannot be compounded for ; and the landlords of small tenements cannot be rated for part thereof in lieu of the occu-

piers. Ib.

Churchwardens in making a church-rate need not follow the poor-rate, and should not do so unless satisfied it is just and equal; and to make it a mere copy of the poor-rate may make the

rate bad. 1b.
In making a church-rate the parishioners are not bound to adopt the valuation made by an assessment committee under 25 & 26 Viet. c. 103. Barnes v. Grant, 35 L. J., Ecc. 9; L. R. 1 A. & E.

37; 12 Jur. (N.S.) 168; 13 L. T. 688.
Where a church-rate was made upon the basis of an old valuation, originally made for the purposes of a poor-rate, and in accordance with 6 & 7 Will, 4, c, 96, s, 1, and which had been since from time to time corrected, and acted upon and acquiesced in for a great number of years, the court refused to disturb the rate, merely on the ground that a new valuation, made under 25 & 26 Vict. c. 103, differed from the old one. Ib. S. P., Edwards v. Hatton, infra.

Assessment founded on Rent. ] - The rent paid for lands is not a conclusive test of their value; and an assessment under 25 & 26 Vict. c. 103, founded chiefly on the basis of the actual rent, and not the rent at which the property might reasonably be expected to let from year to year, according to 6 & 7 Will. 4, c. 96, s. 1, is erroneous. Elwards v. Hatton, 35 L. J., Ecc. 1; L. R. 1 Ecc. 21; 12 Jur. (N.S.) 144; 13 L. T. 689.

\_\_\_\_\_Inequality.]—A defendant in a snit for subtraction of church-rate, may by his allegation, averring inequality of assessment, plead that he is himself assessed at too low a rate, and is not bound to aver or shew that he himself is injured by the imaguality of assessment of which he complains, Th.

Where, upon an assessment for church-rate based upon a valuation for poor-rate made more than twenty years previously (in 1838), nearly half the lands in the parish were underrated. The rate was unequal and therefore invalid. Morton v. Tabiner, 6 Jur. (N.S.) 682.

4. APPEAL AGAINST.

existing value of the subject-matter at the time if care and discretion have been bona fide exercised by the judge. Richards v. Birley, 2. Moore, P. C. (N.S.) 96; 10 L. T. 142.

> Appeal from Order of Justices. - Sec Reg. v. Staffordshire JJ., col. 1380.

> > 5. Borrowing on Security of.

For Repairs to Church-Future Expenses only. ]-The 59 Geo. 3, c. 134, s. 14, which authorises churchwardens to borrow money upon the credit of the church-rates for defraying the expenses of repairs to the church, contemplates future expenses only, and not such as have already been incurred; therefore churchwardens cannot raise a loan to the credit of the churchrates, to pay a debt for repairs incurred in the Dust year. Rew v. Dursley Charchwardens, 5 A. & E. 10; 2 H. & W. 9; 6 N. & M. 333; 5 L. J., M. C. 137. 8, P. Pigott v. Bearblock, 4 Moore, P. C. 499; 8 Jur. 479.

The loan ought to be raised at the time when the repairs are done, and the levying of rates for the repayment should commence immediately. and be continued, so as to pay off the debt by net annual instalments.

1b. See also cases in net annual instalments.

col. 1285-6

What constitutes a Borrowing-Liability of Ratepayers. |-On 22nd June, 1826, a vestry passed a resolution to enlarge the parish church, to approve the estimate of the contractors for 2,390L, and to borrow the money necessary for the plan, beyond the sum already raised, upon bonds of 50% cach, bearing 5 per cent, interest. On 7th December, 1826, the vestry passed another resolution, anthorising the church-wardens, with the assistance of a committee, to borrow at interest any sum or sums of money, not exceeding 2,000% for the payment of such expenses. The resolution declared that, in order to seeme the repayment of such money so borrowed, the churchwardens for the time being should, from time to time, make such rates as should be necessary for payment of interest on such debt, and not less than 5 per cent. to accumulate as a sinking fund. The consent of the bishop of the diocese, and of the incumbent, was given to this resolution. The work was done by the contractors between 29th June, 1826, and 29th March, 1830. A sum of 4001, then remained due to the contractors, and the then churchwardens agreed that this sum should be treated as a loan from the contractors to the parish; and they executed four deeds of charge upon the rates of the parish for 50%, each, at 5 per cent, interest, payable on the 31st March, 1831, and expressed to be in part liquidation of the debt. Interest was gratially paid on the bonds until after March, 1850, but no demand was ever made by or on behalf of the obligees, that any fund should be provided for the payment of the principal, nor had any such fund been provided. On a mandamus to the churchwardens for the time being to make rates for the purpose of paying to the executors of the obligees the principal and the arrears of interest upon the bonds :- Held, first, that the consent of the committee to the borrowing or quasi bor-Ground of, in Suit for Subtraction. ] - The rowing of the 4001, if essential to the validity of judicial committee will not entertain an appeal the bonds, might be presumed, although it did solely on the ground of the refusal of the court not appear upon the face of the instruments. below to allow the defendant costs on the Reg. v. St. Michael's, Southampton, Church-

Jur. (N.S.) 1090; 4 W. R. 741.

Held, secondly, that the transaction amounted to a borrowing within 58 Geo. 3; c. 45, s. 59, and that the bonds were to be considered as given to secure, not a past debt, but a present loan. Ib.

Held, thirdly, that the liability of the ratepavers, under the bonds, was not destroyed by the obligees having failed, during twenty years, to demand that they should provide a fund for payment of the principal. Ib.

Who can borrow.]-The township of B. had had immemorially chapelwardens and a chapel. the expense of repairing which had always been defrayed by a rate on the inhabitants of the township. For many years, commencing in 1727, there had been a burial-ground attached to the chapel, as the burial-ground of the township; and the sucraments of the church had also, for many years, been administered in the chanel. But the township was locally situated within the parish of W., and from 1727 to 1740, burial fees were paid for every burial in B., by the clergy of the chapel at B. to the clergy of the parish church of W., and also a fee upon the churching of women; and, although marriages were solemnised in the chapel at B, both by bains and licence, from 1695 to 1754, yet such solemnisations totally ceased from that time until 1843, when the chanci was licensed for the solemnisation of marriages under the act for the registration of births, deaths and marriages. In 1825, it was resolved, by a majority of two-thirds of the vestry of B., convened by a notice, to consider whether an offer by the society for promoting the enlargement and building of churches and chapels should be accepted, and the church enlarged, and whether a sum to make up any deficiency should be raised upon the rates, that 5501, offered by the society, should be accepted, and that the chapel should be enlarged, and that any deficiency in the expense should be made up by the sale of forty private pews, and by rates under the act of parliament. Afterwards, in 1827, chapelwardens of B. executed a deed, charging the chapel-rates of the township with the repayment of 600%, and interest, which sum of money the deed recited was borrowed, under the resolution of the vestry, for enlarging and rebuilding the chapel:-Held, first, that the township of B. was not a parish within 58 Geo. 3, c. 45, s. 59, so as to authorise the chapelwardens, with the consent of the vestry, to borrow money on the rates. Reg. v. Bilston Churchwardons, 16 Q. B. I: 20 L. J., M. C. 68: 15 Jur. 506.

Consent of Vestry. ]-Held, secondly, that even if it was, no sufficient consent by the vestry was shewn, since no consent was shewn to borrow the specific sum which had been borrowed, in the manner in which it had been borrowed; and that, consequently, a mandamus under 58 Geo. 3, e. 45, to compel the churchwardens to pay off the 600l. out of the rates, could not be supported.

Payment of Sum borrowed. ]-A rate may be made under 58 Geo. 3, c. 45, ss. 59, 60, to pay the principal and interest of money borrowed in the manner provided by that statute, at a meeting of which the notice required by 59 Geo. 3, c. 134, s. 25, has not been given, the latter statute not repealing the former, but merely

wardens, 6 El, & Bl, 807; 25 L. J., Q. B. 379; 2 funds. Farnelly, Smith, 15 C. B. 572; 3 C. L. R. Jur. (N.S.) 1090; 4 W. B. 741.

A, lent to the churchwardens of B., under 59 Geo. 3, c. 134, s. 40, 1,0007, at 5 per cent., and agreed not to call in the principal for twenty years:—Held, that the act was compulsory on the churchwardens to raise annually a sum equal to the amount of the interest, as a fund for the repayment of the principal, although A, could not compel the repayment of the principal although A, could not compel the repayment of the principal until the expiration of the twenty years. Rev v. St. Michael Periodic, Churchwardens, 5. A. & E. 603; 1 N. & P. 69; 2 H. & W. 344; 6 L. J., K. B. 28.

Suit to enforce Debentures-Parties. |-- In a suit against commissioners, to enforce debentures on parish rates (imposed for church building purposes), it was insisted that the ratepayers were necessary parties because they ought to be present at the taking of the accounts. The objection was overruled, on the ground that the ratepayers would be sufficiently represented, in taking the accounts, by the commissioners who were defendants. Fletcher v. Gibbon, 23 Beav. 212.

Some only of many commissioners, appointed under an act of parliament, to raise money on the rates, for parish purposes, were made defendants to a suit in equity, by a bondholder to enforce payment. It was objected that all the commissioners ought to be parties. The objection was removed by the court ordering the decree to be served on the absent commissioners, with notice that they might attend the taking of the accounts. 1h.

## 6 How ENFORCED

### a. In Ecclesiastical Court.

Jurisdiction.]-Ecclesiastical Court has jurisdiction as to church-rates. Court of Chancery not auxiliary thereto. Anon., 2 Ves. 451.

The 53 Geo. 3, c. 127, s. 7, which gives power to a justice to enforce the payment of a sum under 101. due upon a church-rate, where the validity of the rate has not been questioned, nor the liability of the party, takes away the jurisdiction of the Ecclesiastical Court in such cases. But, if the validity or liability is in question, the ecclesiastical courts have jurisdiction, though the party has not been summoned before a justice. Ricketts v. Bodenham, 4 A. & E. 433; 6 N. & M. 171; 1 H. & W. 753; 5 D. P. C. 120; 5 L. J., K. B. 102. But quere as to first point. See Baines, In re. Cr. & Ph. 31: 10 L. J., Ch. 108: 4 Jur. 1194.

As the ecclesiastical courts have general jurisdiction in matters of church-rate, it is unnecessary, notwithstanding the 53 Geo. 3, c. 127, that it should appear from the proceeding, in a subtraction of church-rate cause, either that the amount of the rate exceeded 10L, or that its validity was disputed. Reg. v. Thorogood, 3 P. & D. 629; 12; A. & E. 183; 9 L. J., Q. B. 211; 4 Jur. 987.

A prohibition will go to the Ecclesiastical Court in a suit to enforce the payment of a sum under 101., due upon a church-rate, where neither the validity thereof, nor the liability of the party topay it is disputed. Richards v. Dyke, 2 G. & D. 493; 3 Q. B. 256; 11 L. J., Q. B. 275; 6 Jur. 1036.

The churchyard of a parish having been closed under an order in council, the parishioners in vestry assembled authorised the churchwardens to borrow, according to the provisions of 3 Geo. 4. c. 72, on the security of the rates, a sum sufficient providing a further mode of raising the necessary to purchase a portion of ground adjoining the

churchyard and to convert it into a burial-place, I was assessed in the amended rate and assessment At that meeting an adjournment was moved, put to the vestry, and rejected; a poll was demanded, and refused. Subsequently the ecclesiastical commissioners, under their seal, signified their approval of the intended purchase of land, of the amount to be borrowed, and of the arrangement for raising and paying off the loan. The money was borrowed accordingly, the purchase com-pleted, the land conveyed to the ecclesiastical commissioners, and the churchwardens levied a rate of 4d. in the pound on the assessable property in the parish, to repay the first instalment of the The appellant refused to pay :- Held. that, although the making of a rate to discharge a debt incurred under the provisions of an act is not a matter of ecclesiastical cognisance, the enforcing of it is. The Ecclesiastical Contraction and in such a case inquire whether the purpose of paying off the debt and interest was a legal purpose, or whether the loan was necessary or not, but in other respects its jurisdiction remains intact. White v. Steele, 7 Jur. (N.S.)

— Res judicata.]—A parishioner having been summoned before the magistrates of his parish under 53 Geo, 3, c. 127, for nonpayment of a church-rate under 10*l*., informed them that he disputed the validity of the rate; the magistrates, nevertheless, made a verbal order upon him for payment; but on a subsequent day withdrew the order, and informed him of such withdrawal by letter. The churchwardens then instituted proceedings to enforce the rate; the defendant appeared under protest :- Held, that the matter was not res judicata, and that the Ecclesiastical Court had jurisdiction to enforce the rate. Linnell v. Gunn, 36 L. J., Ecc. 23; L. R. 1 Ecc. 363.

Variance, -In March, 1869, a rate was made by the churchwardens and overseers of a parish in Lichfield, for the repayment of money borrowed from the public works loan commissioners, under 5 Geo. 4, c. 36. The defendant occupied premises in the parish, in respect of which he was assessed, for the purposes of the rate, at 10s. 9d.; he refused to pay this sum, and disputed the validity of the rate. Letters of request were granted, directed to the Court of Arches, requesting the judge to call the defen-dant before him to answer "in respect of the A decree by letters of request said assessment." was issued in April, 1870, and the suit proceeded in the Arches Court. The defendant pleaded that a tithe rent-charge, the property of, and received by, the rector in commutation of the tithes within the parish, was not assessed to the rate, and that the glebe house and lands within the parish, of which the rector was the owner and occupier, had been omitted from the assessment. The plaintiff filed a responsive allegation, in which it was alleged that, in January, 1871, a meeting was duly held to amend the rate and the assessment on which the rate was made; and at the meeting the churchwardens, with the concurrence of the overseers, amended the assessment by adding to and including in such assessment the rectorial tithes, and glebe house and lands, and amended the rate by reducing the assessthe rector as owner of the tithes, and as owner and occupier of the globe house and lands, and F. contributing in any proportion towards the that the sum—in respect of which the defendant repairs of the church of B. Plea stated an

-amounted to 9s. 5d. instead of 10s. 9d., and that the plaintiffs only claimed to recover 9s. 5d. that the plantims only claimed to recover so, on. The defendant opposed the admission of the responsive allegation, and the court held that the allegation was inadmissible, because it had no jurisdiction to inquire concerning any other assessment than that mentioned in the letters of request. Asterley v. Adams, L. R. 3 Ecc. 361.

- Letters of Request. ] - A cause of subtraction of church-rate may be carried into the Arches Court by letters of request from the commissary of the diocese, or other jurisdiction, in which the eause originates, under the 23 Hen. 8, c. 9, s. 3, without any proceeding having been first taken in the court of that jurisdiction. It is sufficient ground for such removal that matters of difficulty may arise, in which the parties desiring letters of request can have assistance of counsel in the superior court, not attainable in the inferior. Jolly v. Baines, 12 A. & E. 201; 4 P. & D. 224; 9 L. J., Q. B. 349; 5 Jur. 22. But sce Rippin v. Bastin, post, col. 1390.

Onus of Proof.]—In the Ecclesiastical Court the onus of proving a rate to have been rightly made lies on those who assert its validity; and, if that validity is not affirmatively established, the common law courts will prohibit the enforcement of the rate. Gosling v. Veley, 4 H. L. Cas. 679; 1 C. L. R. 950; 17 Jur. 939.

An order of the Ecclesiastical Court to admit a libel and exhibit to proof, is not a definite

sentence. Ib.

Declaration in Prohibition-Variance. ] declaration in prohibition stated that the libel in the spiritual court alleged, first, that the parish of F. was a part of and within the parish of B.; secondly, that a usage had prevailed for the inhabitants of F. to maintain their own church, and to contribute to the repair of the parish church of B., and all expenses and charges necessarily laid out and expended by the churchwardens of B., in a certain proportion. That the plaintiff gave a negative issue to the libel, denying thereby the allegations of the same. The declaration further stated, that the plaintiff pleaded that F, was not a part of or within the parish of B.; and that there was not any such usage as that F., besides maintaining its own church, should contribute, in a certain proportion, to the repair of that at B., and all or any of the expenses necessary or otherwise laid out by the churchwardens of B.; and that the plaintiff alleged that F. was a distinct and separate parish. and had a parish church, which had been, time out of mind, maintained by the parishioners of F., and that the same was not a hamlet, chapelry, or township belonging to or within the parish of B. Then followed a statement, that it was falsely alleged in the libel that an ancient usage had been observed, by which the inhabitants of F. had contributed to the support of the parish church of B. in the proportion of three parts in eight of all the expenses of such support; and that, when the churchwardens of B, levied 81, for the repair of their church, or in due execution of their office of churchwardens, the inhabitants of F. had been used to raise 37, as their proportion ment on all the ratable property, and assessed of such charges and expenses; and the plaintiff expressly alleged that there was no such usage of reparation of the parish church of B. in the proportion as in the libel is alleged :-Held, that the libel sought to enforce a usage, with respect to the liability of the parishioners of F. to contribute to B., different from that contained in the plea; and that a question of temporal cognisance was raised in the Ecclesiastical Court, viz. whether F. be a part of and within the parish of B.; and, therefore, the plea disclosed no sufficient ground for awarding a consultation. Dolby v. Rimington, 9 Q. B. 179; 15 L. J., Q. B. 326 ; 10 Jur. 920.

Against Personal Representatives. ]-The exccutor of a deceased parishioner cannot be cited in an ecclesiastical court, in respect of a churchrate due from his testator. Williams v. George, 3 Curt, 343.

### b. In County Court.

Jurisdiction. |- By a local act of parliament trustees were empowered to rebuild a church; and for that purpose to make rates on all the houses in the parish ratable for the relief of the poor; one half on the landlords, the other half on the tenants or occupiers. It also enacted that the tenants or occupiers should first pay the whole rate, and deduct a moiety out of their rent, and that every landlord should allow of such deduction, notwithstanding any agreement to the contrary. Subsequently to the passing of this statute, a lease of premises in the parish was granted, with a covenant that the tenant should pay all taxes and rates; and the landlord having refused to allow half the church-rate to be deducted from his rent, contending that the statute only extended to agreements in existence at the time when it was passed, the tenant proceeded against him by plaint in the county court :- Held, that that court had inrisdiction over the matter; it not being one in which the title to any corporeal or incorporeal hereditaments came in question. Gwynne v. Knight, 1 Ex. 802; 17 L. J., Ex. 168; 12 Jur. 101.

### c. By Proceedings before Justices.

# i. Generally.

Abandonment of Proceedings in Ecclesiastical Court.]—If proceedings against a person are commenced in the Ecclesiastical Court to enforce a rate, and afterwards abandoned, the same person may afterwards be summoned before justices, and by them ordered to pay the rate. Reg. v. St. Clement's, 12 A. & E. 177; 3 P. & D. 481; 4 Reg. v. Jur. 1059.

On whose Complaint. ]-Justices may act upon the complaint of one churchwarden, though in a parish having ten. Reg. v. Fenton, 1 Q. B. 480; I G. & D. 17.

Where parties are unduly elected churchwardens, but are admitted and sworn in and act. they may complain of nonpayment, so as to give justices jurisdiction, the sum not exceeding 10l. Reg. v. St. Clement's, supra.

Application of Local Acts. 1—Certain local acts confidence from the confidence provisions by which any rate in a parish, made by virtue of the acts, might be before them to the validity of the rate, the

immemorial usage, by which F, had supported its peace; and an appeal was given to the quarter own chapel, and contributed to the support and sessions. Separate districts for ecclesiastical purposes were afterwards formed in this parish under 19 & 20 Vict. c. 104 :- Held, that not withstanding the creation of the separate districts, the local acts still applied to church-rates for the parish church. Reg. v. Roberts, 3 B. & S. 495; 32 L. J., M. C. 153; 7 L. T. 822; 11 W. R. 362.

> Sufficiency of Refusal to Pay. ]-A collector called for a church-rate and produced the receiptbook as his authority to collect; the son of the ratepayer, by the authority of his father, refused to pay the rate, handing to the collector a written statement of his refusal: - Held, a sufficient refusal to ground an order of justices for payment. Mirchouse, In re, 1 L. T. 32.

Orders of Justices.]—An order of justices for payment of a chapel-rate need not state that the Ramsbottom proceedings were taken on oath. Ramsbot v. Duckworth, 1 Ex. 506; 19 L. J., M. C. 74.

Appeal from Order.] — A party appealing against an order of justices for payment of a church-rate, under 53 Geo. 3, c. 127, s. 7, need not give notice of appeal to the justices making the order; it is sufficient to give it to the church-wardens. Rew v. Staffordshire JJ., 4 A. & E. 842; 6 N. & M. 477; 2 H. & W. 48.

### ii. Jurisdiction of Justices.

Rate to reimburse Churchwardens, ]magistrates are called upon, under 53 Geo. 3, c. 127, to enforce a church-rate good upon the face of it, it is no ground of objection before them that the rate was in fact made for the reimbursement of the churchwardens. Rew V. Sillifant, 5 N. & M. 640; 4 A. & E. 354.

Procedure to Oust. ]-To oust the justices of their jurisdiction to adjudicate upon a churchrate summons, the party must decline to accept their adjudication. Reg. v. Know, 32 L. J., M. C. 257; 8 L. T. 330; 11 W. R. 703.

Validity of Rate Disputed. ]-By a local act creating a township a district parish, twentyfour substantial and creditable inhabitants of the parish were to be elected vestrymen, and the rector and thirteen or more of the vestrymen in vestry assembled, or the major part of them, might make a rate for keeping the church in repair, with a power to four or more justices, in case of default in payment of the rate, to grant and issue their warrant to levy the same by distress and sale of the offender's goods, and a power of appeal to the sessions was given to any person. who should find himself aggrieved by any assessment or by any distress to be made for the same, within three months after such distress made :-Held, that the justices had no jurisdiction to inquire into the validity of the rate, the remedy, if it was invalid, being by appeal to the sessions, and that, if they had such jurisdiction, the fact of some of the vestrymen not residing and sleeping within the parish did not disqualify. Wilson v. Sunderland Churchwardens, 17 C. B. (N.S.) 694; 34 L. J., M. C. 90; 10 Jur. (N.S.) 1105; 11 L. T. 342; 13 W. R. 85.

recovered by summons before two justices of the justices have no power to make an order, though

he does not object to their jurisdiction to decide in his power to compel the churchwardens to on the points which he has raised. Reg. v. Leievster JJ., 29 L. J., M. C. 203; 2 L. T. 486;

8 W. R. 563.

Where objections were taken, upon a summons before justices, to the validity of a rate made under the 5 Geo. 4, c. 36, as well as to the liability of the person to pay, which objections would have been sufficient, in the case of an ordinary church-rate, to bring the case within the proviso of the 53 Geo. 3, c. 127, s. 7, and oust the jurisdiction of the justices:—Held, that the justices were right in refusing to adjudicate upon the summons, or to make an order. Reg. v. Staffordshire JJ., 25 L. J., M. C. 126; 2 Jur. (N.S.) 1023; 4 W. R. 727.

- Rate Bad on the Face of it. ]-Although by 53 Geo. 3, c. 127, s. 7, if any person refuses to pay a church-rate duly assessed upon him, the validity of which has not been questioned in an ecclesiastical court, a magistrate may grant a warrant to bring such person before two justices, who may examine into the complaint and order payment, &c., the court will not compel by mandamus a magistrate to issue his warrant where the rate is manifestly bad. Reg. v. Byron, 3 New Sess. Cas. 180; 12 Q. B. 321; 17 L. J., M. C. 134; 12 Jur. 479.

Sufficiency of Dispute.]—At a meeting of a vestry held in obedience to a monition from the Ecclesiastical Court, it was moved, and seconded, that a church-rate be laid upon the parish for the necessary repair of the church. It was then proposed, and seconded, that there be no church rate for the parish church for the current year. The original resolution was rejected by a majority. A proposition was then made, and seconded, that a voluntary subscription be commenced to pay the costs of the church, and was adopted by a majority. The churchwardens therefore proceeded to levy a rate with the consent of the minority, against which there was a protest. Upon complaint before justices against a party for nonpayment of the sum to which he was liable in respect of that rate, he gave notice, first, that he protested against the church-rate generally; secondly, that he should not contest the validity of the rate in the ecclesiastical courts; and, thirdly, that he should commence actions in the courts of common law against the justices for all acts connected with the rate which he should be advised were illegal :- Held, that the validity of the rate was sufficiently disjuted, and notice given to the justices within the proviso in 53 Geo, 3, c. 127, s. 7. Dale v. Pollard, 10 Q. B. 504; 2 New Sess. Cas. 631; 16 L. J., Q. B. 322; 11 Jur. 539.

- Bona fides of Dispute.]-A parishioner summoned by the churchwardens before justices for nonpayment of a church-rate, alleged that the rate was partly retrospective, and that several items were otherwise illegal, and that he intended to try the validity of the rate in the Ecclesiastical Court. The justices declined to grant an order then, but said they would do so at the end of a month unless the objecting party proceeded to try the validity of the rate in the meantime. No such proceeding was taken, and the parties appeared again before the justices at the end of a month. The objector continued to assert the invalidity of the rate, and his desire to try the question, and stated that it was not legally mouth Churchwardens, 9 C. B. (N.S.) 315; 30

institute proceedings against him in the Ecclesiastical Court, but he challenged them to do so, and he contended that the jurisdiction of the justices was ousted by the third proviso of the 53 Geo. 3, c. 127, s. 7. The justices nevertheless made an order for payment of the rate. Afterwards, on being applied to for a distress warrant to levy such rate, they declined to grant it, and said they threw themselves upon 11 & 12 Vict. c. 44, s. 5. On motion under that statute, calling upon them to show cause why they should not issue such warrant: -Held, that the justices, on the first hearing, had sufficient ground for considering the rate to be bona fide disputed : that the test of trying the validity of the rate between the first and second hearing was one which ought not to have been imposed; that the ultimate order was bad, and that they could not be called upon to enforce it. Reg. v. Collins, 17 Q. B. 816; 21 L. J., M. C. 73; 16 Jur. 422,

A mere statement to the justices, by the party complained of, that he disputes the rate, and that he has entered a caveat in the Ecclesiastical Court against its being allowed, does not deprive the justices of jurisdiction; they must still hearand examine to ascertain whether the rate is: bonâ fide disputed. Rew v. Wrottesley, 1 B. & Ad. 648; 9 L. J. (o.s.) M. C. 51.

Disputes having arisen in a parish by reason of the refusal of the incumbent to bury the child of a Baptist in consecrated ground, some of the inhabitants determined to contest the churchrate. A person was summoned for nonpayment of his rate, and appeared by his solicitor, who stated that he contested the validity of the rate. But the justices, believing that the dispute about the burial of the child was the real cause of the refusal to pay, and that the legal objec-tion was not made bona fide, held that their jurisdiction was not ousted, and made an order for payment of the rate:-Held, that, in order to entitle the justices to assume jurisdiction in such case, they must have very strong evidence of mala fides, and that the facts disclosed were not sufficient ground for such a conclusion. Reg. v. Pedler, 12 L. T. 17.

Where a person, summoned for nonpayment of a church-rate, makes objections thereto, which the justices overrule as not being made bona fide, the court is not bound by the decision of the justices if the contrary appears from the facts. Reg. v. Huntsworth, 33 L. J., M. C. 131; 10 Jur. (N.S.) 945; 10 L. T. 374; 13 W. R. 7.

It is a general rule that the summary jurisdiction of justices gives way when a matter of title. comes bona fide into question before them. Backhouse v. Bishopwearmouth Churchwardens, 9 C. B. (N.S.) 315; 30 L. J., M. C. 118; 7 Jur. (N.S.) 338; 3 L. T. 626; 9 W. R. 162.

— By Quakers.]—The provision in s. 7 of 53 Geo. 3, c 127, which takes away the jurisdiction of justices where the validity of the rate is bona fide disputed, extends to Quakers.

Pease v. Chaytor, 1 B. & S. 658; 31 L. J., M. C. 1; S Jur. (N.S.) 482; 5 L. T. 280; 10 W. R. 16. When, under 7 & 8 Will. 3, c. 34, s. 4, a Quaker is summoned before justices for nonpayment of a church-rate, if he bona fide disputes the title to enforce the rate, their jurisdiction ceases, and the Ecclesiastical Court is the proper tribunal to decide the matter. Backhouse v. Bishonwear-

Notice to Justices of Dispute. |- In order to take away the summary jurisdiction of magistrates, the party proceeded against must at once give notice to the justices that he disputes the validity of the rate, or his liability to pay it. If he argues an objection to the rate before the justices, and they decide upon it, and make an order, and he then gives notice that he disputes the validity of the rate, the court will not grant a certiorari to remove the order. Reg. v. Wicksted, or Reg. v. Salop JJ., 2 El. & El. 386; 29

Seed, of Mey. V. Suserp 30., 2 Et a S. L. J., M. C. 39; 6. Jur. (N.S.) 143.

A party, summoned before two justices for nonpayment of a church-rate, told the justices that he would immediately bring an action against any person who ventured to levy the rate, as he thought he had no right to pay it, because he had no claim to or seat in the chapel : -Held, that this was sufficient notice that he disputed his liability to be rated, and therefore the

order was quashed. Rev v. Milnrow, 5 M. & S. 248.

In order to oust the jurisdiction of justices, notice that the validity of the rate is disputed must be given to them in a manner such as to induce them to forbear giving judgment. Mannering, Ex parte, 2 B. & S. 431; 31 L. J., M. C. 153.

A person summoned for nonpayment of a church-rate contended that the summons should be dismissed on the grounds that the rate was wrongly described in the summons, and that the rate was illegally made. These grounds having been argued, and the magistrates being about to deliberate, he gave notice that he disputed the validity of the rate and his liability to pay it; and thereupon they decided that their jurisdiction was taken away by the third proviso to s, 7 of 53 Geo, 3, c, 127. The court refused a rule on the justices to make an order for payment of the

Justices proceeding notwithstanding. ]-On the hearing of an information before justices for the nonpayment of a church-rate, the attorney for the defendant objected, first, that the rate was illegal, on the ground that the whole parish was not included in it, as the B. district, a part of the parish, was not rated; secondly, that explanation and details of the estimate for the rate were required and refused; and, thirdly, that the rate was unnecessary and execssive. The complainant gave evidence that at the vestry at which the rate was made an explanation of the estimate was given, and that the amount sought to be raised was necessary; and the justices at once decided that the last two objections were not bona fide made. Further evidence having been adduced at an adjourned meeting by the complainant that the B. district had been legally separated from the parish by an order in council, and formed into a new parish for ecclesiastical purposes, the justices being about to give judgment, the defendant stated that he objected to the validity of the rate; the justices, however, held this objection also not bona fide, and made an order on him to pay :-Held, that the justices acted within their jurisdiction, and the court directed them to issue a distress warrant to enforce their order for payment of the rate. Reg. v. Black-burn, 32 L. J., M. C. 41.

L. J., M. C. 118; 7 Jur. (N.S.) 338; 3 L. T. 626; a symmetry of a church-rate, gives notice that he 9 W. R. 162. S. P., Gray v. Buckhouse, 9 Jur. disputes the validity of the rate, and the justices (N.S.) 54; 7 L. T. 438. believe the objection to be made bona fide, and make an order for payment, the court, on the order being brought up by certiorari, will quash it, upon affidavits showing that the justices had no reasonable ground for disbelieving the bona fides. Reg. v. Nunneley, El. Bl, & El. 852; 27 L. J., M. C. 260 ; 4 Jur. (N.S.) 1146 ; 6 W. R. 654.

# d. By Distress.

Warrants. ]- The plaintiff having been rated to a church-rate, and refused to pay, a complaint was made before justices, and duly heard; and on the 6th May a verbal order was made for payment by the plaintiff of the amount of the rate and costs. This order was not formally drawn up till some days afterwards. On the 7th a minute of the order was served upon the plaintiff, who refused to pay. After such refusal the order was formally drawn up, dated the 6th May, and a warrant issued by the justices, dated the same day, which was not executed until October, when a cart of the plaintiff's was seized for the distress. It did not appear whether the warrant was drawn up before or after the order dated the 6th May, nor did it recite the order. The plaintiff having brought trespass for the seizure:—Held, that it was not necessary, before issuing the warrant, that an order should have been formally drawn up under hand and seal, but that the pronouncing of the order on the 6th, and the service of the minute of the order on the 7th, were sufficient to justify the issuing of the warrant, and that the non-recital of the order in the warrant, and the fact of the date of the warrant being the same as that of the order, and the neglect to shew in the warrant that it had issued subsequently to the disobedience of the order, being all only matters of form, the justices were entitled to the protection of s. 1 of 11 & 12 Vict. c. 44. Hatt v. Parkinson, 20 L. J., M. C. 208.

The 27 Geo. 2, c. 20, which directs that in every warrant of distress the instice shall limit. in such warrant, a time of sale, so as such time be not less than four days, nor more than eight days, is applicable to cases of distress for churchrates (except those directed against persons called Quakers); and, therefore, where a distress was made under the 58 Geo. 3, c. 127, the warrunt directing a levying and selling "forthwith," and the person, against whose goods the warrant of distress was issued, resented the goods distrained from out of the custody of a constable :-Held, that an indictment for rescuing a distress could not be maintained, and the conviction was quashed. Reg. v. Williams, 4 New Sess. Cas. 137; 2 Car. & K. 1001; 1 Den. C. C. 529; T. & M. 235; 19 L. J., M. C. 126; 14 Jur. 115.

Refusal to grant Distress Warrant.]-By a

local act, persons who refused to pay a churchrate, thereby empowered to be levied, were to be summoned before a magistrate, and if they then refused, the magistrate was authorised and required to grant a distress warrant to levy the amount. A tithe-owner having refused to pay the rate, on the ground that tithes were not ratable under the act, the magistrate refused to grant a distress warrant; but the court issued a mandamus to the magistrate to compel If a party, summoned before justices for non- him to do so. Rew v. Buckinghamshire JJ.,

1 N. & P. 503; 6 A. & E. 888; W. W. & D. XXVIII. PRACTICE AND PROCEDURE IN

Illegal. ]-The defendant wrongfully seized the plaintiff's goods, under an alleged distress for church-rate, and gave notice that, unless they were redeemed within five days, they would be sold. In the meantime the defendant removed the goods from the plaintiff's house into another county, from whence they were brought back, and at the expiration of the five days sold :-Held, that the seizure, removal, and sale of the goods were distinct acts of trespass, and that an action might be brought within three calendar months of either, if the latter was within the time limited by 53 Geo. 3, c. 127, s. 12. Collins v. Rose, 7 D. P. C. 796; 5 M. & W. 194; 8 L. J.,

Costs and Expenses.]—By 7 & 8 Geo. 4, c. 17, the provisions, penalties, &c., of 57 Geo. 3, c. 93, are to extend, be applied and put in execution, so far as the same are applicable and capable of being put in execution, with respect to any distress for poor-rates, church-rates, &c., when the sum does not exceed 20%, and the two aets are to be read together. B., being charged with a warrant of distress to enforce the amount of a church-rate under 107. from A., levied on his goods, and sold them by a private contract; but afterwards, bona fide thinking this course erroneons, he induced the purchaser to reseind the contract, and afterwards sold the goods by auction, after appraisement. He retained the amount paid for appraisement, under 6d, in the pound, and tendered the overplus to A. :-Held, that B. was not liable to be convicted under 57 Geo. 3, c. 93, s. 2; for that though he had been mistaken, he had aeted bona fide; he had not taken other or greater charges than were allowed by the schedule, nor charged for what was not really done. Nott v. Bound, L. R. 1 Q. B. 405; 14 L. T. 330.

# e. By Indictment.

Sufficiency of Averment.]—In an indictment for disobeying an order of two justices made under 53 Geo. 3, c. 127, for the payment of a church-rate, an averment stating, by way of inducement, that a rate was duly made as by law in that behalf required, and that the same was afterwards duly allowed as by law in that behalf required, and that the defendant was in and by the rate duly rated, is sufficient, without setting out the facts which constituted the alleged making, allowance and rating. Reg. v. Bedwell, 1 Den. C. C. 222; 2 Car. & K. 564; 17 L. J., M. C. 99.

Where the count after the above averment, by way of inducement, went on to aver an information by the proper parties to the justice by whom the warrant was issued, that the rate was duly made and afterwards duly allowed, and that the defendant was duly rated, and that the party refused to pay, such information as above will give jurisdiction to the justice making the order, irrespective of the truth of the facts deposed to. Ib.

It is sufficient in an indictment to aver that the churchwardens were anthorised to collect and receive the rate at the time of refusal, without averring that they were so at the time of the demand, Ib.

If, in the indictment, it sufficiently appears by implication that the rate was in force when the order was made, that fact need not be positively averred. Ib.

ECCLESIASTICAL MATTERS,

## 1. GENERALLY.

Appearance.]-A defendant in a suit in the Arches Court of Canterbury cannot enter an appearance otherwise than in person or by a proctor. Burch v. Reid, L. R. 4 Ecc. 112.

A defendant in a criminal suit appeared, by his proetor, to the citation and prayed articles. the admission of the articles, the proctor intimated that he was not in a position to give in either an affirmative or negative issue, and praying justice submitted himself to the judgment of the court. The court fixed a day for the hearing, and proceeded with the cause as if a negative issue had been pleaded. Lee v. Morest, 39 L. J., Ecc. 53; 22 L. T. 420.

Abatement. ]-The bishop of the diocese in which an accused elergyman held preferment sent the eause in the first instance, by letters of request, to the Court of Arches. The court accepted the letters of request, and issued a decree ealling upon the accused to appear. He appeared, and after the articles had been brought in and admitted, the bishop, who was the promoter of the cause, resigned his see:—Held, that the cause had not abated by reason of such resignation, and leave was granted to amend the titleof the cause by altering the designation of the promoter. Winchester (Bishop) v. Wix, 39 L. J., Eee. 22; L. R. 3 Eec. 19; 21 L. T. 439.

In a proceeding at the suit of a promoter, judgment was given, and he appealed. After the appeal was filed and before hearing he died:

—Held, that it is the duty of the court before which proceedings are pending, when a promoterdies, to allow a proper promoter to be substituted in the place of the original promoter. Elphinstone v. Purchas, 39 L. J., Ecc. 124; L. R. 3 P. C. 245; 23 L. T. 285; 18 W. R. 1073. See Harris v. Perkins, post, col. 1399.

Amending Libel.]—A churchwarden instituted a suit for the recovery of a church-rate against a parishioner, and brought in a libel. The defendant gave in his answers to the libel, and also filed a responsive allegation, which was admitted; from which it appeared that he was not in the occupation of all the premises for which he had been assessed to the rate. The churchwarden then applied to amend the libel by limiting his demand to the sum assessed upon that portion of the property the occupation of which was admitted :—Held, that, on sufficient cause being shewn, the court may order the amendment of the pleadings at any time before the hearing of the cause; and that there was a reasonable ground for doing so under the circumstances. Barnes v. Grant, 11 Jur. (N.S.) 395; 12 L. T.

Within what Time Proceedings to be commenced.]—By 3 & 4 Vict. c. 86, s. 20, every suit or proceeding against any clerk in holy orders, for an offence against the ecclesiastical laws, shall be commenced within two years after the commission of the offcuce in respect of which the suit or proceeding shall be instituted, and not afterwards:—Held, that the suit or proceeding was not commenced by the issuing of a commission, nor by the report made by the commissioners, nor by the filing of articles in the name of the was committed, and service of the same on the not within the reservation of s. 25, because the accused; but, first, that the suit or proceeding only commenced when the accused was served with a citation to appear at a certain time and place before a competent court, to answer definite charges, as required by ss. 9 and 10; and, secondly, that the limitation of two years, within the meaning of s. 20, was to be reckoned from the time of the service of the citation. Ditcher y. Denison, 11 Moore, P. C. 324; 6 W. R.

After Offence Admitted. - It is proper for the promoter in a criminal suit to bring in articles, though the party cited has by special proxy admitted his breach of the law as intimated in the citation ; for the court, without the specification so afforded by the articles, would not, in many cases, know what sentence to pronounce on such an admission. Jones v. Jelf, 8 L. T. 399.

Lapse of Time. ]-It is the duty of the promoter to prosecute the suit with reasonable expedition. If he neglects to do so, the court may dismiss the suit. Sheppard v. Bennett, 39 L. J., Ecc. 68;
L. R. 3 Ecc. 167; 22 L. T. 399.

Lapse of time is not an absolute bar to a criminal suit where the evil complained of is a customary one, e.g. that a church was unroofed and dismantled, whereby the parishioners were, and still are, prevented from resorting to their parish church. St. Davids (Bishop) v. De Rutzen, 4 L. T. 90.

Interlocutory Proceedings. ] - Interlocutory proceedings, such as decisions as to admission to proof of articles of charge, and the retention of a cause by the Court of Appeal, are matters on which the Judicial Committee can decide without the necessity of a confirmation of their decision by the Queen in council. The Judicial Committee has, under 6 & 7 Viet. c. 38, in such matters the same power as was formerly exercised by the Court of Delegates. Voysey v. Nable, 7 Moore, P. C. (N.S.) 167; 40 L. J., Ecc. 11; L. R. 3 P. C. 357; 23 L. T. 822; 19 W. R. 629.

Authority of Archbishop.]—The 3 & 4 Vict. c. 86, s. 24, puts the archbishop of the province in the place of the bishop, for the purpose of doing any act, or exercising authority under that act, where the bishop is the patron of the pre-ferment held by the clerk proceeded against. Reg. v. Canterbury (Archbishop), 6 El. & Bl. 546; 25 L. J., Q. B. 946; 2 Jur. (N.S.) 835. See S. C., 4 W. R. 259.

In such cases the archbishop must proceed in the same manner as the bishop would have proceeded, and therefore he is bound to require the accused party to appear before him at a place within the diocese of the bishon by whom the case has been sent by letters of request. Ib.

The archbishop has no authority to summon him to any place within his province not within

the diocese of the bishop. Ib.

Where an archbishop, at his visitation, re ceived a charge of simony against a clerk, and pronounced sentence of deprivation against him, and interdicted him from exercising his functions on pain of the greater excommunication : -Held, that the proceeding ought to have been conducted in the mode directed by the 3 & 4

bishop of the diocese in which the alleged offence | and in court, within the words of s. 28, and was power of depriving personally and without process in court did not belong to the archbishop before the statute; and the court prohibited the archbishop from enforcing the sentence. Reg. v. York (Archbishop), 2 G. & D. 202; 2 Q. B. 2; 6 Jur. 412.

> Jurisdiction of Archbishop.]—The archbishop has jurisdiction to cite a bishop in respect of ecclesiastical offences. Read, Exparte, or Read v. Canterhary (Archbishop), 58 L. J., P. C. 32; 13 P. D. 221; 59 L. T. 509—P. C.

> The Archbishop of Canterbury, sitting alone or with assessors, has jurisdiction to entertain a charge against a bishop of his province, of charge against a bishop of this province, of having been guilty of illegal practices in the conduct of divine service. Read v. Lincoln (Bishop) (No. 1), 14 P. D. 88; 61 L. T. 403.

> Power of Bishep. ]--- Upon a charge against a clerk of preaching erroneous doctrine repugnant to the thirty-nine articles, the bishop has no power under 13 Eliz. c. 12, s. 2, of proceeding personally and without process in court, to adjudicate upon such charge; the proceedings in 3 & 4 Vict. c. 86. Denison, Exparte, 4 El. & Bl. 292; 3 C. L. R. 247; 24 L. J., Q. B. 34; 1 Jur. (N.S.) 517; 3 W. R. 105.

> Where such a charge was made to the bishop, the patron of the living, accompanied by an application to grant letters of request to the Court of Arches to adjudicate on the case, and he declined to issue such letters, but privately admonished the clerk :- Held, that he had not adjudicated upon the charge so as to make the issuing of a commission by the archbishop to inquire into the charge an excess of jurisdiction.

Discretion of Bishop in issuing Commission.]
-The words in a statute "it shall be lawful" of themselves merely make that legal and possible which there would otherwise be no right or authority to do. Their natural meaning is permissive and enabling only. But there are cir-cumstances which may couple the power with a duty to exercise it. It lies upon those who call for the exercise of the power to shew that there is an obligation to exercise it. The 3rd section of the Church Discipline Act (3 & 4 Vict. c. 86) gives the bishop complete discretion to issue or decline to issue such a commission as is there provided for to inquire as to the grounds of Charges made against clerks. Julius v. Oorford (Bishop), 49 L. J., Q. B. 577; 5 App. Cas. 214; 42 L. T. 546; 28 W. R. 726; 44 J. P. 600. S. P., Reg. v. Chichester (Bishop), 2 El. & El. 209; 29 L. J., Q. B. 23; 6 Jur. (N.S.) 120; 7 W. R.

The act recites that the manner of proceeding in cases for the correction of clerks requires amondment. Its provisions, therefore, may be construed independently of the practice under the previously existing law.

Semble, there is no duty cast on the bishop by the statute, unless, perhaps, a duty to hear and consider the application. Ih.

Enabling words are always compulsory where they are words to effectuate a legal right. Ib.

Reg. v. Tithe Commissioners (14 Q. B. D. 459

474) and Ditcher v. Denison (4 Q. B. D. at Wict. c. 86, because it was a criminal proceeding | p. 273) commented on and explained. Ib.

compel the bishop to issue such a commission, which is in the discretion of the court to grant or not, ought not to issue upon the application of one who is a stranger to the parish and diocese, and has no personal interest in the investigation of the charges. Reg. v. Chichester (Bishop), supra.

Statement of Offence.]-In a commission issued under 3 & 4 Vict. c. 86, it is not necessary that the offences complained of should be stated to have been committed within the two years limited by s. 20, if they are charged and admitted as continuing offences. Simpson v. Flamank, 36 L. J., Ecc. 28; L. R. 1 P. C. 463; 16 L. T. 724; 16 W. R. 8.

A citation or a decree issued by the court under letters of request being in the form prescribed by the rules made in pursuance of s. 13, it is no valid objection that it does not state the offences complained of to have been committed within two years, the time prescribed. It is sufficient if the letters of request, which are the

foundation of the suit, allege that fact. Ib.

It is the object of letters of request, under 3 & 4 Vict. c. 86, s. 3, to present to the Court of Arches the subject of future proceedings, but it is not necessary to state therein matters over which the judge cannot exercise jurisdiction, notwithstanding that they may have found a place in the report of the commissioners upon which the letters of request are founded.

Bonwell v. London (Bishop), 14 Moore, P. C.

395; 7 Jur. (N.S.) 1001; £ L. T. 813; 9 W. R. 874.

The insertion of an objectionable item of charge will not vitiate others well laid, and forms no objection to the judgment when founded on the charges which are well laid. *Ib.* 

Evidence of circumstances which took place beyond the diocese is admissible to throw light upon the true character of acts which were done within the diocese. Ib.

Letters of Request.]—Letters of request arc no part of the record, and are recited in the decree. citing the party complained of to appear, only for the purpose of shewing how the superior court has acquired original jurisdiction. Fry. Transurs. 2 Moore, P. C. (N.S.) 539; 11 Jur. (N.S.) 205; 11 L. T. 753; 13 W. R. 476; 5 N. R. 383.

When accepted, they enable the superior court to authorise the persons who obtain them to institute a suit, but they do no more, and until a suit is instituted in the superior court, litigation has not begun. Ib.

The acceptance or refusal of letters of request sent by a bishop to the Arches Court of Canterbury in proceedings taken under 3 & 4 Vict. c. 86, is not optional with the Dean of the Arches, the bishop being empowered to send such cases "to the court of appeal of the province, to be there heard and determined according to the law and practice of such court"; and it is not requisite that the letters of request should contain any reason for their being sent. Sheppard v. Philli-mare, 38 L. J., Ecc. 49; L. R. 2 P. C. 450; 20 L. T. 762; 17 W. R. 897.

But the Dean of the Arches will not accept letters of request in a suit for subtraction of church-rates, unless it appears on the letters of request, or by affidavit accompanying the letters particular articles and portions of the prayer of request, that the rate can be enforced not-

Discretion of Court.]—A mandamus to withstanding the provisions of 31 & 32 Vict. the bishop to issue such a commission, c. 109. Rippin v. Bastin, 38 L. J., Ecc. 22; 20 L. T. 622

The court must be moved by counsel to accept

letters of request. Ih. In proceedings under 3 & 4 Vict. c. 86, the bishop sent the case, by letters of request, in

the inst instance, and without issuing it commis-sion of inquiry, to the court of appeal of the province:—Held, that the bishop might make his election as to the mode of proceeding, and that the court of appeal could not refuse the letters of request. Brookes v. Cresswell, 10 Jur.

The service of notice of the intention to issue a commission by the bishop, but upon which no from sending the case to the court of appeal, by commission issues, will not preclude the bishop letters of request in the first instance. Head v. Sanders, 4 Moore, P. C. 186; 6 Jur. 1071.

Articles and Pleading.]—When it is intended to oppose the admission of a pleading, a notice must be filed stating the grounds of the objection. Daunt v. Crocker, 37 L. J., Ecc. 1; L. R. 2 Ecc. 41.

In a proceeding against a clergyman for maintaining doctrine alleged to be heretical, the comtaming decrine angest to be accepted, the com-mission is a mere preliminary step for the pur-pose of advising the bishop whether there is a prima facie case, and the letters of request are for the purpose of founding jurisdiction in the higher court, and the citation need only state. generically the offence charged, so that the accused may know the nature of the offence he is called upon to answer. Where, therefore, the commission was to inquire as to certain works of the accused, of which the titles and certain passages accused, of which the titles and certain passages were given, but no charge was preferred before the commissioners, or alleged in the letters of request or citation, in respect of the 29th article of religion:—Held, that the citation was sufficient to enable the promoter to introduce into cient to chable the promoter to introduce into the articles the additional passages and charge of impugning the 29th article of religion. Sheppard v. Bennett, 39 L. J., Ecc. 59; L. R. § 1°, C. 350; 23 L. T. 145; 18 W. R. 650.— P. C.

In support of a charge of heresy, articles filed in the Arches Court set out passages from the works of the accused in which he expressed approval of the works of certain other writers alleged to contain heretical doctrine :- Held, that the articles must set forth passages from the works of the accused in which he has maintained heretical doctrine; that it is not sufficient to set out passages of works of which the accused has expressed a general approval, and which contain passages he has not by his own publication accepted in their totality. Ib.

Where articles are exhibited against a clerk

for unsound doctrine, it is not sufficient to set out in the articles the words of the defendant and to state generally that they contain unsound doctrine; but the unsound doctrine complained of must be specifically stated. *Heath* v. Burder, 6 Jur. (N.S.) 785; 2 L. T. 670; 9 W. R. 22—P. C.

Articles exhibited against a clergyman for publishing and maintaining doctrine contrary to that of the Church of England, after charging that the doctrine complained of was contrary to certain articles of religion, and certain parts of the prayer book and of the homilies, set out the positions, or teachings, declared and taught in which the said articles of religion, parts of the Book of Common Prayer, and formularies of the church, are also more largely expressed in the godly and wholesome dectrine necessary for these times, contained in the following passages from the 1st and 2nd book of the homilies, namely, &c."—Held, that the articles might be admitted to proof in this form. Noble v. Veysey, 39 I. J., Ecc. 21: 23 L. T. 169.

Certain articles, exhibited in a suit instituted by letters of request against the vienr of a parish, alleged that the viear, when officiating in the parish church and during divine service, on divers specified days, and on divers other days and times within two years next before the commencement of the suit, the precise dates whereof the promoter was unable to specify, had performed or sauctioned certain ceremonics alleged to be unlawful. One of the articles alleged the wearing, when officiating in the communion service, of divers dresses and things of divers forms and colours, and other than the habits appointed by law, without giving any specific description of the dresses and things complained of. On motion to reject these articles:—Held, that they were admissible. Combe v. Bdwards, I. R. 4 Ecc. 390.

In proceedings against a clerk for heresy, one of the articles charged him with having maintained that the "commonly received doctrines" of intercession and meditation by Christ, and atonement or reconciliation to God by the death of Christ, were opposed to the perfect harmond and simplicity of the love of God and tony and simplicity of the love of God and to the teaching of Jesus Christ himself:—Held, industriable, and must be struck out. \*Voysey v. Nibble, 7 Moore, P. C. (S.S.) 167; 40 L. J., Ecc. 11; L. L. S. P. C. SST; 38 L. T. SSZ; 19 W. R. GSZ.

Articles in a responsive plea, stating that the suit was being promoted contrary to the wish and desire of the parishioners, and that the promoter had a pew in an independent chapel, ordered to be struck out as irrelevant. Ib.

In a suit against a clergyman for muking additious to and variations from the rites and ceremonies prescribed by the Book of Common Prayer in the performance of divine offices, it is necessary to state in the articles with clearness the acts done by him, and the law he has contavened by such acts; but it is not necessary to set out in detail the evidence that will be adduced in proof of them, or the intent with which they were done by him. Martin v. Mackenochie, 36 L. J., Ecc. 25.

When certain articles exhibited against a clergyman charged him with doing certain specified acts in his church "in a ceremonious manner," or "as connected with and forming part of the ceremonies of public worship" Held, that these words amounted to allegations of fact capable of proof, and not to conclusions of law to be drawn from facts. The averment, that an incumbent has "sanctioned or permitted" in his church any alleged departure from the course of public worship as authorised by law, is sufficient, without alleging that such departure was authorised by the incumbent. An averment, following the exact words of the third rubric at the end of the communion service, that there had been communion; that the elements were consecrated and received by the minister, either where no person communicated with him, or where only one person communicated with him,

positions, or teachings, declared and taught in him, is a sufficient allegation of an ecclesiastical which the said articles of religion, parts of the offence having been committed. Parnell v. Book of Common Prayer, and formularies of the lourch, are also more largely expressed in the W. R. 428.

Proxies—Signing.]—The general rule of the Ecclesiastical Court requires every proxy to be signed by the party himself, or by some one anthorised to sign for him. Evy v. Treasure, 2 Moore, P. C. (N.S.) 539; 11 L.T. 7.53; 11 Jur. (N.S.) 205; 13 W. R. 476; 5 N. R. 383.

Articles—Signing.]—The articles under 3 & 4 Vict. c. 86, s. 7, may be approved of and signed by any barrister practising in the Arches Court of Canterbury. Mouncey v. Robinson, 87 L. J., Ecc. 8.

Effect of Admission to Proof, ]—The effect of the admission to proof of articles of charge in proceedings for hereey is to adjudge that the matter of the charge is prima facic filegal, but this prima facic inpression the defeudant may remove by shewing that his expressed opinions do not bear the meaning ascribed to them, or that they do not exceed the limits allowed by law. Foyeny, Noble, 7 Moore, P. C. (N. S.) 167; 40 L. J., Ecc. 11; L. R. 3 P. C. 357; 23 L. T. 822; 19 W. R. 629.

— Including offences Committed in Different Diocess. J—Although, where there has been a commission of inquiry which has limited its investigation to a particular offence, the articles afterwards exhibited cannot add to the offence inquired into by the commission another offence committed in another dioces that did not come within the scape of this inquiry, yet there is no objection to coupling in the articles offences committed in different dioceses, where the bislope sends the case by letters of request to the Court of Arches in the first instance. Educards v. Moss, 20 L. T. 834—P. C.

Evidence.]—The 3 & 4 Vict. c. 86, s. 20, requires only that the corpus deliction which the clerk is to be judged shall be shown to have been committed within two years before the service of the citation; but evidence of matters anterior to that period is not thereby excluded. Th.

— Affirmative Issue.]—When a defendant gives an affirmative issue to articles in a criminal suit, he may at the same time file an affidavit explanatory of his conduct. Kitson v. Drury, 11 Jur. (N.S.) 272.

Residence—Venne, ]—A man may be resident in one diocese, and come into another to commit the offence charged upon him in the significant, This, for the purpose of being cited, is a sufficient residence, and he may be prosecuted in the diocese where the offence was committed. Trebe v. Keith, 2 Atk, 489.

was authorised by the incum hent. An averment, following the exact words of the third rubric at the end of the communion service, that there had been communion; that the elements were conservated and received by the minister, either where no person communicated with him, or where only one person communicated with him, or where only one person communicated with a suit against morality and religion, and especially against the Established Church of which he was or where only one person communicated with

would constitute a criminal offence, over which the Ecclestatical Court has no jurisdiction; the gravamen of the charge being the seandal Induced by the reports of the acts in question, for which a clergyman is amenable to his ordinary, and not their criminality, for which he is liable to the criminal tribunal of the island. Jersey (Dean) v. Parish  $\phi \longrightarrow (Reton)$ , 3 Moore, 229.

Production of Documents.]—Where the contents or substance of a document, e.g. an order in council are pleaded, the document itself must be annexed to the articles. St. David's (Bishep) v. De Ratzen, 4 L. T. 90.

Evidence, —In a criminal suit against a clergyman, under 3 & 4 Vict. c. 86, he is competent and may be compelled to give evidence. Novucieh (Bishop) v. Pearse, 37 L. J., Ecc. 90. Where, in a proceeding by criminal articles

Where, in a proceeding by criminal articles against a clergyman for adultery, the defendant tendered limself as a witness (the promoter not objecting), the court rejected the evidence on the ground that, though the case did not fall within the exception of s. 4 of 14 & 15 Vict. c. 99, it was not intended to be included within the terms of s. 2. Moss v. C., 6 L. T. 302.

In a suit against a clergyman, under 3 & 4 Vict. e. 86, for immorality, an application was made on his behalf, and joined in by the promoter, that he might be examined as a witness: —Hold, that, as by 14 & 15 Vict. c. 99, s. 2, if a party to a suit is a competent witness, he is also compellable to give evidence in that suit, and by 13 Car. 2. c. 12, s. 4, the ecclesiastical courts are forbidden to compel any person to confess, or accuse or purge himself of, any criminal matter or thing, therefore, notwith-standing the consent of the promoter, the defendant could not be examined. Burder v. O'Neill, 9 Jun. (N.S.) 1109; 9 L. T. 232.

The rule of practice in the ecclesiastical courts, which requires that a material fact should be proved by two witnesses, is not applicable to proceedings under 3 & 4 Vict. c. 86, in which the witnesses give oral evidence in open court. Ib.

The evidence of a single witness of good character, whose memory is shown to be innecurate, and whose acts subsequent to the misconduct alleged, are not consistent with a resentment of it, will not be sufficient to convict a clergyman of an attempt, by words only, to solicit the chastity of such witness. Berney v. Norwich (Bishop), 38 L. J., Ecc. 10—P. C.

In a proceeding under 8 & 4 Vict. c. 86, against a leggram if, it a longstre issue is filed on his behalf without any defensive plea, evidence may nevertheless be given of all material facts necessary to the defense, but not of special circumstances which do not immediately arise out of the charges made against the defendant. Aloss v. Edvards, 27, 17, 18 feet.

v. Edwards, 37 L. J., Ecc. 89.
An application by either party to take evidence viva voce will be granted unless the party opposing the application shews sufficient reason why it should not. Edwards v. Hatton, 13 L. T. 253.

Case stated.]—Where a question is to be decided upon the principles of an ecclesiastical court, a court of equity will have a case stated for the opinion of civilians. Hurst v. Beach, 5 Madd. 356; 21 R. R. 304; followed in that respect. Sayre v. Cramp, 2 W. R. 438.

Costs.]—Although the judgment in the court below may be on all points reversed, a bistop, as respondent, will not be condemned in the costs of the proceedings either in the Court of Arches or in the Court of Appeal, if in instituting them he has acted simply in accordance with his duty to the public. Berney v. Norwich (Bishap), 36 L. J., Ecc. 10—P. C.

If the promoter in a criminal suit has been obliged to seek the assistance of the court in asserting a clear legal right which has been denied by the party cited, the latter will be condemned in costs. Jones v. Jelf, 8 L. T.

But, semble, otherwise, if party cited had at once acknowledged to promoter his error in point of law and his discontinuance of the illegal practice complained of. *Ib*.

Where a clergyman was charged with having officiated in an unconsecrated and unificensed building and without any authority from the bishop:—Held, that a misupprehension of the law, and the fact that other clergymen had acted in a similar way with impunity, were no grounds for his non-condemnation in costs. Kitson v. Drury, 11 Jur. (X.S.) 272.

In a litigation in the Ecclesiastical Court aparty intervenes and fails, but the decree of the court gives him his costs. An administration suit is then instituted; and upon the question at the hearing whether the costs of the intervener in the Ecclesiastical Court ought to be paid in priority to those of the administration suit:—Held, that they ought not, being in effect a charge on the estate. Major v. Major, 2 Drew. 281; 2 W. R. 382.

### 2. ECCLESIASTICAL OFFICERS,

Official Principals and Viear-Generals. —The official principal and viear-general of the bishop has jurisdiction within a district for which a commissary has been appointed (though for life), commissary is inhibited pending the bishop's visitation. Reg. v. Thougand, 12 A. & B. 583; 3 P. & D. 629; 9 J. J., & B. 121; 4 Jur.

The appointment of such a commissary does not make the district a peculiar; and the 23 Hen. 8, c. 9, s. 2, does not apply in such a case. Ib.

Under an appointment by the bishop, P. was constituted chancellor and vicar-general in spirituals, and official principal of the episcopal and consistory court of Chichester, for life, with power of surrogating and substituting a fit person or persons in his stead, and of recalling or removing them with the consent of the bishop, and power was conferred upon him in the absence of the bishop from the consistory court, to proceed by himself or his substitute, in all causes, businesses, suits and complaints, spiritual and ecclesiastical, &c., and decide and finally determine the same (with certain exceptions not now material), nevertheless first consulting and having the consent of the bishop, if either party prayed the judgment of the bishop. The appointment also reserved to the bishop to examine and determine every cause in his proper person in the consistory court:—Held, that, although the official principal exercised powers delegated to him by the bishop, he was constituted an ordinary judge of the consistory court, and acted judicially quite independently of the bishop, and therefore that the bishop's being interested in a suit heard and decided by the official principal questions of law and fact are involved, the court was no ground for a prohibition, Medwin, Exparts, 1 El. & Bl. 609; 22 L. J., Q. B. 169; 17 Jur. 1178.

Registrar of Archdeacon's Court.]-A claim for fees of office, as the fees of the registrar of an archdeaconry court, to be valid, must be founded archiceaconry court, to be want, must be founded upon immemorial usage. Shephord v. Payne, 16 C. B. (x.s.) 182; 33 L. J. C. P. 158; 10 Jur. (x.s.) 540; 10 L. T. 193; 12 W. R. 584—Ex. Ch. The office of registrar of an archideaconry

court, being a freehold office, with duties of a continuous and presumably perpetual character, and one whose existence is essential to the due exercise of the functions of the archdeacon, is an office to which fees may be annexed by

immemorial usage. Ib.

The fact of such fees having been paid and received from 1727 down to 1862, is evidence from which the immemorial receipt of them ought to be presumed, if they could have had a legal origin : and the fact of their amount having from time to time been varied does not necessarily

affect their validity. Ib.

The archdescon's visitation operating for the benefit of the parish at large, and of the churchwardens themselves, the performance of whose duties is facilitated by the service of the registrar, the fees payable to that officer are properly chargeable upon the churchwardens. 1b. But see Veley v. Perture, 39 L. J., Q. B. 195; L. R. 5 Q. B. 573; 22 L. T. 713; 18 W. R. 1024; aute, col. 1353.

Construing ss. 9 & 10 of 54 Geo. 3, c. 68, together, the acts intended by the latter section to be prohibited are those which are legally incident to the office of a proctor, not those which, though usually performed by him, are not of right incident to his office. And, therefore, a registrar of an ecclesiastical court, who, in cases where there was no testamentary contest, had prepared the document, and done the acts necessary for obtaining letters testamentary and probates of wills, and other similar matters, was held not to have thereby subjected himself to the penalty imposed by the 10th section, Stephenson v. Higginson, 3 H. L. Cas. 638.

On the trial of an action brought on this statute, evidence from ecclesiastical courts was tendered, to shew that it was enstomary for the registrar to do these acts, and to receive fees on account of doing them :-Held, that such evidence was properly admitted. Ib.

#### 3. CONSISTORY COURT.

As to the Disposal of Alms. ]-It is doubtful whether the disposing to pious and charitable uses of the alms of the parishioners is the exercising of a civil right under 3 & 4 Vict. c. 86, s. 19, so that a suit in a criminal form can be brought in a consistorial court to ascertain to whom such right belongs, Liddell v. Rainsford. 37 L. J., Ecc. 83.

Can order Proctor to Refund Money. |-- If money is improperly in the hands of a proctor, the consistory court may order him to refund it. Morris v. Gardner, 1 D. P. C. 524.

4. PUBLIC WORSHIP REGULATION ACT.

will hear two counsel on each side, and one counsel in reply. Clifton v. Ridsdale, 1 P. D. 316: 35 L. T. 432.

Jurisdiction of Judge.] - A representation under the Public Worship Regulation Act, 1874, s. 9, having been in due course transmitted to the Archbishop of Canterbury by the Bishop of Rochester, the archbishop sent to the judge a requisition to hear the matter of the representation "at any place in London or Westmiuster, or within the diocese of Rochester, as you may deem fit." The judge gave due notice to the defendant that the case would be heard at Lambeth. Lambeth is in the province of Canterbury, but not in the diocese of Rochester. The defendant did not appear, and the case having been heard in his absence, judgment was pronounced against him :—Held, that all the proceedings before the judge were void, on the ground that the judge had no jurisdiction except by virtue of the requisition to him of the archbishop, and that, the archbishop having limited the place for that, the independent of the part of the rate of the aring, the judge had no power to hear the case outside the limits so prescribed. *Hudson* v. *Tooth*, 47 L. J., Q. B. 18; 3 Q. B. D. 46; 37 L. T. 462 : 26 W. R. 95.

Issue of Inhibition discretionary. 1-The issue of an inhibition pending appeal in ecclesiastical cases was a matter for the discretion of the court before the Public Worship Act, 1874, and the effect of that act is not to take away such discretionary power, but to give powers to the judge of first instance as to suspension of pro-Judge of first Instance as to suspension of pro-ceedings which did not previously exist. *Midsalolo* v. *Clifton*, 45 L. J., P. C. 12; 1 P. D. 383; 34 L. T. 515; 24 W. R. 1021.

Effect of |-The Public Worship Regulation Act deals only with matters of procedure, and does not in any respect enlarge the jurisdiction of the Court of Arches. Hudson v. Tooth, 2 P. D. 125; 35 L. T. 820.

Service of Representation, 1-A representation under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 9, was sent to the bishop of the diocese on the 29th of August, 1876. The bishop received the representation on the 30th of August, and finding that the party complained of was the incumbent of a benefice in his patronage, forwarded it on the 15th of September to the archbishop of the province. On the 21st of October the archbishop transmitted a copy of the representation to the party complained of. The party complained of did not acknowledge the receipt of the copy of the representation so transmitted to him, and, though subsequently personally served with a duplicate copy of the representation, entered no appearance. Afterwards the archbishop required the judge to hear the matter of the representation :--Held, that the proceedings were void, and must be dismissed. by the judge, for the provision as to the time within which a copy of a representation should be transmitted to the party complained of was imperative, and had not been complied with, Howard v. Bodington, 2 P. D. 203.

Disqualification of Bishop to Act. | The action of the bishop under s. 9 of the Public Worship Counsel ]-In cases under the Public Worship Act, 1874, is a judicial action which he is dis-Regulation Act, 1874 (37 & 38 Vict. c. 85), where qualified from performing if he is the patron of

the living; and the word patron includes as well | of the county palatine sitting at Lincoln's Inn, a bishop who has the second turn as one who has the next presentation, each being interested in avoiding the benefice. Serjeant v. Dale, 46 L. J., Q. B. 781; 2 Q. B. D. 558; 37 L. T. 153.

Discretion of Bishop.]—Sect. 9 of the Public Worship Regulation Act, 1874, confers upon the bishop a general discretion as to taking steps to have a complaint, which has been sent in under s. 8, tried in the Ecclesiastical Court. Alleroft v. London (Bishop), [1891] A. C. 666; 65 L. T. 92; 55 J. P. 773—H. L. (E.)

Two representations were sent to the Bishop of London, one complaining that the Dean and Chapter of St. Paul's Cathedral had set up on a reredos in the cathedral figures which tended to encourage ideas and devotions of an unauthorised and superstitions kind, and were unlawful; the other repeating the former complaint, and going on to allege that the figures had in fact encouraged such ideas and devotions as above mentioned. The bishop, in reply to the first representation, stated that, having considered the whole circumstances of the case, he was of opinion that proceedings should not be taken; and gave as his reasons that the main question of principle had been already decided in Phillpotts v. Boyd (L. R. 6 P. C. 435), between which and the present case there were no differences of importance; that litigation in such matters. even where necessary to decide an important point, is a great evil, causing irritation and party strife, and that in the present case it would cause more mischief than benefit to the Church at large. To the second representation he replied that the questions in the second case were sub-stantially identical with those in the first, which was still sub judice. The complainants applied in both eases for a mandamus to compel the bishop to direct proceedings to be taken :-Held, that no grounds were shown for issuing a mandamus. Ib.

Judge of Provincial Chancery of York -Request to hear Matter at Westminster. ]-A representation having been made against a clerk, rector of a parish within the county palatine of Lancaster, in the province of York, under the Public Worship Act, 1874, for offences against s. 8 of that act committed in the parish church, the bishop of the diocese sent the matter to the Archbishop of York, who sent a requisition to Lord Penzance—the judge appointed under the act, who had since the passing of the act become official principal of the chancery court of York-requiring him to hear and determine the matter of the representation at any place in London or Westminster, or within the province of York or diocese of Manchester, as he might deem fit. The judge heard it at Westminster, and there pronounced judgment, and issued a practices complained of. The elerk having disobeyed the monition, the judge, sitting at Westminster, issued an inhibition inhibiting the clerk, for three months and thereafter until relaxation, from performing any service of the church within the diocese, and on his persisting in his disobedience pronounced him contumacious and issued a significavit under 53 Geo. 3. c. 127, s. 1. The tenor of the significavit was sent by mittimus from the Petty Bag Office to the chancellor of the county palatine of Lancaster.

a writ de contumace capiendo was issued, under which the clerk was arrested by the sheriff of Lancashire, and lodged in Lancaster Gaol. On a motion for a habeas corpus :-Held, that the matter so heard before the judge, as official principal of the chancery court of York, was a cause cognisable in an ecclesiastical court within the meaning of 53 Geo. 3, c. 127, s. 1, and that the judge had power to pronounce the contumacy and issue the significavit under that act. That the county palatine being one of the exempt jurisdictions mentioned in 5 Eliz. c. 23, s. 11. the procedure required by that section as to the mittimus and the issue of the writ de contumace capiendo was applicable and was duly followed. That the mittimus was not one of the writs referred to in Ord. II. r. 8, of the Rules of the Supreme Court, and was properly tested as in the name of the Queen by the Master of the Rolls. That under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 9, the judge had power not merely to "hear" but also to hear and determine the matter, and to do all the acts which he did at Westminster. That all the proceedings were regular and there was no ground for a habeas corpus. Green, In re, or Green v. Penzance (Lord), 51 L. J., Q. B. 25; 6 App. Cas. 657; 45 L. T. 353; 30 W. R. 218; 46 J. P. 115—H. L. (E.)

Monition—Inhibition.]—A monition, precisely following a judgment pronounced by the judge under the Public Worship Regulation Act, 1874, admonished a clerk to abstain for the future when officiating in his church from doing each of certain specified acts, and (amongst them) from wearing the vestments known as an alb. a chasuble, and a biretta; and from causing to be formed a procession at the commencement of morning service; and also "from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth or any of them, or from unlawfully permitting the same or any of them." A subsequent inhibition, after reciting the monition and the disobedience of the clerk thereto in regard to several other matters, recited his disobedience in permitting his curate to wear a vestment known as a biretta and a vestment known as a stole. and also in permitting his curate to form a procession between morning prayer and the communion service, and for such his disobedience inhibited the clerk from performing services for three months and until relaxation. The clerk having applied for a writ of prohibition :-Held, that the judge had jurisdiction (subject to correction on appeal) to insert the alia similia clause in the monition. And that under s. 13 of the Public Worship Regulation Act, 1874, the judge had jurisdiction to determine whether the wearing of a stole, and the forming a procession monition ordering the clerk to abstain from the between morning prayer and the communion service, were practices, acts, matters and things of the same or a like nature to those particularly set forth in the monition; and that if he had determined that question wrongly it might be the subject of appeal-if an appeal lies-but could not afford any ground for prohibition. And that, even if the wearing of a stole and the forming a procession between morning prayer and the communion service were not breaches of e chancellor the monition, yet, as it appeared on the face of In accord- the inhibition that the clerk had committed ance with an order made by the Vice-Chancellor several other acts of disobedience, any one of which would have justified an inhibition for the future from the commission of unlawful acts full period, there was no excess of jurisdiction and no ground for prohibition. Enraght v. Penzance (Lurd), 51 L. J., Q. B. 506; 7 App. Cas. 240; 46 L. T. 779; 30 W. R. 753; 46 J. P. 644— H. L. (E.)

Substitution of succeeding Churchwarden as Promoter. -The object of the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), is to give an easy mode of compelling obedience to the law; but proceedings under that act are not to be deemed to be a criminal suit within the meaning of the Church Discipline Act (3 & 4 Vict. c. 86). No power is given to the court by the Public Worship Regulation Act, 1874, to substitute succeeding churchwardens for a churchwarden who has instituted a snit under s. 8 of the act for acts committed during the time that he was churchwarden, but has ceased to be so before the termination of the suit, and in such a case the speceeding churchwardens have no interest in the matter which entitles them to intervene in the suit. Harris v. Perkins, 51 L. J., P. C. 83; 7 P. D. 161; 47 L. T. 69-P. C.

Avoidance of Benefice. ]-G., a beneficed clerk, was admonished in a suit to discoutinue certain illegal practices, and on refusing was inhibited from performing divine service within the diocese. For disobedience his contempt was signified, and G. was imprisoned under warrant in pursuance of 53 Geo. 3, c. 127. G. having remained in prison for three years, whereupon his benefice became void under the Public Worship Regulation Act, s. 13:—Held, that, as the services inhibited ceased to operate when the incumbency ceased, G. had substantially obeyed the order of the court and satisfied his contempt, and was entitled under 53 Geo, 3, c. 127, to his order of discharge, Denn v. Green, 8 P. D. 79; 46 J. P. 742

### 5. MONITION.

Issuing.]—Where the court is satisfied that an ecclesiastical offence which has been proved will not be repeated, it is not bound to issue a monition in respect of such offence. Read v. Lincoln (Bishop), 62 L. J., P. C. 1; [1892] A. C. 644; 67 L. T. 128; 56 J. P. 725.

Interest of Promoters should appear on. ]-When a monition issued by the Commissary-General of the diocese of Canterbury to an incumbent and churchwardens, ordering them to remove certain ornaments from their church unless they should show cause to the contrary, did not disclose on the face of it any interest in the suit on the part of the promovent, and such defect was insisted upon by the churchwardens in showing cause against the same :- Held, that the judge of the Court of Arches was right in directing that the suit should be dismissed with costs as against the churchwardens. Fagg v. Lee, 48 L. J., Ecc. 1; L. R. 6 P. C. 88; 30 L. T. 801; 22 W. R. 902.

Such a suit is a civil suit, and is not open to every one, even with the consent of the ordinary, but only to those who have an interest in it. Ib.

may be attached to a definitive sentence; and, if the monition be disobeyed, the clerk, upon motion and without a fresh suit, may be condemned to a suspension ab officio et beneficio : and such a proceeding is not in contravention of am uses a proceeding is not in contravention of the Church Discipline Act (3 & 4 Vict. c. 84):— So held, by Lord Coleridge, C.J., James and Thesiger, L.J.; Brett and Cotton, L.J.J., dis-senting. Martin v. Mackonochie, 49 L. J., Q. B. 9; 4 Q. B. D. 697; 40 L. T. 680-C. A. Affirmed, 50 L. J., Q. B. 611; 6 App. Cas. 424; 44 L. T. 479; 29 W. R. 633; 45 J. P. 584—H. L. (E.) See also Cambe v. Edwards, 3 P. D. 103; 39

L. T. 295, coram Lord Penzance, Dean of Arches.

Disobedience to.]—Order of suspension ab officio et a beneficio decreed against the perpetual curate of a chapel of case to a parish church, for persistent contempt in disobeying a monition, issued to enforce obedience to an order in council made in an ecclesiastical canse, declaring illegal and prohibiting the practice of certain rites and ceremonics, and the use of certain vestments, in the services of the church. Hebbert v. Purchas, L. B. 4 P. C. 301.

- Discretion of Court as to its Sentences. The articles, exhibited in a suit by letters of request under the Church Discipline Act, charged that the respondent, the incumbent of a parish church, had, within two years of the institution of the suit, whilst officiating in the performance of divine service in his parish church, committed certain offences in matters of ritual, the same being repetitions of offences from which he had been admonished to abstain by monitions issued in previous suits, and prayed that the respondent should be deprived ab officio et beneficio. At the time of the hearing of the snit, a decree of suspension pronounced in one of the previous suits above mentioned, and suspending the respondent ab officio et beneficio, was in force and unrelaxed, but no future proceedings to enforce such sentence had been taken. The court, though holding the articles proved, refused in its discretion to pronounce a sentence of deprivation, Martin v. Machonochie (third snit), 6 P. D. 87.

Compelling Obedience by Significavit in Chancery, ]-A suit having been brought against a churchwarden for removing earth and bones from a churchyard to a field on his own property. he was ordered to restore them. The order not being complied with, and a monition having issued, an objection was filed thereto, on the ground that the field was no longer in his possession. Having heard the argament, the court pronounced him contumacious and in contempt, and announced its intention to signify the same to the Court of Chancery, but withheld the processes for six days with the expectation that he would comply with the order. Adlam v. Coul-thurst, 37 L. J., Eec. 3; L. R. 2 Ecc. 30; 17 L. T. 226.

De Contumace Capiendo. ]-After the hearing of the matter of a representation in which the vicar of a parish was the party complained of, a monition issued admonishing the vicar to abstain from certain unlawful ceremonies and observances during the performance of divine service Attached to Definitive Sentence.]—In a criminal suit against a clerk instituted in an acclesiastical court, a monition to abstain in under the Public Worship Regulation Act, 1874,

inhibiting him for the term of three months from | on payment of costs to be discharged of process performing divine service within the diocese. Afterwards, and, whilst the inhibition was still in force, the complainants applied to the court on affidavits, which alleged that since the inhibition the vicar had performed divine service in the church, and had there continued the ceremonies and observances from which he had been admonished to abstain, and had also obstructed the curate appointed by the bishop of the diocese from entering the church, and prayed that the vicar should be pronounced contumacious. Thereupon the vicar was pronounced by the court to be contumacious; and, his contempt having been signified to the Queen in chancery, he was arrested and imprisoned under a writ de contumace capiendo. Shortly after the vicar had been thus arrested, divine service was, without any opposition being offered, performed in the church by the curate appointed by the bishop, and the complainants applied to the court on motion that the vicar should be released. The court that the vicar should be released. The court ordered that the vicar should be forthwith released without previous payment of the costs of his contempt, but without prejudice to any other remedy for such costs; and that such costs should be recoverable as costs in the cause. Hudson v. Tooth, 2 P. D. 125; 35 the cause. L. T. 820.

Lasting Effect of Monition - Discretion to refuse to enforce Monition.]—Monitions in a criminal suit under the Church Discipline Act against a clerk in orders, though general in terms and admonishing the defendant to abstain for the future from the like offences to those the court at the hearing pronounced him to have committed, are not to be regarded as forbidding him, under pain of being pronounced in contempt, to resort at any time during his life to the practices from which he has been so admonished to abstain. Hakes v. Cox. [1892] P. 110. Having regard to the time (four and a half

years) which had clapsed since the expiration of a sentence of suspension founded upon disobedience to a monition, an application to enforce obedience to the monition was refused. Ib.

6. WRITS DE EXCOMMUNICATO CAPIENDO AND DE CONTUMACE CAPIENDO.

### a. De Excommunicato,

Discontinuance. ]—By statute 53 Geo. 3, c. 127, excommunication is now discontinued except for offences of ecclesiastical cognisance. Rex v. Burrard, 1 P. W. 435.

Absolve, Writ to.]—Where the spiritual court has excommunicated a party for a cause for which it has no authority to do so, he has a right to some writ to absolve him ; but notice must be given to the complainant in a spiritual court of the application for such writ. *Boraine's Case*, 16 Ves. 346. *See* 14 R. R. 762, n.

Demurrer. - A demurrer because plaintiff excommunicated, overruled. Plumpton v. Headlam, Brookes v. --, Toth. 74.

Answer.]—After a plea of excommunication, yet returnable, the Court of Chancery would plaintiff obtained letters of absolution, and produced them; defendant ordered to answer, and of custody. Ib.

of contempt which had issued against them. Amers v. Legg, Cho. Ca. Ch. 164.

The defendant must answer the bill though excommunicated, Tichborne v. Edmonds, Toth.

Where two executors were plaintiffs and one was excommunicated, it was held that defendant must answer the other; that excommunication is a good plea to an executor or administrator, though he sue in autre droit. Tomes v. Vaughan, Toth. 74. Vide Co. Lit. 133, b.; 4 Abr. 36. Aliter, as to the proclam ami, or guardine of an infant. Wy. Pr. Reg. 327; Curs. Can. 185.

Supersedeas.]-Executrix in custody under a writ de excommunicato capiendo, for not appearing to a citation by a creditor to exhibit an inventory, moved for a supersedeas disputing the

debt upon equitable grounds; motion refused.

Rex v. Blatch, 5 Ves. 113.

Supersedeas to a writ de excommunicato capiendo denied, though the significavit was general and uncertain, and said that the method was to proceed by habeas corpus; but, an appeal being brought, a supersedcas was granted. Rew v. Sneller, 1 Vern. 24,

Habeas Corpus.]—One that had been a prisoner in Newgate for debt, but since removed to the Fleet, is excommunicated; the Court of Chancery will not direct the cursitor to make out a writ of excommunicato capiendo to the warden of the Fleet, but the writ may be directed to the sheriff, who may return a non est inventus, and on the return the King's Bench may grant a habeas corpus, and thereupon charge him with an excommunicate capiendo. Strudwicke's Cuse, 3 P. Wms. 53. S. C.; Anon., Mos. 365.

Motion to Supersede.]—Motion to supersede a writ de excommunicato capiendo; the court refused to interfere, and ordered the party applying to pay the taxed costs of the applica-tion. Cheveley, Ex parte, Dick. 473.

Motion to supersede a writ of excommunicato capiendo, first, for want of addition; secondly, because not said the defendant was commorant in the diocese. Court allowed both the exceptions, but inclined to think that, after the writhhad been issued out of Court of Chancery, and then brought into B. R., and there delivered to the sheriff, but not yet actually returned to B. R., Court of Chancery, on a plain error appearing, may supersede or quash it. Rex v. Burrard, 1 P. Wms. 435.

Quashing.]-On motion to quash the writ of significavit, because the cause of excommunication was not set forth, and for divers other eauses, it was held sufficient to warrant the writ of excommunicato capicudo, Trebec v. Keith. 2 Atk. 498.

The court cannot do anything after the return of the writ excommunicato capiendo is out, the King's Bench having the recognisance; for they can compel the sheriff to return it, and the application to quash it must be there. Little, Ex parte, 3 Atk. 479.

If the writ had issued in the vacation, and not

#### b. De Contumace.

When can be issued.]—It was not necessary at the time of the excommunication; it was sufficient if he was there at the time of the citation. Rev v. Payton, 7 Term Rep. 153; 4 R. R.

Concurrent.]—It is competent to the Court of Chancery to issue several concurrent writs de contumace capiendo. Rex v. Blake, 2 N. & M. 312: 4 B. & Ad. 355.

A contumace capicado may be returnable on or after the essoign day of the term. Ib.

Significavit - Error in.] -A defendant committed by an ecclesiastical judge of appeal for contumacy in not paying costs, and the signifieavit only describing the suit to be "a certain cause of appeal and complaint of nullity," without showing that the defendant was committed for a cause within the jurisdiction of the spiritual judge, was entitled to be discharged on habeas corpus. *Rrx* v. *Dugger*, 1 D. & R. 460; 5 B. & Ald. 791; 24 R. R. 549.

Where a writ de contumace capiendo expressed "that the defendant had been pronounced guilty of contunacy and contempt of the law and jurisdiction ecclesiastical, in not having obeyed a decree made upon him to perform the usual penance in the parish church of St. M. N., in a certain cause of defamation"; and it appeared that, at the time the sentence was pronounced, a schedule of penance was made out, but which, by the practice of the ecclesiastical court, could not be delivered to the defendant until he paid the costs of the suit :-Held, that he ought to have had the decree exhibited to him in its more perfect form, before he could be considered as being in contempt, especially as the costs were not mentioned in the significavit, and that he was consequently entitled to be discharged. Rex v. Maby, 3 D. & R. 570; 2 L. J. (o.s.) K. B. 34.

Proper Person to Issue. |- The surrogate of the bishop's official principal is not the proper party to signify the contumacy of a defendant in a suit before him, as judge of the Consistory Court; and this both before and after 53 Geo. 3, c. 127; and, where a parson is taken under a contumace capiendo issued upon such certificate, the court will discharge him out of enstedy. Reg. v. Jones, 10 A. & E. 576.

The return to a habeas corpus set out a writ de contumace capiendo, reciting the significavit of "H. J., &c., official principal, &c., which Place, in the borough of L., a parishioner and inhabitant of the parish of St. M., in the borough of L., in the county of L., had been duly pronounced guilty of contumacy, in not obeying the lawful commands to pay to, &c., the church-wardens of the parish of St. M., 21. 5s., rated and assessed upon him, pursuant to a monition duly issued under the seal of the Arches Court. and duly and personally served on him, by not paying, &c., pursuant to the monition, in a cause or business of subtraction of church-rate, depending, &c., and the proceedings wherein were carried on in pain of the contumacy of W. B., duly cited to appear in the cause, with the usual intimation, but in nowise appearing, nor would be submit to the ecclesiastical jurisdiction":-Held, first, that the significavit, that the defen-

dant was contumacious, was properly issued by the official principal of the Arches. Reg. v. Baines, 4 P. & D. 362; 12 A. & E. 210; 10 L. J., Q. B. 34; 5 Jur. 387. Held, secondly, that, although the defendant

had not appeared in the ecclesiastical court, the Queen's Bench would not discharge him on habeas corpus; for, if it was the practice of the eeclesiastical court to give judgment against an absent party, there was nothing to show such practice was lilegal; and, if the practice was not so, the remedy of the party was by appeal. Ih.

Quere, whether the defendant was correctly described in the writ according to 53 Geo. 3, e. 127, schedule B; but held, that the misdescription could not be taken advantage of upon motion to discharge the defendant, on a return setting out the writ, and on an affidavit verifying a copy of the writ, as the proper course would have been to move to set aside the writ itself for irregularity. Ib.

Held, also, that an endorsement on the writ. that it had been delivered of record to the sheriff of L., was sufficient within 5 Eliz. c. 23, s. 2. Ib.

Sentence partly Good and partly Bad. ]-Where a writ de contumace capiendo set out the sentence of the spiritual court, which directed certain costs to be paid by the defendant, the court refused to quash the writ for an alleged invalidity in the sentence as to the other matters, that part of it being good which awarded costs against the defendant, who was therefore in conagainst the description, who was interested in contempt for the nonpayment of them. Kington v. Huck, 3 N. & P. 3; 7 A. & E. 708; 1 W. W. & H. 1; 7 L. J., Q. B. 59; 2 Jur. 14.

Committal of Trustee upon. ]-A. spiritual judge has no jurisdiction over a trustee appointed by a testator in his will; therefore, where a trustee was committed upon a writ de contumace capiendo, for not exhibiting an inventory and account of the goods of a testator, the court ordered him to be discharged. Rew v. Jenkins, 3 D. & R. 41. S. C., nom. Jenkins, Ex parte, 1 B. & C. 655.

Disobedience to Order of Suspension. ]-The power to issue a writ de contumace capiendo under 53 Geo. 3, c. 127, for disobedience of an order of the Ecclesiastical Court, is not confined to cases where obedience to the order remains possible. A clerk in orders having disobeyed a monition issued in a suit instituted against him

in the Eeelesiastical Court under the Church Discipline Act, 1840, a suspension was published and served upon him whereby he was suspended from his clerical office for a period of six months. During such period he officiated in his church, notwithstanding the suspension, and a significavit in respect of such disobedience issued against him. After the expiration of the six months, a writ de contumace capiendo was issued against him under 53 Geo. 3, c. 127, s. 1, upon which he was arrested :- Held, that the writ was lawfully issued. Cox, Ex parte, 57 L. J., Q. B. 98; 20 Q. B. D. 1; 58 L. T. 323; 36 W. R. 209; 52 J. P. 484-C. A.

Form of Writ. - The writ de contumaceeapiendo was improperly indorsed "The Public Worship Regulation Act, 1874. — Held, that this irregularity did not render the imprisonment illegal. Dean v. Green (8 P. D. 79) followed. Con, Exp parte, 56 L. J., Q. B. 532; 19 Q. B. D. 307.

Where it appeared on the face of a writ of

capies cum proclamatione, that a whole term impedit, against a bishop, at the suit of W., who had intervened between its teste and the term claimed to be instituted to a living within the in which the writt de contumnac capiendo was diocese of which he was himself the patron. returnable, the court quashed the writ of capias as being a discontinuance on the face of it. Reg. v. Ricketts, 1 P. & D. 150; 8 A. & E. 951; 1 W. W. & H. 885; 8 L. J., Q. B. 44; 2 Jur. 1039.

Where a party in custody under writs of contumace capiendo applied for a rule to show cause why they should not be set aside for irregularity, with costs; and, after the rule obtained, also applied to the chancellor, who decided that one of them was bad, and ordered the others to stand over for argument, the court, on showing cause, cnlarged the rule, with a stay of proceedings. Rew v. Richetts, 1 H. & W. 64.

- To whom Addressed. ]-The writ de contumace must be addressed to the sheriff of the county of which the party contumacious is described in the significant; and, if addressed to the shoriff of a different county, the court will quash the writ. Rew v. Richetts, 1 N. & P. 680; 6 A. & E. 537; W. W. & D. 297; 6 L. J., K. B.

A writ directed to the sheriff of one county. and describing the defendant "heretofore and now" of another county, may be set aside for irregularity after the arrest has taken place. Rev v. Hewitt, 1 N. & P. 689; W. W. & D. 299; 5 D. P. C. 646; 6 A. & E. 547; 6 L. J., K. B. 235; 1 Jur. 721.

An insufficient writ may be quashed, on motion before the return day; and, if the defendant has been arrested on it, it is not necessary to bring him into court by habeas corpus. Ib.

- Significavit.] -- A writ, reciting a significavit by two judges, of disobedience to the commands of three judges, is bad, and the court will quash it on motion. Rew v. Ricketts, 1 N. & P. 685; 6 A. & E. 587; W. W. & D. 297; 6 L. J., K. B. 172. S. P., Rew v. Blake, 2 B. & Ad. 139.

It is not necessary that the significavit of contempt from the spiritual court should purport to be issued within ten days of the judgment of contempt. Reg. v. Thorogood, 12 A. & E. 183; 3 P. & D. 629; 9 L. J., Q. B. 211; 4 Jur. 937.

A significavit is not vitiated by the introduction of merely superfluous words not contained in the statutable form, viz. by the addition of the words "as by our citation he was required to appear," after the statement that the party had been pronounced in contempt. Ib.

The writ need not give the defendant any addition where he is imprisoned under it for contempt in not appearing to a citation, such imprisonment not being a pain or forfeiture within 5 Eliz, c. 23, s. 13. Ib.

A significavit of the sentence of an ecclesiastical court having been set aside by the Court of Chancery, for an ambiguity appearing in the sentence, and no subsequent proceedings having been taken, and there appearing no intention to proceed, the court refused a prohibition applied for, on the ground that no good significavit could issue on such a defective sentence. Bodenham v. Richetts, 2 H. & W. 132.

Court of Common Pleas, in an action of quare -H. L. (E.)

Whilst this action was proceeding, W. instituted a suit of duplex querela in the Arches Court of Canterbury, calling upon the bishop to show cause why W. should not be instituted to the living. The court, on motion on behalf of the bishop, directed that, if W. did not elect to abandon the action of quare impedit within ten days, the suit of duplex querela should stand dismissed, Walsh v. Lincoln (Bishop), L. R. 4 Ecc. 242.

Judgment. ]-In a quare impedit against A. and B., tenants in common of an advowson, being assignees of co-parceners, who did not agree to present, A. suffered judgment by default, and B. died pending the writ. This judgment is a bar to another quare impedit brought by A. and C. the representatives of B., to recover the same presentation; but it is not a bar to C.'s right to recover on the next avoidance in his turn. Barker v. London (Bishop), 1 H. Bl. 412, n.; Willes, 659; 2 R. R. 799.

Power of Judge to Amend. |- In quare impedit by the Crown upon a forfeiture by simony between the patron in fec, the grantee of the turn and the incumbent, a judge at chambers has authority to allow an amendment, by adding counts varying the terms and the parties to the simoniacal contract. Rew v. York (Archbishop), 3 N. & M. 453; 1 A. & E. 394.

Costs. ]-Though a defendant had judgment on denurrer in quare impedit, he was not cutilled to costs under 8 & 9 Will. 3, c. 11, s. 2. Thrale v. London (Bishop), 1 H. Bl. 530; Wadowes v. Carlisle, 3 Bing. 404; 11 Moore, 269. A bishop who falls upon a demurrer may be

exempted from costs by certificate of the court.

Edwards v. Exeter (Bishop), 6 Bing. (N.C.) 146; 7 Scott, 679; 9 L. J., C. P., 87; 3 Jur. 1000. Tenants in common of an advowson, one being a Protestant, the other a Roman Catholic, the church being vacant, the former presented alone; the ordinary refused to admit the clerk so-presented, on the ground that the sole right of presentation was not in the Protestant co-patron : and after a lanse collated :- Held, that this was, a proper case for a certificate under 4 & 5 Will, 4, c. 39, to exempt the bishop from costs. Ib.

See also cases ante, col. 1532 foll.

# S PROHIBITION

### a. Generally.

What.] - Prohibition is the common law proceeding by which any of the superior temporal. courts at Westminster (not the Queen's Bench only) are enabled to restrain, among others, the courts ecclesiastical from acting in excess of their jurisdiction : but it does not enable the temporal. court to act as a court of appeal from the court coclesiastical so as to correct any irregularity, or even injustice, which may have been done by the Ecclesiastical Court, if done in the 7. QUARE IMPEDIT.

Proceedings in ]—A writ was issued out of the

#### b. When the Writ goes.

Generally.]—Where part of a decision of the court sought to be prohibited is within its jurisdiction, and part not, a prohibition is awarded against doing what is in excess of jurisdiction and a consultation as to the rest. Mackonochie v. Penzance (Lord), 50 L. J., Q. B. 611; 6 App. Cas. 443; 44 L. T. 479; 29 W. R. 633; 45 J. P. 584—H. L. (E.)

A prohibition will not be granted to restrain a petition in the Ecclesiastical Court where it is within the jurisdiction of the court to grant some on privileges prayed for, especially where the applicant has no special interest in the proceedings. *Reg.* v. *Twiss*, 10 B. & S. 298; 38 L. J., Q. B. 228; J. R. 4 Q. B. 407; 20 L. T. 522; 17 W. R. 765.

The granting of a prohibition on the application of a stranger is discretionary. 1b.

The Court of Oncen's Bench will not interfere by prohibition, unless it is plain that the court against which the prohibition is prayed is exceeding, or is about to exceed, its authority. Sinyanki, In re, 12 W. R. 825.

The court will not put the party to declare in prohibition, if it is clearly of opinion against granting the prohibition, because the same application may be made to the other courts. Liado v. Rodney, 2 Dougl. 618, n.

Prohibition to the spiritual coart lies only

where that court is proceeding in a matter which is clearly out of its jurisdiction, or in a manner that is manifestly contrary to the general principles of justice. Story, Ex parte, 12 C, B, 767; 22 L, J., C, P, 75; 1 W, R, 38. S, P, and S, C, 8 Ex, 195; 22 L, J, Ex, 83.

The Archbishop of Canterbury required the judge to hear the matters of a representation, under the Public Worship Regulation Act, 1874, against a clergyman "at any place in London or Westminster, or within the diocese of Rochester, as you may think fit." The judge, having heard the case at Lambeth Palace (which is in neither London nor Westminster nor the diocese of Rochester) gave judgment against the clergyman who did not appear. A monition was issued against the clergyman, who disobeyed it and was pronounced guilty of contempt and imprisoned : -Held, that a prohibition must issue, for that the judge had no power to hear the case at any place outside the limits defined, and that, by hearing it at Lambeth, he had exceeded his jurisdiction, and the whole proceedings were on that account void and coram non judice. Hudson v. Touth, 47 L. J., Q. B. 18; 3 Q. B. D. 46; 37 L. T. 462; 26 W. R. 95.

A prohibition to an ecclesiastical court, in a cause which is clearly of ecclesiastical cognisance, does not lie where there has been an stregglarity in the practice. Smyth, Exp parte, 5 N. & M. 145; 3 A. & E. 719; 1 H. & W. 417. S. P., Jolly v. Baines, 12 A. & E. 201; 4 P. & D. 224; 9 L. J., Q. B. 349; 5 Jur. 22.

Where the matter is within the jurisdiction of an ecclesiastical court, the court will not interfere by prohibition to prevent an adjudication upon it. Hallack v. Cambridge University, 1 G. & D. 100; 9 D. P. C. 583; 1 Q. B. 593; 10 L. J., Q. B. 206; 6 Jur. 10.

some that that jurisdiction will be improperly exercised, and therefore will not prohibit the ecclesiastical court from proceeding to judgment, although the faculty prayed for is larger than that court has power to grant. Ib.

Refusal to Bury Corpse. -On the 20th April, 1843, a clerk was cited to appear and answer in the spiritual court, for refusing a second time on the 26th May, 1841, to bury a corpse after due notice, the first whereof occurred on or about 17th February, 1840. Upon motion for a prohibition:—Held, that the decision of the ecclesiastical court, that there were distinct offences, involved only a question of ecclesiastical cognisance as to the construction, and not simply a misconstruction of the 3 & 4 Vict. c. 86, s. 20; and that, therefore, the proper remedy was by appeal to a higher ecclesiastical court, and not by prohibition. *Titchmarsh* v. *Chapman*, 1 D. & L. 732; 13 L. J., Q. B. 59; 8 Jur. 316.

- Nonpayment of Church-rate. ]-In a suit by churchwardens, against F., for nonpayment of church-rate, a libel, answer and reply were put in, and certain articles were exhibited by the churchwardens with and in support of the reply. The articles were rejected in the Consistory Court, but on appeal to the Arches Court they were admitted. F. then appealed to the privy council, and his appeal was referred to the judi-cial committee. While the appeal was depending, but before any proceedings had been taken in that court, F. moved for a prohibition, on the ground that the rate was bad on account of its being retrospective, and it appeared to be so from facts stated on the pleadings :- Held, that a prohibition could not be granted on this ground. the cause being before a court, the jurisdiction of which was not denicd, no erroneous proceeding having been taken there, and the court refusing to presume that the judicial committee would act incorrectly. Chesterton v. Furlar, 7 A. & E. 713; 3 N. & P. 15; 1 W. W. & H. 19; 7 L. J., O. B. 66: 2 Jur. 394.

A declaration, in prohibition, stated that the plaintiff having been libelled in the spiritual court for nonpayment of a church-rate, had pleaded in his defensive allegation that the rate, though good on the face of it, was asked for and intended to be applied to the payment of autecedent debts, and that the court had admitted to proof a responsive allegation, which alleged that the churchwardens of a prior year had neces-sarily incurred debts, in consequence of the parish refusing to make a rate, and that the retrospective rate subsequently became necessary, in order to discharge the said debts :- Held. that, whether the rate, being good in form, was or was not vitiated by any design to apply it retrospectively, and whether the rate, under the circumstances, was or was not bad, it being retrospective, the suit itself was a matter of ecclesiastical cognisance, and the objection to the rate was such as the ecclesiastical court was able to give effect to, if valid; and that it was to be presumed, that it would correctly administer the law; and that therefore the plaintiff was not entitled to a prohibition. Griffin v. Ellis, 3 P. & D.

398; 11 A. & E. 743; 9 L. J., Q. B. 127; 4 Jur. 409.
Where a plaintiff declared, in prohibition, that Particular Matters-Grant of Faculty. ]-The he had been libelled by the defendant in a spirigrant of a faculty to appropriate certain parts of tual court, for nonpayment of a church-rate, a parish church is within the jurisdiction of the ecclesiastical court; and the court will not pre- grounds, one of which was as to the construction of an act of parliament, and averred that the exceptions were not the subject of ecclesiastical cognisance, and theupou prayed for a writ of prohibition:—Held, that he had shewn no ground for prohibition, as it did not appear that the court was proceeding to decide on the act of parliament, or that it would decide contrary to the common law. Hall v. Maule, 3 N. & P. 459; 7 A. & E. 721; 1 W. W. & H. 399; 7 L. J., O. B. 210: 2 Jur. 887.

- Payment of Legacy. ]-If a spiritual court go about to compel an executor to pay a v. Penzaece (Lord), 51 L. J., Q. B. 506; 7 Applegacy without a security to refund, a prohibition Cas. 240; 46 L. T. 779; 30 W. R. 753; 46 J. P. shall go. Noel v. Robinson, 1 Vern, 93; 2 Vent. 358; 2 Ch. Ca. 145; 2 Ch. Rep. 248.

- Lease of Tithes. ]-In a sait for subtraction of tithes, in the spiritual court, by an impropriator, the defendant's personal answer stated a lease of them by the plaintiff to a third party, by whom they were demanded, and also that they belonged to the vicar, and not to the plaintiff. The defendant also put in a responsive allegation, that, by immemorial usage, custom, and prescription, the titles were deemed small or vicarial, and as such due to the vicar and not to the plaintiff; the plaintiff's personal answer denied the usage, and the judge assigned a day to hear on the sufficiency of the plaintiff's answer, and term probatory to the defendant :— Held, that at this stage of the cause there was no issue on the lease; that the only matter in issue, viz. the immemorial right of the viear, was properly cognisable by the spiritual court; and that there was no ground of prohibition. Beauchamp (Earl) v. Turner, 10 A. & E. 218; 2 declare in prohibition, for the more solemn P. & D. 496; 8 L. J., Q. B. 252.

— Custom.]—A prohibition lies to an ecclesi-astical court, where the question of custom or no custom is distinctly raised on the face of the libel and answer. Rhodes v. Oliver, 2 H. & W. 38.

Where a custom for a church-rate is pleaded in the Ecclesiastical Court, and the plea admitted, they may proceed to try the custom; but, if denied, a prohibition lies. Dunn v. Coates, 1 Atk.

— Breaking open Chest in Church.]—A line migrace court or appear in expensive control prohibition was granted to stay a suit in the L. J., Q. B. 611; 6 App. Cas. 424; 44 L. T. 479; spiritual court, for breaking open a chest in L. J., Q. B. 611; 6 App. Cas. 424; 44 L. T. 479; spiritual court, for breaking open a chest in Church Church and Church Churc - Breaking open Chest in Church. ]-A the church, and taking away the title-deeds to the advowson. Gardner v. Parker, 4 Term Rep. semble, the Court of Exchequer had power to the advowson. Gardner v. Parker, 4 Term Rep. semble, the Court of Exchequer had power to the advoiced a writ of prohibition to the judicial. 351.

After Appearance.]-A defendant cited in the Ecclesiastical Court must appear before he can apply for a prohibition. Law, Ex parte, 2 A. & E. 45; 2 D. P. C. 528. S. C., nom. Rew v. Mills, 4 N. & M. 7; 4 L. J., K. B. 18.

Upon motion for a prohibition, the court is not bound to wait till the suit in the spiritual court is actually at issue; if the latter is clearly in progress towards the trial of a question over which it has no jurisdiction, prohibition lies forthwith. Byerley v. Windus, 7 D. & R. 564; 5 B. & C. 1; 4 L. J. (o.s.) K. B. 102; 29 R. R.

cognisance of the cause; otherwise, if there is only a defect of trial. Full v. Hutchins, Cowp. 424, 432.

Under s. 9 of the Public Worship Regulation Act, 1874, it appearing after sentence that the bishop was disqualified from acting :-Held, that prohibition might be granted after sentence where the sentence had not been fully executed, and the applicant had neither acquiesced in the jurisdiction of the court nor done anything to estop himself from complaining of it. Serjeant v. Dale, 46 L. J., Q. B. 781; 2 Q. B. D. 558; 37 L. T. 153.

Prohibition will not be granted against a judgment merely because of a defect. Enraght

644-H. L. (E.)

It does not lie after sentence, unless it appears by the sentence that the Ecclesiastical Court has pronounced on matters cognisable at common law, although there are several articles contained in the libel, some of which are so cognisable. Hart v. Mursh, 1 N. & P. 62; 5 A. & E. 591; 5

D. P. C. 424; 2 H. & W. 341; 6 L. J., K. B. 9. Where the spiritual court incidentally determines any matter of common law cognisance, such as the construction of an act of parliament, otherwise than the common law requires, prohibition lies after sentence, although the objection does not appear upon the face of the libel, but is collected from the whole of the proceedings below. Gould v. Gapper, 5 East, 345; 1 Smith, 528; 7 R. R. 766.

After sentence in the Ecclesiastical Court in a matter of tithe, where the question turned upon the construction of an act of parliament, upon a doubt raised whether that court had not misconstrued the act, the court directed the plaintiff to adjudication of the question. Gare v. Gapper, 3 East, 472. S. P., White v. Steele, 12 C. B. (N.S.) 383 ; 5 L. T. 449.

Appeal no Bar. ]-An appeal from the consistory court to the Court of Arches is no bar to an application for a prohibition. White v. Steele, 12 C. B. (N.S.) 383; 31 L. J., C. P. 265; 8 Jur. (N.S.) 1177; 6 L. T. 686.

Semble, the temporal court, proceeding in prohibition, is not bound by a decision of even the highest court of appeal in ecclesiastical

committee of the privy council, if it exceeded its jurisdiction; but it could not issue for that which is a subject of appeal. Smyth, Ex parte, 2 C. M. & R. 748: 1 Tyrw. & G. 222; 1 Gale, 274; 5 L. J., Ex. 33.

### c. Practice and Pleading.

Motion.]-A prohibition to the Ecclesiastical Court cannot be granted upon petition, but by motion and a proper suggestion it may. Hill v. Turner, 1 Atk. 516.

Application.]-A prohibition will issue out of chancery, when the common law courts are not After Sentence. Prohibition lies after sitting upon an ex parte application to restrain sentence, if the Ecclesiastical Court has not a spiritual court from trying a claim by prescription to pews in a parish church. Bateman, Ex parte and In re, 39 L. J., Ch. 383; L. R. 9 Eq. 660; 22 L. T. 60; 18 W. B. 425.

In Ecclesiastical Courts.]—On a motion for incurred in the Ecclesiastical Court. Tessimond v. prohibition, the court will not enter into questions as to the practice of the ecclesiastical

A plaintiff for whom a verdict is given by a courts. Jolly v. Baines, 4 P. & D. 224; 12 A. & E. 201; 9 L. J., Q. B. 349.

Affidavits in Support.]—Affidavits in support of an application for a prohibition must be entitled simply in the court, and not in any cause. Exams, Ex parte, 2 D. (N.S.) 410; 12 L. J., Q. B. 68; 7 Jur. 281.

Where it was objected to affidavits in answer to a rule nisi for a prohibition that they were entitled "In the Queen's Bench, between M. A. B., plaintiff, and W. P., defendant, in prohibition," and not in the Queen's Bench only, the court allowed them to be read. Breedon v. Capp, 9 Jur, 781.

Rule nisi for-Enlargement of . - A party heing libelled in the spiritual court for non-payment of a church-rate, made in pursuance of a resolution of the vestry, objected to the libel, because it stated a notice to have been given, which was defective, and he obtained a rule nisi for a prohibition; afterwards, the notice really given, which was good, and which had been lost, was discovered, and was submitted to the court, on shewing cause, with an affidavit, that, by the practice of the Ecclesiastical Court, leave would be given to amend the libel by an additional article, setting out the real notice :- Held, that the rule nisi for a prohibition might be enlarged. to give opportunity for such amendment. Blunt v. Harwood, 8 A. & E. 610; 3 N. & P. 577; 7 L. J., M. C. 107.

Discharged. -- Where a rule nisi for a prohibition to an inferior court has been discharged, the court will not allow the motion to be renewed, upon affidavits stating matter not before presented to the court, but existing at the time of the original application. Bodenham v. Ricketts, 6 N. & M. 537.

Pleading.]-Pleading an issuable plea to articles in the spiritual court is no answer to a prohibition, if the spiritual judge has no jurisdiction over the matter of which he has taken cognisance. Williams, Exparte, 6 D. & R. 373; 4 B. & C. 313; 3 L. J. (o.s.) K. B. 221.

A declaration in prohibition alleged that a question had been raised, and left for trial, in a suit in the spiritual court, whether A. was or was not a parish; and shewed, by reciting the pleadings in the spiritual court, that the question was a material question in the suit there. The pleas to the declaration were merely simple traverses of other allegations in the declaration, and left unanswered the allegation that the question of parish or no parish had been raised and left for trial in the spiritual court :- Held. that the pleas were no answer to the declaration. because the question whether A. was or was not a parish is a question not triable by the spiritual court; and, therefore, the allegation that such question had been raised and left for trial in the spiritual court, ought to have been either answered or depied by the pleas. Rutland (Duke) v. Bagshaw, 14 Q. R. 869; 19 L. J., Q. B. 234; 14 Jur. 715.

Costs.]-The 1 Will. 4, c. 21, s. 1, does not enable the court, when a party has declared in house of convocation, is repealed by 25 Hen. 8, prohibition and succeeded, to grant him his costs c. 19. Ib.

jury upon a declaration in prohibition is not entitled to recover the costs of the proceedings in the court below, as damages, under 1 Will. 4, c. 21, s. 1. White v. Steele, 13 C. B. (N.S.) 231; 32 L. J., C. P. 1; 9 Jur. (N.S.) 648.

#### 9. APPEAL.

To Privy Council.]-Rule 14 of the rules for appeals in ecclesiastical and maritime causes applies to an appeal from the Arches Court, as to the form of articles of charge against a clerk for heresy, although he contumaciously refused to appear to the citation of that court. Sheppard v. Bennett, 21 L. T. 650-P. C.

In such a case, therefore, as well as in the ordinary case where an appearance has not been entered, the appeal shall not stand for hearing before the judicial committee until a period of four months has expired from the bringing in of

the petition of appeal. Ib.

A party is not bound to appeal from an interlocutory decree, though he might by so doing have raised the whole question at issue on the appeal from the definite sentence. Jones v. Gough, 3 Moore, P. C. (N.S.) 1.

No appeal was interposed from an interlocutory indement of the Arches Court, admitting articles of charge against a clergynan proceeded against under 3 & 4 Vict. c, 86:—Held, that the appellant was not concluded by the admission of the articles, and that it was competent to him, upon appeal from the final sentence, to open the finding of the interlocutory judgment upon the articles. Williams v. Salisbury (Bishop), 2 Moore, P. C. (N.S.) 375.

Secus, with respect to the respondent who had

adhered to the appeal. Ih.

The court will not allow an appeal from its decision as to the admission of articles, unless some important principle of law is involved in such decision. Martin v. Mackonochie, 36 L. J., Ecc. 25.

A. being a stipendiary curate within a diocese, the bishop, after due notice and inquiry, revoked his licence. He appealed to the archbishop of the province under 1 & 2 Vict. c. 106, s. 98, and the archbishop confirmed the revocation :—Held, that neither the 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41, nor the 1 & 2 Vict. c. 106, anthorise the privy council to receive appeals, except in the eases mentioned in 1 & 2 Vict. c. 106, s. 6, from the decisions given by the archibishops under 1 & 2 Vict. c. 106. Poole v. London (Bishop), 14 Moore, P. C. 262; 7 Jur. (N.S.) 347; 4 L. T. 224; 9 W. R. 485.

Under 25 Hen. 8, c. 19, an appeal lay from the archbishop's court to the delegates in all spiritual causes, whether touching the king or not, and therefore by 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41, s. 3, there is an appeal in such cases to the judicial committee of the privy council, whose decision is final. Gorham v. Exeter (Bishap), or Exeter (Bishap), Ex parts, 15 Q. B. 52; 10 C. B. 102; 5 Ex. 630; 19 L. J., Ex. 376; 19 L. J., C. P. 200; 19 L. J., Q. B.

279; 14 Jur. 480, 522, 876. Semble, that the 24 Hen. 8, c. 12, s. 9, which. in matters touching the king, gives an appeal from certain ecclesiastical courts to the upper

From Refusal of Archbishop.]—Anappeal year, created by his predecessor, is unexpired. lies to her Majesty in council from the refusal Doe d. Kirby v. Carter, R. & M. 237. of the archbishop to exercise his jurisdiction to 1. A rector succeeded to the rectory, upon the cite a bishop in respect of ecclesiastical offences. Read, Exparte, or Read v. Cunterbury (Archbishop), 58 L. J., P. C. 32; 13 P. D. 221; 59 L. T. 909-P. C.

Rehearing.]—An appeal from the Arches Court was heard ex parte and judgment was delivered. Before any report was presented to her Majesty an application was made to rehear the appeal on the ground that the respondent was unable to instruct counsel at the hearing, or to appear in person through ill-health, and on the ground that the judgment was binding upon all the clergy. They refused to rehear the appeal. Hebbert v. Purchas, 7 Moore, P. C. (N.S.) 551; 40 L. J., Ecc. 55.

To Court of Arches—From Archbishop.]—An appeal lies to the Court of Arches under 3 & 4 Vict. c. 86, s. 15, from a judgment of a diocesan court presided over by the Archbishop of Canterbury, in consequence of the bishop of the diocese being the patron of the preferment held by the party proceeded against. Denison, Esc parte, 7 El. & Bl. 315; 26 L. J., Q. B. 178; 3 Jur. (N.S.) 439; 5 W. R. 320.

— Security for Costs.]—A criminal suit under the Church Discipline Act (3 & 4 Vict. c. 86) having been promoted against the incumbent of a parish, and proof given of the charges made in the articles in the suit, the bishop of the diocese pronounced sentence suspending the defendant for two years ab officio et beneficio, and condenning him in the costs of the proceedings. The defendant appealed to the Court of Arches. On motion on behalf of the bishop, who had promoted his own office and appeared as respondent in the appeal, the Dean of Arches. on proof that the defendant was in a state of poverty, and had not paid any part of the costs in which he had been condemned, ordered the defendant to give security for the costs of the appeal in the sum of 100%, within four months from the date of making the order for security, O' Malley v. Norwich (Bishop), [1892] P. 175.

— From Commissioners.]—But no appeal is given by 3 & 4 Vict. c. 86, either to the Arches Court, or thence to the privy council, from the decision of the commissioners, on the regularity or the irregularity of the proceedings before them, Simpson v. Flamank, 4 Moore, P. C. (N.S.) 385; 36 L. J., Ecc. 28; L. R. 1 P. C. 463; 16 L. T. 724: 16 W. R. 8.

By Party in Contempt for disobeying Monition. -A party in contempt for not obeying a monition, whose contempt has been signified under 53 Geo. 3, c. 127, and a writ de contamace capiendo extracted against him, is not precluded from appealing from the principal sentence, though pronounced in poenam; protest against permission to appeal under such circumstances overruled. Harrison v. Harrison, 4 Moore, P. C. 96; 6 Jur. 899.

### XXIX, GLEBE,

Rights of succeeding Incumbent, 1-An incumbent of a living may maintain an ejectment against parties in possession of the glebe lands, PROPERTY—4. PURCHASES FOR PUBLIC UNDERthough the current year of tenancy from year to TAKINGS, col. 1274.

death of the former incumbent, in April, 1816. A. and B. were then in possession of the glebe lands, having been tenants of the former incumbent, and they continued in possession until after December, 1816, when the vector conveyed the lands to trustees for securing an annuity :-Held, that the latter could not maintain an ejectment against A. and B. without giving them a notice to quit. Doe d. Coutes v. Somerville, 6 B. & C. 126; 9 D. & R. 100; 5 L. J. (o.s.) K. B. 28.

Mortgage.]—A vicar is a person having a limited interest within the meaning of s. 3 of the Landowners West of England and South Wales Land Drainage and Inclosure Companies Act. and may charge his glebe land thereunder. To a foreclosure action under such a mortgage the patron of the living is not a necessary party. Goodden v. Coles, 59 L. T. 309; 36 W. R. 828.

A demise of glebe by an incumbent of a benefice, with cure of souls, to secure an annuity, is void by 57 Geo. 3, c. 99, reviving 13 Eliz. c. 20. Shaw v. Pritchard, 5 M. & Ry. 180; 10 B. & C. 124; 8 L. J. (o.s.) K. B. 133.

A rector, in December, 1816, granted, bargained, sold and demised the rectory and all the glebe lands, tithes, &c., to a trustee, for securing an annuity for a term of years, if he, the rector, should so long live. This conveyance having been made after 43 Geo. 3, and before 57 Geo. 3, was a valid conveyance, and passed the legal estate to the trustee. Dae d. Coates v. Somerrille, 6 B. & C. 126; 9 D. & R. 100; 5 L. J. (0.s.)

— Action by Owner of Rent-charge under Drainage Act — Ecclesiastical Commissioners, whether Parties.]-See Scottish Widows' Fund v. Craig, col. 1339.

Inclosure Act — Allotment to Vicar and "Successors" — Vesting.] — Where, under an inclosure act and an award, land is allotted to a vicar and his "successors" in respect of the glebe, such land vests in fee simple in the vicar not as an individual, but as an ecclesiastical corporation sole, subject, however, to the statutory restrictions on the alienation of ecclesiastical land. Castle Bytham (Vicar) and Midland Ry., Ex parte, 64 L. J., Ch. 116; [1895] 1 Ch. 348; 13 R. 24; 71 L. T. 606; 43 W. R. 156.

Receiver. - A receiver will be appointed over the tithes and glebe of the grantor of an annuity who has charged it on the benefice he had at the time of this grant, and covenanted to charge it on any benefice he might thereafter possess, on his being promoted, if a sufficient arrear of the annuity is due. Stronge v. Ormsby, 2 Hog. 55.

Neglect of.] - See ante, XIII. PROPERTY -5. DILAPIDATIONS, col. 1277.

Letting.] - See aute, XIII. PROPERTY -3. LEASES, col. 1269.

#### XXX. TITHE.

As an Objection to Title on Sale of Land. ]-See VENDOR AND PURCHASER.

Abatement or Compensation in respect of, on Sales of Land. - New VENDOR AND PURCHASER.

### 1. COMMUTATION.

Meaning of .]-The commutation of tithes does not mean merely the commutation of existing tithes into a rent-charge settled at the moment, but the commutation of the right to take the tithes into the right to take a rent-charge in lien of them. Walsh v. Trinmer, 36 L. J., Q. B. 318: L. R. 2 H. L. 208: 16 L. T. 722; 15 W. R. 1150.

Intention of Commutation Acts.]-The intenon which the apportionment in each parish is cast, and these lands only, shall be liable in respect of the tithe payable for any lands in the parish; and that lands on which no apportionment is cast shall not be liable to tithe. Walker v. Bentley, 9 Hare, 629.

Award - Apportionment Act. ] - Award of the tithe commissioners commuting tithes for a rent-charge : - Held, "an instrument under which the rent-charge was payable" within s. 2 of the Apportionment Act (4 & 5 Will. 4, c. 22). Heasman v. Pearse, L. R. 8 Eq. 599.

Confirmed Award—Effect of ]—A confirmed award under 6 & 7 Will. 4, c. 71, ss. 27, 52, is final, as between the tithe-owners and tithepavers, but does not exclude from further investigation a case between the tithe-owners themselves, in which there was, before the award, a just title to tithes, which, by accident and mistake, is not brought forward till after the award is made. Clarke v. Yonge, 5 Beav. 523.

Lands, which, on the agreement and apportionment (confirmed by the commissioners), are treated as free from tithe, cannot be afterwards made subject to tithe. Walker v. Bentley, 9 Hare, 629.

Principle of Apportionment. -Ou a commutation of tithes of a parish, the valuer made an apportionment, which was objected to by the landowners, and the objectors were heard, first, by the assistant commissioners, who received evidence for and against the objections, and then by the tithe commissioners. The tithes of corn and grain were payable to the rector, and moduses for all other tithes to the vicar. A rent-charge, in lieu of such tithes and moduses, had been awarded, A., a landowner, held ancient pasture land of the dean and chapter of Canterbury, by lease, which forbade him to plough the land without licence in writing, for which he had never applied, nor intended applying, but lands of the dean and chapter in the same district had been ploughed within living memory. Part of the land in the parish was woodland. The valuer, in apportioning the rent-charge upon A.'s pasture lands, assessed them to the vicar's rent-charge according to the modus, and added a small portion of rent-charge, to be paid to the rector as part of the gross rent-charge awarded 2 Jur. 939. to him, where it seemed that the productive to him, where it seemed that the productive In a suit for tithes, commenced before the quality of the land admitted of its being arable, passing of the Tithe Commutation Act, this.

and that there was a reasonable probability of its being tilled, but he made no such additional assessment on the woodland, not considering that a reasonable probability existed of that land becoming arable. The objectors disputed both the facts and the principle of assessment. The commissioners, having inspected the evidence given as above stated for and against the objections, decided that they would confirm the apportionment if they were not forbidden by a superior court :-Held, that a prohibition did not lie, the commissioners having acted within their statutory jurisdiction, and according to law; and that the apportionment was right in principle, Appledore Tithe Commutation, In re, 8 Q. B. 139; 17 L. J., Q. B. 59.

Authority of Commissioners. - To a declaration (as to expenses of apportionment of a rent-charge), the commissioners pleaded first that the grievances complained of were committed after the passing of the 6 & 7 Will. 4, c. 71, and 5 & 6 Vict. c. 97, and that they were committed under the authority of the first act, and that no notice of action had been given one month before action; and, secondly, that the grievances were committed after passing of an act in the last plea first mentioned, and were done under the authority of that act, and they were committed in the county of M., and not of D.:— Held, that the pleas were good, and that the action would lie. Acland v. Buller, 1 Ex. 837; 18 L. J., Ex. 51.

Jurisdiction of Commissioners.]-A commissioner has, by his award, to fix the amount of rent-charge payable in lieu of tithe, and, for that purpose, to decide upon the tithability of lands; but he has no invisdiction to decide thereby who is the party entitled to receive the rent-charge.

Edwards v. Bunbury, 3 G. & D. 229; 3 Q. B.

885; 12 L. J., Q. B. 45: 6 Jur. 1014.

An act, passed in 1792, for carrying into effect an agreement for vesting lands in lien of titles, provided that no thing in the act should prejudice the right of the rector or his successors to the right of tithes and customary stocking in certain specified lands, the modus in the "The Groves" and "The Ancient Closes," and all other petty and personal tithes not therein mentioned or relinquished. The tithe commissioner decided that "The Ancient Closes" were not exempt from titles:—Held, that the titles on "The Aucient Closes" were not commuted or extinguished by the act of 1792, wherefore the jurisdiction of the tithe commissioners was not taken away by 6 & 7 Will. 4, c. 71, s. 90. Winteringham Tithes. In re, 31 L. J., C. P. 274; 9 Jnr. (N.S.) 277; 6 L. T.

- Suits pending.] - The commissioners under the Tithe Commutation Act, 6 & 7 Will. 4 c. 71, have no jurisdiction to interfere with suits for tithes which were pending in the Court of Exchequer when the act was passed. Girdlestone: v. Stanley, 3 Y. & Coll. 421; 3 Jur. 382.

Under the 6 & 7 Will, 4, c. 71, s. 45 (Tithe Commutation Act), the commissioners have a discretionary power to determine suits theretofore pending; but, where they intend to do so, specific notice of such intention must be given. Wetherell v. Weighell, 3 Y. & Coll. 243; 8 L. J., Ex. Eq. 1;

court refused, on motion; to suspend the pro- August, when the respondent, who was the rector on a particular day, proceed to commute. Ib.

Practice-Discovery in Aid. ]-The parties to an action, brought upon a feigned issue, under the provisions of the Tithe Commutation Act (6 & 7 Will, 4, c. 71), are not precluded by that act from sustaining a bill of discovery in aid of the trial of such issue. Morris v. Norfalk (Duke), 9 Sim. 472; 9 L. J., Ch. 273; 4 Jur. 1007.

Expenses.]-Expenses incurred by the employment of an attorney by landowners, to conduct proceedings towards a commutation of the tithes of a parish, are "not expenses of or jucident to making the apportionment," within 6 & 7 Will. 4, c. 71, s. 75; and the attorney may therefore make the order on the ground that they had no power:—Held, that the magistrates had against the landowners who were parties to employing him. Hincheliffe v. Armitstead, 9 M. & W. 155; 11 L. J., Ex. 258; 6 Jur. 693.

Evidence.]—A tithe commutation map is not, under 6 & 7 Will. 4, c. 71, s. 64, admissible in evidence as shewing the boundary of land in a case of disputed title. Wilberfuree v. Hearfield, 46 L. J., Ch. 584; 5 Ch. D. 709; 25 W. R. 861.

The proceedings (properly authenticated) of the tithe commissioners are public evidence of The matters therein stated, and to be received as such. Giffard v. Williams, 38 L. J., Ch. 597; 21 L. T. 575; 18 W. R. 56.

Construction.]—The words "every instrument," in s. 19 of the Tithe Commutation Amendment Act (9 & 10 Vict.e. 73), cannot be read as "every such instrument." Walker v. Bentley, 9 Hare,

Apportionment. ]-By 23 & 24 Viet. c. 93, s. 28, shall have possession of the sealed copy of any confirmed instrument of apportionment, it shall be lawful for any two justices of the peace for the county or other jurisdiction, within which the lands mentioned in the apportionment are situate, upon the application of any person interested in the lands or rent-charge, and upon fourteen days' notice in writing of such application to the person or persons in whose custody such copy shall be at the time of such application, to hear and determine such application :-Held, that such notice refers to a notice of an application that has already been made; and, where fourteen days' notice had been given of an intention to apply to the justices, and they heard the application ex parte, and made an order, the court granted a writ of certiorari to quash it. Reg. v. Sayers, 3 L. T. 405.

Tithe Map-Custody-Order of County Council Power of Justices to enforce Order.]-The appellant L. was the chairman of the parish council of West Meon, and was interested in the tithe apportionment and map of that parish. In 1894 these documents were in the enstody of one A., and kept at his house. In March, 1895, the parish meeting passed a resolution that he should still retain the custody of these documents.

eceilings on the mere ordinary notice of the lot the parish, obtained them. In October of the commissioners under the act, that they should, same year the parish council passed a resolution that they should be handed over to them for custody, but the respondent refused to part with them. In April, 1896, the parish conneil applied to the county conneil under s. 17 (8) of the Local Government Act, 1894, and they ordered that these documents should be placed in such custody as the parish conneil might direct. In February of the present year the order was drawn up, sealed, and served on the respondent, but he refused to comply with it. The appellant then moved before the justices, under s. 28 of the Tithe Act, 1860, for an order that these documents should be moved from the custody of the respondent and deposited in the custody of the parish conneil. The magistrates refused to power to make such an order. Lewis v. Poole, 67 L. J., Q. B. 73; [1898] 1 Q. B. 164; 77 L. T. 369; 46 W. R. 93; 61 J. P. 776,

#### 2. MERGER

Extent of ]—The provision contained in s. 19 of the 9 & 10 Vict. c. 73, that every instrument purporting to merge any tithes, and made with the consent of the commissioners, shall be absolately confirmed and made valid, both at law and in equity, in all respects, is not limited to cases in which the person executing the instrument has a title to the title, but operates as well where such person has no estate in the tithe as where his estate is insufficient to effect the merger. Walker v. Bentley, 9 Hare, 629.

The intention of the legislature was to preclude all questions of merger of tithe in all cases where declarations of merger had been made with Application for Possession of Instrument of the parties affected by an erroneous declaration the consent of the tithe commissioners, leaving whenever any person, other than the persons and, such being the intention, the merger is shall have possession of the same, offected, although the suntention, the merger is shall have possession of the same, offected, although the same of the same. sioners has been erroneously given. Walker v. Bentley, Ib.

## 3. INCLOSURE ACTS.

Generally.] - The commissioner appointed under an inclosure act stated that lands in the parish were subject to a modus, which "extended only to the lands when occupied by the owners thereof," or by residents, but that such lands became liable to the payment of tithes, the amount of which he specified in a schedule, when otherwise occupied, or "if converted into tillage." A resident owner built in one of his fields, then subject to the modus, a house, attached to it a garden, and planted fruit trees on the rest of the field :- Held, that, by the planting of the fruit trees, there had not been a conversion into tillage so as to destroy the modus, and render the hand subject to the increased tithe. Dudman v. Vigar, 42 L. J., C. P. 297; L. R. 6 H. L. 212; 29 L. T. 552; 22 W. R. 170.

The conversion into tillage of any part of the land, if such conversion had actually taken place, would not under this award make the whole field, but only that part of it which was so converted, liable to the increased tithe. Ib,

An inclosure act granted an annual rent of 4s. He died in May of that year, and they still per acre to a rector of a parish, in lieu of tithes, remained in the possession of his family till and enacted that all allotments and the annual and, to prevent the settling of such proportions parish as the commissioner should fix as the proportion the rector should pay, considering the nature of a money payment. The commissioner awarded that the rector's proportion should be "one-fourteenth part of the amount of the rate so made by me as aforesaid," which he declared to be 295t, upon 4,140t. 8s., the ratable value of the lands in the parish :- Held, that such award was bad, not being what the act directed him to do, and that a rate founded upon it could not be supported. Reg. v. Hemsworth Overseers, 3 L. T.

An inclosure act enacted that it should be lawful for the commissioner to apportion the rent-charge in lien of tithes upon such portion as he should think fit of the lands of A. The commissioner apportioned the rent-charge upon all the lands of A. :- Held, that it was not necessary to specify the lands. Willoughby v. Willoughby, 4 Q. B. 687; 12 L. J., Q. B. 281; 7 Jur. 798.

- Re-Apportionment. ]-Under an inclosure act, by which a corn-rent was given to a rector in lieu of certain thes :- Held, that an application for re-ascertainment of the amount of the rent could take place only at the expiration of one of the periods fixed by the act; and, if then omitted, could not be made till the next twenty-one years had expired. Reg. v. Lindsey, J., 13 Q. B. 484; 18 L. J., Q. B. 168; 13 Jur. 491.

See also COMMON.

### 4. AS BETWEEN LANDLORD AND TENANT.

54 Vict. c. 8 (Tithe Act, 1891), s. 1.]-Any lands, after the passing of this art, for the pay-ment of the litherent charge by the occupier, shall be void:

Demise.]—The decision in this case, reported 1 Ir. Ch. R. 401, varied on appeal. A demise of lands and the tithes thereof does not necessarily mean a demise of hands and a demise of tithes as separate and independent properties, but may, if the circumstances of the case warrant such an

Construction-"Charges." ]-A lease contained a covenant that the lessee would pay the rent reserved without any deductions in respect of any taxes, rates, assessments or charges whatsoever, the landlord's property-tax only excepted :-Held, that he was not entitled to deduct the Held, that he was not entired to define the amount of a tithe-rent charge paid by him from the rent payable to the lessor, for that the word "charges" is wide enough to include it, and is not confined to matters ejusdem generis with taxes, rates and assessments. Lockwood v. Wilson, 43 L. J., C. P. 179; 30 L. T. 761; 22 W. R. 919.

"Outgoings." ]—A landlord agreed to let, and a tenant agreed to take, a farm, for a term

rent to the rector should at all times be rated lord to abate 5%, per amount of the rent for the proportionably with other lands in the parish, first two years, in consideration of the condition of the place, and to put the farm into repair, and from creating disputes between the rector and the tenant to keep the same in repair .--Held, parishioners, the rector's rate for ever thereafter that, under the words "free of all outgoings." parishioners, the rector's rate for ever thereafter that, under the words "free of all outgoings," should be in such proportion to the rates of the the tenant was bound to pay the land fax and tithe commutation rent-charge. Parish v. Sleeman, 1 De G. F. & J. 326: 29 L. J., Ch. 96: 6 Jur. (N.S.) 385; 8 W. R. 166.

> Taxes and Assessments. -A. let land to B. at a specified rent, payable without any deduction, except level tax, property tax, and land tax; B. covenanted to pay all taxes and assessments, except such specified taxes; A., besides being owner of the land, was owner of the titherent charge thereon:—Held, that B. was not liable on such covenant for not paying the tithe rent-charge in addition to the specified rent. Jeffery v. Neale, 40 L. J., C. P. 191; L. R. 6 C. P. 240; 24 L. T. 362; 19 W. R. 700.

> Effect of Commutation-On Lessee's Covenants. -A lessee of tithes is liable on his covenant to pay rent, notwithstanding the tithes have been commuted for a rent-charge; his remedy being by surrender of his lease under 6 & 7 Will. 4. c. 71, s. 88. Tasker v. Bullman, 3 Ex. 351; 18 L. J., Ex. 153.

- On Agreement to demise "Tithe Free." -Where A., being the owner of land, and also of the commuted tithes thereof, agreed by parol to demise to B, the land, tithe-free, at a yearly rent :- Held, that, although before the commutation, such an agreement might have operated as an agreement to demise both tithe and land at that joint rent, yet the agreement being after the commutation, the words "tithe free" were surplusage, since by 6 & 7 Will, 4, c, 71, s. 80, if the owner distrained for the rent-charge, the contract made between an occupier and owner of tenant would be entitled to deduct the amount

Indemnity. ]-A declaration alleged that the plaintiff was tenant of a furn to the defendant for a term of years, after the expiration of which there became due and payable from him, to the ecclesiastical commissioners, money in respect of tithe commutation rent charged on the farm and land, which farm and land were interpretation, be construed to mean a demise of liable to the payment of the rent, as the defendands tithe free. Denny v. Deconshire, 1 Ir. Ch. R. dant knew; that, he having neglected to pay that knew; that, he having neglected to pay it, the commissioners, according to the pro-visions of the 6 & 7 Will. 4, c. 71, distrained for it a stack of wheat of the plaintiff, lawfully being on the farm and land, and afterwards sold it, in satisfaction of the sum in arrear, costs and charges, and the plaintiff was deprived of the stack, yet the defendant, though he had notice of these matters, and was requested by the plaintiff to indemnify him, had not indemnified him :-Held, that the declaration shewed no cause of action, the facts stated creating no liability on the part of the defendant to indemnify the plaintiff. Griffinhoofe v. Daubuz (in error), 5 El. & Bl. 746; 25 L. J., Q. B. 237; 2 Jur. (N.S.) 392; 4 W. R. 131-Ex. Ch.

— "Outgoings.")—A landlondagreed to let.

Seb-off.]—Where, in an agreement between and a tenant agreed to take, a farm, for a term of fourteen years, determinable at the end of the officers even years, at the many and the contend upon D's land, D being then lessed of first seven years, at the yearly rent of 40t., pay- a part of the great tithes on the land demised, it able quarterly, "free of all outgoings," the land- was agreed that the defendant should pay 375t.

yearly rent, and all rates, taxes and assessments, and also the vicarial tithes :-Held, that the owners of a rectorial tithe rent-charge from the defendant, in an action for rent by the plaintiff, who had purchased the demised farm from D., was not entitled, under 6 & 7 Will. 4, e. 71, s. 80, to set off a payment made by him to the bishop, estimated rental in respect of the remuneration to set of a payment made by him to the obstop, estimated remain respect to the remindential on account of rent-charge in lieu of tithes after of a collector, legal costs and out-of-pocket the lease of the tithes to D. had expired; the expenses, bad debts and irregularity in payment contained nothing to show that the ments, and tenant's taxes, and also for tenant's land was demised by D. free of rectorial tithes, profits and for the repair of the chancel of the although it did contain the stipulation that the defendant should pay the vicarial tithes, and although the defendant had never paid anything by way of tithes to D. or to the plaintiff. Forbes v. Elderfield, 4 W. R. 15.

Tithe Act, 1891-Failure by Landowner to give Notice of Liability of Occupier.]—The county court judge, in granting a certificate under s. 2, sub-s. 6 of the Tithe Act, 1891, has only to consider whether there has been good cause for the landlord's failure to give the notice to the tithe-owner, and whether the tenant has been prejudiced by the failure to do so; he has not to construe the tenant's lease or his liability thereunder. Hughes v. Himmer, [1893] 2 Q. B. 314; 5 R. 475; 69 L. T. 417; 42 W. R. 79; 58 J. P. 23.

## 5. RATES AND TAXES.

Rates-How recoverable: ]-Where the owner of a tithe rent-charge does not pay the rates to which he is assessed in respect thereof, the amount is recovered from one or more of the occupiers of the land out of which such rentcharge issues, and not from the owner of such rent-charge. Lamplugh v. Yalding Overseers, 58 L. J., Q. B. 279; 22 Q. B. D. 452; 37 W. R. 422; 53 J. P. 389—C. A.

Poor-rate. The impropriate rectory and tithe rent-charge of a parish, and a piece of land thereunto appertaining, were vested in the archbishops of Canterbury, one of whom, under the statutory power given for that purpose, granted to the perpetual curates of T. for ever an annual rent of 40%, to be charged upon, and yearly issuing out of, the rectory, rent-charge and land. A lease of the same was afterwards granted by the archbishop to G., who paid a rent calculated on the basis that the curate's portion would have to be paid to him by G., which G. accordingly did : -Held, that G. ought not, in assessing the value of his occupation for the purposes of poor-rate, to be allowed to deduct the sum paid to the perpetual curate, as that was only a part of the rent. Reg. v. Groves, 2 El. & El. 793; 29 L. J., M. C. 179; 6 Jur. (N.S.) 1014; 8 W. R. 434. Also, Rey. v. Sherford, 8 B. & S. 596; 36 L. J., M. C. 113; L. R. 2 Q. B. 503; 16 L. T. 663; 15 W. R. 1035.

Measure of Assessment.]-A tithe rentcharge is to be assessed to the poor-rate, like all other property, according to the sum for which it might reasonably be expected to let from year to year, and, in deciding upon such amount, it must be considered whether, in each particular case, anything over the expenses for collecting. and the allowances for bad debts and legal and other expenses, would be necessary to induce a tenant to take it. St. Asaph (Dean) v. Llantenant to take it. Sc. Asaph (Deen) v. Llan-rhaiadr-yn-Mochaant Overseers, 66 L. J., Q. B. 267; [1897] 1 Q. B. 511; 76 L. T. 42; 45 W. R. 374; 61 J. P. 213—C. A.

Upon an appeal to quarter sessions by the decision of an assessment committee as to the ratable value thereof, the court of quarter sessions allowed deductions from the gross parish church :-Held, on appeal, first, that in the absence of a finding of fact that the amount allowed for the expenses of collection, bad debts, and legal and other expenses was insufficient to induce a tenant to take the tithe rent-charge without a further allowance, the court of quarter sessions were wrong in allowing a deduction for tenant's profits; and, secondly, that, as it did not appear that a tenant could be charged with the repair of the chancel of the church, the deduction upon that ground was also wrong, Reg. v. Goodchild (El. Bl. & El. 1; 27 L. J., M. C. 233) followed. Ib.

Annual Value for Purposes of Property Tax. ]-In estimating the "annual value" of tithe commutation rent-charge for the purpose of charging the owner thereof with property tax under 16 & 17 Vict. c. 34, s. 32, the amount necessarily expended by him in collection of the tithe rentcharge must be deducted. Stevens v. Bishop, 57 L. J., Q. B. 283: 20 Q. B. D. 442; 58 L. T. 669; 36 W. R. 421; 52 J. P. 548—C. A.

Repayment of Money borrowed under 5 Geo. 4, c. 36.]-The owner of tithe or tithe rentcharge is liable to be assessed to a rate made under 5 Geo. 4, c. 36, s. 1, for the repayment of money borrowed under that act from the public works loan commissioners for the repair of the parish church, notwithstanding his exemption from church-rates. Smallbanes v. Edney, 7 Moore, P. C. (N.S.) 286; 40 L. J., Ecc. 8; L. R. 3 P. C. 444; 24 L. T. 241; 19 W. R. 287.

General Rate, Lighting Rate, Sewers Rate.] A commutation tithe rent-charge is liable to the general rate and lighting rate levied under 18 & 19 Viet. c. 120, s. 161, but not to the sewers rate, being within the exemption of s. 164, when the practice, before the 18 & 19 Vict. c, 112, was the practice, periors the 10 & 12 vict. C. 112, who to exempt the tithes of the parish from the sewers rate. Ileg. v. Goodchild, El. Bl. & El. 1; 27 L. J., M. C. 251; 4 Jur. (N.S.) 1050.

In City of London. ]-By 37 Hen. 8, c. 12, provision was made for payment to the clergy of the city of London and their successors of a rate made upon the inhabitants and calculated upon the rent of the houses in the city. In this and several subsequent statutes these payments were described as tithes. A special act passed in 1881 provided that all tithes, and sums of money in lien of tithes, arising or growing due in a parish in Loudon should cease and be extinguished, and the tithe-owner should receive, in lieu and satisfaction thereof, a fixed annual sum, to be levied and collected in the same manner as the poorrates. Neither the above-mentioned tithes, nor the fixed annual sum in lieu thereof, had ever been assessed for the relief of the poor :-Held, that the owner was not ratable to the poor-rate in respect of this fixed annual sum, as such sum was a personal payment, and was not a payment in lieu of tithes ratable under 43 Eliz. c. 2. Esdaile v. City of London Union, 56 L. J., M. C.

722; 51 J. P. 564-C. A.

Land Tax.]—The annual rent-charge payable under the Extraordinary Tithe Redemption Act, 1886, in lieu of the extraordinary charge pre-viously levied under the Tithe Commutation viously levied under the 11the Commutation Acts, is not liable to laud-tax. *Curr v. Fuele*, 62 L. J. Q. B. 177; [1893] 1 Q. B. 251; 5 R. 163; 68 L. T. 123; 41 W. R. 365; 57 J. P. 136.

Arrears of Rates upon Tithe Rent-charge due before passing of Tithe Act, 1891.]—Having regard to the provisions of s. 6 of the Tithe Act, 1891, the machinery under the repealed Tithe Acts, 1836 and 1837, cannot be applied to the recovery of arrears of rates due before the passing of the act of 1891. Sect. 38, sub-s. 2 of the Interpretation Act, 1889, does not affect the matter. An occupier of lands is, therefore, not entitled to deduct from his rent any money paid by him after the passing of the Tithe Act, 1891, in respect of arrears of rates due before the passing thereof. Such a payment by an occupier being voluntary, a landowner cannot deduct the amount from payments made by him to the tithe-owner (Kay, L.J., dissenting). *Jones* v. *Potts*, 63 I., J., Q. B. 381; [1894] I. Q. B. 213; 9 R. 230; 69 L. T. 849; 42 W. R. 294; 58 J. P. 333-C. A.

#### 6. EXTRAORDINARY TITHE.

What Lands liable.]—The power of the tithe commissioners, under 6 & 7 Will. 4, c, 71, s. 42 (repealed), and 23 & 24 Vict. c. 93, s. 42 (repealed), to impose an extraordinary charge on lands in a parish newly cultivated as hop grounds or market gardens, is not limited to lands in a parish in which a district had been assigned at the time of the commutation within which such extraordinary charge should be payable, but such charge may be made although no district had ever been so assigned. Russell v. Tithe Commissioners, 40 L. J., C. P. 265; L. R. 6 C. P. 596; 24 L. T. 908; 19 W. R. 1007.

Where lands, at the time of a commutation and apportionment, were not liable to, and did not pay, any tithes; but such lands are afterwards inclosed, and are cultivated as hop grounds, they become liable, under 6 & 7 Will. 4, c. 71, s. 42, to pay the extraordinary charge fixed by the commissioners to be paid by lands fixed by the commissioners to be paid by lands in the particular district cultivated as hop grounds. Walsh v. Trimmer, 36 L. J., Q. B. 318; L. R. 2 H. L. 208; 16 L. T. 722; 15 W. R. 1150.

Contribution - Jurisdiction. ] - Where land. belonging to two or more owners, is charged with one smount of rent-charge by the land commissioners, acting under the provisions of the Extraordinary Tithe Redemption Act, 1886, one of such owners who has paid the whole of such rent-charge must claim contribution or apportionment from the other owners under the provisions of s. 16 of the Tithe Commutation Act, 1842; that is, before justices. In such a case, a county court has no jurisdiction. Simmonds v. Heath, 62 L. J., Q. B. 445; 5 R. 550; 69 L. T. 442; 42 W. R. 30.

149; 19 Q. B. D. 481; 57 L. T. 749; 35 W. R. to the plaintiff. Subsequently, the land commissioners ascertained and certified the capital value of the extraordinary charge on the whole farm :-Held, that, inasmuch as, before the passing of the act of 1886, the extraordinary charge was only a charge on the land cultivated as a hop ground, the annual rent-charge payable under s. 4 of the act of 1886 was only a charge on the land so cultivated, notwithstanding that the commissioners had assessed it in respect of the whole farm : and that, therefore, the defendant was not liable to contribute towards payment of the charge. S. C., 63 L. J., Q. B. 214; [1894] 1 Q. B. 29; 9 R. 29; 69 L. T. 841; 42 W. R. 122; 58 J. P. 180—C. A.

Incidence and Apportionment. ]—See the Extra-ordinary Tithe Act, 1897, 60 & 61 Vict. c. 23.

#### 7. PRESCRIPTION ACT AND STATUTE OF LIMITATIONS.

Limitation. ]-The Statute of Limitations cannot be pleaded to a bill for tithes. Marston v.

Cleypole, Bunb. 213.
The right to tithe rent-charge in Ireland was vested in a spiritual corporation sole until 1871, when it was transferred by statute to a lay corporation. In 1877 the lay corporation brought an action against the persons liable to pay tithe rent-charge to recover six years' arrears. more than twenty years next before action there had been no payment and no acknowledgment in writing:—Held, that the tithe rent-charge was "rent" within s. I of the Statute of Limitations (3 & 4 Will. 4, c. 27), and not a "composition" within the exception to s. I, compositions in Ireland having been abolished by 1 & 2 Viet. c. 109; that s, 2 of 3 & 4 Will, 4, c, 27, applied as between the owner and the persons liable to tithe rent-charge; that the lay corporation could not avail themselves of the provisions of s. 29 in favour of spiritual corporations sole; and that the action was barred by the lapse of twenty years. Irish Land Commission v. Grant, 10 App. Cas. 14; 52 L. T. 228; 33 W. R. 357—H. L. (Ir.)

A suit was instituted for the tithes of a par-ticular district in a parish. The whole tithes of that parish had been demised by general words, but it was not asserted that the lease had been granted with a view to the tithes claimed by the ill, or that the lessee had paid or received anything on account of them :-Held, that the out-standing lease did not prevent the operation of the Statute of Limitations running as regarded the particular tithes claimed. Ely (Dean and Chapter) v. Hiss, 5 Beav. 574; 11 L. J., Ch. 351; 6 Jur. 496.

The right to tithes as against an ecclesiastical corporation aggregate is barred under the 3 & 4 Will. 4, c. 27, by nonpayment for twenty years.

Where, on a bill for tithes of a district of the parish recently brought into cultivation; plea, nonpayment and no acknowledgment of the right within twenty years (under 3 & 4 Will. 4, c. 27) before the commencement of the suit ; that the district was not exempt; that a decree of the passing of the Extraordinary of the Redemption Act, 1886, a farm called Boxall's Farm, was owned by one man, part of which was cultivated as a hop ground. After the passing of the act, he sold part of the farm to the defendant, and part containing the hop ground. it appeared from the bill, by way of evidence,

time the act took effect, but no payment or although that fact was clearly established by the right of action and the nonpayment during

Prescription. ]-The act 2 & 3 Will. 4, c. 100. is nuaffected by the provisions of the act 3 & 4 Will. 4, c. 27; the interpretation clause of the latter act, although enacting that the word hand" shall in its meaning extend to tithes, has reference to an estate in tithes, and not to tithes as a chattel, and the 2nd section, therefore, does not embrace the case of a render of tithes these not enibrace the case or a remer or others as a chartel by the person bound to pay to the tithe owner. S. C., 2 De G. M. & G. 459.

The statute 2 & 3 Will. 4, c. 100, brings down

the period of legal memory from the time of I Rich, I to the time of the commencement of the two incumbencies (not being together less than sixty years) and three years of a third incombency, but does not create a new ground of exemption, or destroy the right to tithes, apon mere proof of nonpayment or nonrender during two such incumbencies and three years of a third, in cases where proof of nonpayment, or nonrender, from the time of 1 Rich. 1, would, or nonrender, from the time of 1 Rich, 1 would, before the statute 2 & 3 Will, 4, e 100, have established no exemption. Subleta v. Johnston, Hare, 190; 11 L. J., Ch., 201; 6 Jur. Reversed, 1 Mac. & G., 242; 1 H. & Tw. 521; 18 L. J., Ch., 493; 14 Jur. 1. And see M. C. at law, 2 Mim. Gr. & Sc. 749; 2 Ex. 256; 18 L. J., Ch., 400; 10 L. J., 2 L. J., 3 L. J

The object of the Tithe Prescription Act (2 & 3 Will. 4, c. 100), to be inferred from its preamble, as explained by the enacting part, was to prevent the expense and inconvenience of suits for tithes, by establishing certain limitations of time, after which claims of moduses and discharges should not be questioned. And and discharges should not be questioned. And the effect of the act, as applicable to claims of exemption, is not only to facilitate the proof of exemption de facto for the time past, but to dispense with the proof (which was before required from laymen) of any legal origin of such exemption. Att. Gen. v. Darham (Earl), 46 L. T. 16.

And semble (though the opinion of the majority of the judges consulted was to the contrary), that the act applies to cases in which it appears that the lands have paid tithes of some tithable matters, other than those for which the exemption is claimed, and even where such last-mentioned matters are of modern introduction, as well as to eases in which the lands have been enjoyed without payment of any tithes. Ih.

But :- Hekl, that, at all events, it is sufficient, even in a case of the former description, for the occupier to allege and prove that his lands have been enjoyed for the prescribed period, without payment of the tithes demanded, miless the party claiming the tithes shall specifically allege, as well as prove, that other tithes have during that period been paid. And, therefore, where a bill by a vicar for some particular tithes contailed no such allegation, and the defendants alleged and proved that their lands had been enjoyed for the prescribed period, without payment of the tithes demanded, or any money or other matter in lieu thereof, it was :- Held, that the court could not notice the fact that tithes of other matters had been paid for the same lands,

the act rook enect, but no payment or although that fact was clearly established by the receipt of tithes in respect of the particular cyclence in the cause; and, therefore, that district was ever made :—Held, that, shewing a whether the fact were so or not, the defence set up was, upon these pleadings, a complete answer above the period prescribed by the act, the plan to the plaintiffs demand, and the bill was accordingly dismissed. Ib.

> Six Years' Arrears. ]-Courts of equity are not bound in tithe causes to any limitation in point of time for which tithes are sought, although, a convenienti, it has been usual to confine the account to the period of six years where the court sees no reason to depart from such usage. St. Paul's (Wardens) v. Lincoln (Bishop), 4 Price, 86.

In a suit in equity for an account of tithes, the defendant set up an award, which declared that a certain sum should be paid in lien of tithes, provided the whole lands were subject to tithes; but, if only subject to titles according to a specified terrier, then a different sum was awarded. The defendant's counsel also set up at the hearing the statute 53 Geo. 3. c. 127, as a bar to the recovery of tithes for more than six years. The statute was not pleaded by the answer of the defendant :—Held, that the award, not being final, was void, but that the plaintiff was only entitled to an account of tithes for six years before the filing of the bill. Goode v. Waters, 20 L. J., Ch. 72

Practice — Amendment.] — A bill for tithes having been filed within the period limited by the statute 8 & 4 Will. 4, and amended after that period for the purpose of adding another party:— Held, sufficient as against the last party, inasmuch as the bill and amended bill formed bub one record. Thorpe v. Mattingley, 2 Y. & Coll. 421; S. L. J., Ex. Eq. 9.

### S. REDEMPTION.

Jurisdiction of County Court.]—A county court has inrisdiction since the Tithe Act, 1891, to hear and determine actions brought for recovery of redemption-money and expenses incident to the redemption of a title rent-charge. Reg. v. Essex County Court Judge, 64 L. J., Q. B. 20; [1895] 1 Q. B. 31; 15 R. 79; 71 L. T. 671; 43 W. R. 127.

### 9. REMISSION.

Certificate of Annual Value-Tithe Act, 1891, s. 8.]-An owner-occupier of agricultural land 8. 8.)—An owner-occupier or agricultural mana-cexercised the option given by a 18 of the Inland Revenue Act, 1887, to be assessed for property and income-tax purposes under schedule D. in lieu of schedule B. He subsequently applied under the Tithe Act, 1891, s. 8, sub-s. 5, for a certificate from the district commissioners of taxes of the annual value of his land. The commissioners declined to give the certificate unless the applicant first consented to have his land assessed for the purposes of schedule B, under sub-s, 4 of the lastmentioned act :-Held, that the commissioners were right, inasmuch as the certificate to be granted under sub-s. 5 of s. 8 of the Tithe Act, 1891, only applied to the annual value of land under that section, and that section referred only to asse ments ascertained and entered under schedule Bor, if not already so entered, to be ascertained for the purposes of the said schedule B. under sub-s. 4; and that no assessment under schedule D. was made applicable for the purposes of remission of tithe-rent charge under this section. Reg. v. Petersfield Tax Commissioners, 63 L. J., Q. B. 357.

Commissioners. - Where a tithe rent-charge is reduced under s. 8, sub-s. (i.) of the Tithe Act, 1881, in consequence of a lower assessment under schedule B. of the Income Tax Act, 1853, being made by the commissioners upon appeal from the surveyor, the owner may, if he has not had notice of, and has not been represented at, the hearing, appeal to them against their previous decision, under the provisions of sub-s. (iii.) of s, 8 of the Tithe Act, 1801. Reg. v. Commissioners of Taxes for Barnstable Division of Essex, Gibson, Ex-parte, 64 L. J., Q. B. 759; [1895] 2 Q. B. 123; 15 R. 471; 72 L. T. 800; 48 W. R. 666; 59 J. P.

#### 10. RECOVERY.

See Tithe Act, 1891 (54 Vict. c. 8), ss. 1, 2, for recent changes in the law.

#### a. By Distress.

Where Distress not sufficient. ]-If the halfyearly payments of the rent-charge are in arrear, and no sufficient distress found an owner of the rent-charge may recover such arrear, for a period not exceeding two years, by inquisition and writ of habere facias possessionem under 6 & 7 Will. 4, c. 71, s. 82, although he may not have attempted to levy the arrears by distress, under s. 81, at the end of each, or any but the last, of the half-years; and although, at the end of one or more of such previous half-years, there may have been a sufficient distress for the amount then due. Camberwell Rent-charge, In re, 4 Q. B. 151; 3 G. & D. 365; 12 L. J., Q. B. 155; 7 Jur. 128.

A tithe rent-charge owner is bound, in estimating whether there is any sufficient distress on the premises, in respect of which the tithe rentcharge is in arrear, to include the value of a growing crop, although not in such a state as to come to maturity and to be capable of realisation within forty days from the date of entry. Within Tork days from the date of chtry. Plumpton Tithe Rent-charge, In re, Arnison, Ex parte, 37 L. J., Ex. 57; L. R. 3 Ex. 56; 17 L. T. 480; 16 W. R. 368.

Distress ineffectual—Arrears not recoverable by Sale.]—By the 67th section of the Tithe Commutation Act (6 & 7 Will. 4, c. 71), the sam thenceforth payable in lien of tithes is declared to be "in the nature of a rent-charge issuing out of the lands charged therewith." Lands in respect of which a tithe rent-charge was payable having become unproductive, and the remedy by distress and entry having become ineffectual :-Held, that the sum payable in lieu of tithes is not by the statute rendered a charge on the inheritance; and that the owner of the rentcharge was not entitled to claim a sale of the lands in order to recover the arrears of his rent-charge. Bailey v. Badham, 54 L. J., Ch. 1067;
 30 Ch. D. 84; 53 L. T. 13; 33 W. R. 770; 49

day for a man in possession of a grass crop dis-trained for arrears of rent-charge less than 201. in amount, is excessive, notwithstanding 57 Geo. 3, c. 93, s. 1. Ib.

A rick of wheat of the value of 62l. was seized as a distress for 391., arrears of a tithe rent-

Appeal against Assessment of Income Tax | the tenant was under covenant with his landlord to consume it on the farm, the tithe rent-charge owner sold the wheat only, the buyer to thresh it on the premises and leave the straw. The value of the wheat was  $42l_{\odot}$ , that of the straw 201. :- Held, that the tithe rent-charge owner was justified in seizing the entire rick, and, although there was other property on the premises, that the distress was not excessive. Roden v. Eyton, 6 C. B. 427; 18 L. J., C. P. 1; 12 Jur. 921.

The sworn appraisers by whom the distress is valued must be persons reasonably competent, but need not be professional appraisers. Ib.

Inclosure Act.] - An inclosure act, reciting that there were owners of old inclosed lands within a parish, provided that the tithes should be extinguished, and certain yearly corn-rents substituted, to be payable for ever out of the lands to be charged therewith as aforesaid. It also provided that the rector, in addition to all present powers for recovery of tithes and compositions, should have the same powers for recovering them as by common law or statute given to landlords for the recovery of rack-rent in arrear. It further provided for the apportionment of the rent-charge in case of the division of the land, and enacted that such apportioned part of the rent might be recovered from the lands socharged therewith, or from the owners thereof, in the same manner as the whole yearly cornrents:—Held, that a distress by the rector for the amount of the rent-charge imposed upon lands of a proprietor acquired by him before the passing of the act, and also for the amount of the rent-charge imposed upon other lands in the parish acquired by him since the passing of the act, jointly, was illegal. Bedford v. Sutton Coldfield, 3 C. B. (N.S.) 449; 27 L. J., C. P. 105; 4 Jnr. (N.s.) 133.

Held, also, that a distress might be levied in respect of the whole rent-charge imposed on all the lands in the parish belonging to the same owner, upon an occupier of any part thereof.

Judge's Order.]—The judge's order, under 6 & 7 Will, 4, c. 71, s. 82, may be made on an exparteapplication. Hammersmith Rent-charge, In re. 4 Ex. 87; 19 L. J., Ex. 66.

Costs of Rule to set aside Order. |-The court discharged a rule obtained for setting aside anorder so made, without giving any directions asto the costs of shewing canse :- Held, that the costs upon the rule were properly taxed as costs of the inquisition, for which the writ of haberefacias possessionem might issue. S. C., 1 L. M. & P. 578; 19 L. J., Ex. 357.

Double Costs.]-The owner of a tithe rentcharge distraining, and afterwards obtaining judgment in replevin, is not entitled to double costs under 11 Geo. 2, c. 19, s. 22; neither, consequently, is he entitled to the "full and reason-Excessive Distress.]—A charge of 2s. 6d. per double costs by 5 & 6 Vict. c. 97, s. 2. Newnham v. Berer, 8 C. B. 560; 7 D. & L. 253; 19 L. J., C. P. 129.

Companies Act, 1862. -An injunction will not be granted under this act, ss. 87 & 163, torestrain proceedings under a distress for arrears. charge. It being doubtful in point of law of a tithe rent-charge. Trimsaran Coal, Irrne whether the straw could be sold, inasmuch as and Steel Co., In ra, 24 W. R. 900. b. By Action.

When Action lies.]—An inclosure act enacted that, where the rent-charge apportioned in lien of tithes by vitue of the act should be unpaid for three months, the rector should have such and the like powers and remedies for recovering the same as by the common law or statute are given to laudlords for the recovery of rent. Semble, that an action would lie by the rector. Willoughby, 4 Q. B. 687; 12 L. J., Q. B. 281; 7 Jur. 798.

An inclosure act, reciting that there were owners of old inclosed lands within a parish, provided that the tithes should be extinguished. and certain yearly corn-rents substituted, to be payable for ever out of the lands to be charged therewith as aforesaid. It also provided that the rector, in addition to all present powers for recovery of tithes and compositions, should have the same powers for recovering them as by common law or statute given to landlords for the recovery of rack-rent in arrear. It further, having provided for the apportionment of the rent-charge in case of the division of the land. enacted that such apportioned part of the rent might be recovered from the lands so charged therewith, or from the owners thereof, in the same manner as the whole of the said yearly corn-rents were thereby made recoverable :-Held, that the rector could not maintain an action against the owners of the land for the Bedford v. Sutton Coldfield, 3 C. B. (N.S.) 449; 27 L. J., C. P. 105; 4 Jm. (N.S.) 133.

Recovery of Arrears -- Contribution. ] -- The defendant was the owner and occupier of certain ducfiltant was the owner and tocopies of carrier aluds in the parish of P., which by a private act were charged with the payment to the vicar of 270l. in lieu of all tithes. The act provided that if the anumal rents were in arrear, the vicar was to have such and the same powers and remedies for recovering the same as by the laws and statutes of the realm are provided for the recovery of rent in arrear; and also that, if no sufficient distress was found on the premises, the vicar might cuter and take possession of the same until the arrears were satisfied. Four years' arrears of the annual rent accrued in respect of the whole of the lands charged, during the whole of which period the defendant was the owner and occupier of a portion only of such lands :- Held, that the vicar might maintain an action of debt against the defendant for the whole amount in arrear, the remedy by real action, which was a higher remedy than the action by debt, having been abolished by 3 & 4 Will. 4, c. 27, s. 36. And held, further, that the defendant had his remedy in an action against the co-owners for contribution. Christic v. Barker, 53 L. J., Q. B. 537—C. A.

Persons entitled in Moieties. ]—A. and B. were caustilled to tithes in equal moieties; B. under 2 Ves. & B. I. mistake received the whole. A bill filed by A. against B. for his moiety dismissed with costs. Clarke v. Yonge, Young v. Yonge, 5 Beav. 523.

How computed 37 He in the pound, in the pound in

Small Tithes.]—The 5 & 6 Will. 4, c. 74, which cancted that no suit or other proceeding shall be had or instituted in any court for or in respect of any tithes withheld, of or under the yearly value of 10L, took away the action for treble value given by 2 & 3 Edw. 6, c. 13, for not setting out.

tithes. Peyton v. Watson, 2 G. & D. 750; 3 Q. B. 658; 11 L. J., Q. B. 271; 6 Jur. 856.

Proceedings before Justices.]—Since 5 & 6 Will. 4, c. 74, if any tithe, oblation or composition, not excepted in 7 & 8 Will. 3, c. 6 (made perpetual by 3 & 4 Anne, c. 18, s. 1), or exceeding 10. yearly value, due from any one person, is in arrear, it must be proceeded for before two instices, and if the title of the chimant, or liability of the party sought to be charged, is undisputed, two years arrears may be there recovered; whereas, if such title or liability is denited viva voce before the justices, or at any time in writing, the claimant night proceed by sait in equity and recover six years' arrears. Robinson v. Pacedaq, 16 M. & W. 11.

Ou the hearing of an appenl at quarter sessions, under 7 & 8 Will. 3, c. 6, s. 7, gardist an order of justices for the payment of small tithes, oblations, &c., the respondent may addince evidence additional to that given before the justices. Heg. v. Halt, 35 L. J., M. C. 251; L. R. 1 Q. B. 632; 12-Jur. (x.s.) 820;

Contribution of Proportion of Rent-charge, ]—An order for payment of contribution of a proportion of the tithe rent-charge, under 5 & 6 Vet. c. 54, s. 16, after stating that complaint was made on each before the two justices signing the order of the several matters required to give jurisdiction, proceeded, "and now at this day E. H. and E. W., the parties aforesaid, appearbefore us the undersigned justices, and we, having examined futo the merits of the complaint, do, in pursance of the statute in that case made and provided, determine," &c. :—Held, that there appeared no sufficient determination of the facts of complaint, and therefore that the order was bad on the face of it. Reg. v. Williams, 18 Q. B. 303; 21 L. J., M. C. 150; 16 Jur. 1055.

#### 11. IN LONDON.

Generally.]—Decree, under the statute 37 Hen. S, for payment of tithes in London as to warchouses-creeted by the East India Company upon the site of old buildings, and occupied by them, at 2s. 9d. in the pound upon the value, to be let, without an issue, no specific customary payment in lieu of tithes being alleged. Antrobus v. East. India to A. 13 Ves. 9.

Bill had been filed under startute 37 Hen. 8, c. 12, to recover 2x. 9d. in the pound for tithes, and an issue was refused, under these circumstances: iffirst, mispleading; the defendants not stating customary payments by their answer, but adopting ore tenus payments disclosed by the answer to their cross bill, instead of moving for leave to file a supplemental answer; secondly, the improbability of establishing three payments, after two unsuccessful trials at her in another cause. St. Paul's (Warden) v. Kettle, 9 Ver. 8. B.

How computed.]—Titles in the city of London under 37 Hen. 8. c. 12, at the rate of 2s. 9d. in the pound, are to be computed, not merely on the rent reserved by the lease, but on the full annual improved value of the premises to let. *Tirion v. Unchram*, \* De G. M. & G. 818: 25 L. J., Ch. 858; 1 Jur. (K.S.) 809; 3 W. R. 254.

Houses not let.]—The second resolution in Skidmore v. Bell (2nd Inst., 660), to the effect

and shall pay no tithes by force of the decree can defined under the act 37 Hen. 8, c. 12. Latta v. London made under 37 Hen. 8, c. 12, is not now law. 1b. | Ch. 684.

Meaning of "Rent." |- The term "rent," used in a decree, under statute 37 Hen. 8, c. 12, relating to tithes in London, means rent actually and bona fide received, without fraud or covin, and not the annual value of the premises let. Fines, to whatever amount, paid on the renewal of leases of dwelling-houses, are not to be considered as increase of rent, or to be taken into calculation in estimating the amount of tithes due, provided the rent reserved is equal to that at which the

Nonpayment ]—Mere nonpayment of tithes under statute 37 Hen. 8, c. 12, is no answer to a claim for them; as it would be no answer to a claim for tithes at common law. St. Paul's (Warden) v. Kettle, 2 Ves. & B. 1.

Exemption.]—A certain enstomary payment in Loudon, in lieu of tithes, may be good so as to exempt an individual house, if usually made a sufficient time to acquire the character of customary in the Ecclesiastical Court, though within time of memory, and not general through the place or parish. St. Paul's (Warden) v. Kettle, Ib. By the London City Tithes Act, 1864 (27 & 28

Vict. c. 268), s. 7, an occupier of property, which, although subject to poor rates, is exempt from tithes, shall continue to be exempt in the same manuer as if the not had not been passed. In 1856, the rector of one of the parishes subject to the act leased the basement, yard, ground floor and first floor of his rectory house for twenty-one years, reserving to himself the upper part of the house for his own residence :- Held, that the occupiers of the leased part of the rectory were L. T. 509.

- Computation. ]-The right of exemption from tithes, and the mode of computing them in the deanery of St. Paul's, London. St. Paul's (Warden) v. Lincoln (Bishop), 4 Price, 65.

Deanery of St. Paul's. -The deanery-house, or residence of the dean of St. Paul's, is liable to tithes at 2s. 9d. in the pound, on the full value. St. Paul's (Warden) v. St. Paul's (Dean), 1

St. Saviour's, Southwark. ]-Houses in St. Saviour's, Southwark, shall pay tithe, it being the only provision made for the minister. Poeack v. Titmarsh, Bunb. 102.

Consultation on Prohibition. ]-By the statute 37 Hen. 8, c. 12, all houses in London shall pay tithe according to their ordinances, except the houses of noblemen; therefore, a surmise that a house in London was a priory, and discharged from tithe by the pope's bull, and by the statute 31 Hen. 8, which gave the possessions to the Crown, will not prevent a consultation being awarded on a prohibition prayed against a suit in the spiritual court. Green v. Pipe, or Grene v. Piper, Moor, 912. See Cro. Eliz. 276; 3 C. Dig. 108; 1 Roll. Abr. 636; Hob. 11; 11 Co. Rep. 16, a.

Reference-Form.]-Form of reference to the master to ascertain the value of the London H. L. (E.)

that " such houses as were never letten to farm, | Corn Exchange in regard to its liability to tithe

Practice.]-A bill lies in the Exchequer for nonpayment of tithes in London, according to the decree in 37 Hen. 8. Langham v. Baker, Hardr. 116.

Jurisdiction.]—Notwithstanding the statute and decree 37 Hen. 8, c. 12, the Court of Chancery has jurisdiction upon the subject of tithes in London. An account was decreed according to the improved reut. Another defendant, houses have been at any time before let. St. setting forth his lease at a low rent and a flue, Paul's (Minor Canons) v. Crickett, 5 Price, 14. and alleging by answer that he had never heard of any greater rent being paid, there being no evidence against it, was held liable only according to that rent. St. Paul's (Wardon) v. Crickett, 2 Ves. J. 563.

> Issue. ]-A parson sues for 2s. 9d. per pound for titles of houses in London, under the statute 37 Hen. 8. But an issue was directed to try whether less than that sum had ever been paid, although there was no proof of any regular modus. Bannet v. Treppass, 4 Bro. P. C. 650. Affirming Bunb, 106; Gilb. Eq. Rep. 191.

Evidence. ]-The books of former rectors may be produced in evidence, upon an issue to try whether there had been any variation as to sums paid for tithe in London. Ih.

Presumption of Inrolment. ]-A decree concerning the payment of tithes within the city of London was made under 37 Hen. 8, c. 12, but no involment of it in chancery could be produced, though the decree appeared, by a statement in the registry book of the see of London, to have been given to Archbishop Bonner, the bishop of not exempt from liability. Reg. v. Fenner, 31 London, to be kept in the registry of St. Paul's cathedral. As the courts have repeatedly treated the decree as a binding instrument, and the citizens have recognised it by the usage of paying tithes according to its order, the involuent must be presumed. Macdonyall v. Purrier, 2 Dow. & Cl. 135. See Macdonyal v. Young, 2 Car. & P. 278 : R. & M. 392.

> Prescription-Limitation.]-A lay impropriator of the tithes in a parish within the city having brought an action to recover from the inhabitants of certain houses within the parish tithes payable under 37 Hen. 8, c. 12, it appeared that (so far as was known) no tithes or payments in lien of tithes had ever been paid in respect of those houses:—Held, upon the authority of Andrews v. Drever (3 Cl. & F. 314) that (apart from statute) mere nonpayment afforded no defence even against a lay impropriator, that the payments imposed by 37 Hen. 8, c. 12, were not a render of tithes in kind within the meaning of the Tithe Prescription Act (2 & 3 Will. 4, c. 100, s. 1), and that that act afforded no defence, and that the payments imposed by 37 Hen. 8, c. 12, were "annuities or periodical sums of money charged upon land" within the meaning of the Statute of Limitations (3 & 4 Will, 4, c, 27, s, 1), and that the statute (as amended by 37 & 38 Vict. c. 57) afforded a defence to the action. Payne v. Esdaile, 58 L. J., Ch. 299; 13 App. Cas. 613; 59 L. T. 568; 37 W. R. 278; 53 J. P. 100—

Compulsory Purchase by Railway Company.] Lloyd, 58 L. J., Q. B. 122; 22 Q. B. D. 157; 60
-Where a railway company is given compulsory | L. T. 675; 37 W. R. 381; 53 J. P. 310 -Where a railway company is given compulsory powers, under a special act, to take property subject to tithes, on condition that the owner of the tithes was indemnified, either by their being still paid to him, according to the last annual assessment, or by purchasing them under the Lands Clauses Act. 1845, upon payment of compensation; and the company elected to purchase the tithes :- Held, that the last annual assessment was not to be taken as the basis for estimating the compensation to be so paid.

Place of Burlal. —Or to compel a rector to

Esdaile v. Metropolitan and District Rys., 46 bury the corpse of a parishioner in a vanit, or in J. P. 103.

— Houses pulled down by Railway Company—Indemnity by Company.]—By 37 Hen. S, c. 12, the inhabitants of the parishes in Londou therein mentioned are to pay tithes at the rate of 2s. 9d. in the pound on their rent. By a railway act, it was enacted that, where houses in these parishes shall be taken for the railway. after the occupiers shall have quitted their houses, and until new houses shall be erected. and occupied, of such annual rent or value that the titles of such new houses shall be cound to the tithes payable for the houses quitted, the tithes, or payments in lieu of tithes, payable in respect of the houses quitted (according to the last assessments to the 25th March, 1839), or annual sums of money equal to the loss in tithes which the rectors may sustain by taking down such houses, shall be payable to the rectors. The company removed houses, and built others which were at once occupied :- Held, that the object of the act was only indemnity to the clergy : that, therefore, the clergy were entitled to receive only what they would have received if the company had never interfered with the premises; that the company was liable to pay in respect of houses removed (where no others had been built in their places) such sums as were actually paid to the rector, whether by agreement or otherwise, up to the 25th March, 1839; that the amount before agreed upon between the restor and the occupant, and paid by the occupant, constituted the "assessment," and that the amount of compensation must be measured thereby; and further, that, where new honses had been built and occupied, the company was entitled to be credited (in reduction of its general liability to make compensation) with the sums which had become payable in respect of such new houses, and not merely with those which had been actually received therefrom.

Landon and Blackwall Ru, v. Letts, 3 H. L. Cas. 470; 15 Jur. 995. Reversing 5 Hare, 605,

### 12. OTHER MATTERS RELATING TO.

Control of Tithe-Owner over Farmer. ]-Titheowners cannot control the farmer in his mode of cultivation or consumption of produce of his ground, provided he act bona fide, and without fraud. Lowis v. Younge, M'Cle, 129; 13 Price,

#### XXXI. BURIAL.

### 1. DUTIES AND RIGHTS RESPECTING.

19 & 20 Vict. c. 104.]-The burial of the dead is an "ecclesiastical purpose" within the mean-ing of 19 & 20 Vict. c. 104, s. 14. Hughes v. address. The vicar at first objected to bury the

Mode of Burial |- Burial in the parish churchyard is a common-law right inherent in theparishioners, but the mode of burial is of ecclesinstical cognisance; and, therefore, the court will refuse a mandamus to inter the body of a parishioner in an iron coffin. Rev v. Coleridge, 2 B. & Ald, 806: 1 Chit. 588: 21 R. R. 498.

any particular part of a churchyard. Black-more, Ex parte, 1 B. & Ad. 122.

A prescription for a right of burial in a chancel, claimed as belonging to a messuage, has been allowed. Waring v. Griffiths, 1 Burr. 440.

A custom in a parish for the inhabitants to bury as near as possible to their ancestors is bad. Fryer v. Johnson, 2 Wils, 28,

Grant of Vault.]—A burial board may, under the Burial Acts (15 & 16 Viet. c. 85, and 16 & 17 Vict. c. 134), grant a grave space to the grantce and his heirs, and the title to the burial rights. under such grant will descend to the heirs of the grantee, and will not be vested in all the the grantee, and will have been a members of the family of the grantee. Matthews v. Jeffery, 50 L. J., Q. B. 164; 6 Q. B. D. 290; 43 L. T. 796; 29 W. R. 282; 45 J. P. 361.

By Parol. -A grant by a rector to an individual, of the exclusive right of burial for himself, his family and friends, in a vault underthe church, is a grant of an easement arising out v. Whistler, 2 M, & Ry. 318; 8 B, & C. 288; 6 L. J. (o.s.) K. B. 302.

Burial of Paupers. |-- Overseers are not bound either by common law, or by 43 Eliz. c. 2, to bury a pauper settled in their parish, who dies in the parish, but not in any parish house. Reg. v. Stewart, 4 P. & D. 349; 12 A. & E. 773.

Every person dying in this country, and not within certain ecclesiastical prohibitions, is cu-

titled to christian burial. Ib.
Where no such prohibition attaches, semble, that every householder, in whose house a dead body lies, is bound by common law to inter the body decently; and that, upon this principle, where a body lies in the house of a parish or of a union, the parish or the union must provide for the interment. Ib.

Duty of Parent, &c., to provide for Burial of Child. - A parent is bound to provide christian burial for the body of a deceased child, if he has the means: but, if he has not the means, though the body remains unburied and becomes a nuisance to the neighbourhood, he is not indictable for the nuisance, notwithstanding he could have obtained money for the burial expenses by way of loan from the poor-law authorities of the parish, for he is not bound to incur a debt. Reg. v. Vunn, 2 Den. C. C. 325; T. & M. 632; 21 L. J., M. C. 39; 15 Jur. 1090; 5 Cox, C. C. 379. See also CRIMINAL LAW.

Notice to bury without Church Service-Expenses of Funeral. —A notice given by H., under 43 & 44 Vict. c. 41, s. 1, of burial without the church service, contained his name, but no

child, because the churchyard was full, but persons on board were drowned. Some of the afterwards room was found. H, attended with bodies were found ashore within the boundaries afterwards room was found. H, attended with his friends on the day named in the notice, but had to postpone the burial to a future day. H. sued the vicar for the expenses of the abortive funeral on the first day :- Held, that the notice of burial was bad, and the defect was not waived by what the vicar had done thereafter. Houre v. Ram. 45 J. P. 729.

Right to recover Costs of Burial. ] - Semble. that a child or a more distant relation, being an infant, would not be liable upon a contract for the burial of a parent or a relation. Chapple v. Cooper, 13 M. & W. 252; 13 L. J., Ex. 286.

But an infant wiclow is liable upon a contract for her deceased husband's funeral expenses. Ib.

The husband is liable for the necessary expense of the decent interment of his wife from whom he has been separated, whether the party incurring such expense is an undertaker or a mere volunteer. Ambrose v. Kerrison, 10 C. B. 776; 20 L. J., C. P. 135.

Or, whoever the party may be who buried her. Bradshaw v. Beard, 12 C. B. (N.S.) 344; 31 L. J., C. P. 273: 8 Jur. (N.S.) 1228: 6 L. T. 458.

Right of Executors to Body. |-- Where a gaoler refused to deliver up the body of a person who had died while a prisoner in execution in his custody to the executors of the deceased unless they would satisfy certain claims made against the deceased by the gaoler, the court issued a peremptory mandamus in the first instance, commanding that the body should be delivered up to the executors, Reg. v. For, 2 Q. B. 247; 1 G. & D. 566.

There is no property in a dead body, but the executors have a right to the possession of the body, and their duty is to bury it, although there is direction in the will that some other person should cause the body to be burnt. Williams v. Williams, 51 L. J., Ch. 385; 20 Ch. D. 659; 46 L. T. 275; 30 W. R. 438; 15 Cox, C. C. 39; 46

J. P. 726.

Refusal to bury. ]-A clergyman refused to bury the body of a parishioner on the coroner's order for burial, the jury having returned a verdict of found drowned, assigning as his reason that such person had died in a state of intoxication, or was felo de se :- Held, that the mere opinion of the clergyman as to the cause of death did not justify his refusal to bury. Cooper v. Dodd, 2 Rob. Ecc. Rep. 270; 14 Jur. 724.

A suit against a clergyman in the Ecclesiastical Court, for refusing to bury the corpse of one of his parishioners, was dismissed, on the ground that a convenient warning had not been given, The court refused an application for a mandamus, though the clergyman had stated generally, that he never would bury the body, but allowed the applicant to make a fresh demand. Titchmarsh.

Ex parte, 9 Jur. 159.

A clergyman of the Church of England having refused to perform the office of interment, after due notice of the death of a duly baptised parishioner, was suspended from the ministry for three months, under the 68th canon of 1603 (2 Curt. 692). Escott v. Martin, 4 Moore, P. C. 104; 6 Jur. 765.

Burial of Dead Bodies cast on Shore from Sea -36 Geo. 5, -75. |-A steamship was sunk by collision in the river Thames, near Woolwich, at Church of England is bound to read the burden of a place below low-water mark, and a number of service in the manner and form prescribed by

of Woolwich in Kent, and were buried by the overseers. The river Thames, at Woolwich and at the places where the bodies were found ashore, is a navigable tidal river where great ships go :-Held, that the county treasurer could not be made liable for the expenses incurred by the overseers under 48 Geo. 3, c. 75, ss. 1 and 5, for the bodies were not east on shore "from the sea" within the meaning of the act. Woodwich Overseers v. Robertson, 50 L. J., M. C. 87; 6 Q. B. D. 654; 44 L. T. 747; 29 W. B. 892; 45 J. P. 766.

Order to pay Expenses-Bodies cast on Shore -Validity of Justices' Order. ]-A justice's order, made under 48 Geo. 3, c. 75, s. 6, after stating that he had inquired into and ascertained on oath the costs and expenses, amounting to 11, 5s., incurred by churchwardens and overseers by reason of a dead human body having been found and brought on to the shore within their parish, directed the county treasurer to pay to them the said sum of 11. 5s., according to the act :- Held, that the order was bad, because it did not shew that the expenses in question were proper and necessary expenses incurred in or about the execution of the act, and, therefore, did not sufficiently state facts to shew, or from which it could be inferred. that the justice had jurisdiction to make it. Reg. v. Krnt Treasurer, 58 L. J., M. C. 71; 22 Q. B. D. 603; 60 L. T. 426; 37 W. R. 619; 16 Cox, C, C, 583; 53 J, P, 279,

Disinterring Dead Body. ]-A dead body by law belongs to no one, and is therefore under the protection of the public. If it lies in consecrated ground the ecclesiastical law will interpose for its protection; but, whether in ground consecrated or unconsecrated, indignities offered to human remains in improperly and indecently disinterring them are the ground of an indict-ment. Foster v. Dodd, 8 B. & S. 842, 854; 37 L. J., Q. B. 28; L. R. 3 Q. B. 67; 17 L. T. 614.

It is a misdemeanor at common law to remove, without lawful authority, a corpse from a grave in a burying-ground belonging to a congregation of Protestant dissenters, and it is no defence to such a charge that the motive of the person such a charge that the moove of the person removing the body was pious and landable. Reg. v. Sharpe, Dear. & B. 160; 26 L. J., M. C. 47; 3 Jür. (N.S.) 192; 5 W. R. 318; 7 Cox, C. C.

#### 2. SERVICE.

Who has Right to take Part in. |- It is illegal for anyone, unless he is lawfully anthorised, to read or assist in reading a burial service in consecrated ground over a dead body. Johnson v. Friend, 6 Jur. (N.S.) 280.

Burial Board-Performance of Service. ]-It is a breach of the ecclesiastical law on the part of a burial board to permit any person to perform the burial service in the consecrated portion of their cemetery unless such person be authorised by the incumbent to do so, and, a fortiori, unless he be a nesament to do so, and, a fortiorf, unless he be a person "duly qualified." Wood v. Headingley Burial Board, [1892] 1 Q. B. 713; 66 L. T. 90; 40 W. R. 390; 56 J. P. 326.

the Book of Common Prayer, over the corpse of any person who has been baptised with water, and in the name of the Holy Trinity, if required so to do, though the deceased was never baptised otherwise than by a layman. Essoft v. Martin, 4 Moore, P. C. 104; 6 Jur. 765.

On Unconsecrated Ground, ]—The ordinary cannot compel an incumbent by ecclesiastical consure to perform the burial service on unconsecrated ground in which the only entrance to the vault is to be found. Rugg v. Kingsmill, 5 Moore, P. O. (Kas.) 79; 37 L. J., Ecc. 18; L. R. 2 P. C. 59; 18 L. T. 94.

#### 3. BURIAL BOARDS.

Authority for forming.]—The 15 & 16 Vict. e.85, authorising the formation of a burial board in a parish, is applicable to a parish not having separate overseers, no resparately maintaining its poor. The interpretation clause extends the meaning of the word to places not parishes, having separate overseers and separately maintaining resparate overseers and separately maintaining their own poor, but does not exclude parishes which for any reason do not fulfil those conditions. Rep. v. Sudabery Burial Bloor El. Bl. & El. 264; 27 L. J., Q. B. 232; 4 Jur. (S.S.) 948; 6

Appointment of, 1—The existence of a legally constituted burial board for the whole of a parish, does not prevent the vestry of an ecclesiastical district formed out of such parish under 1 & 2 Will. 4, c. 38, and which does not separately maintain its own poor, from legally appointing a burial board for such district under 18 & 19 Vict. c. 128, s. 12. Reg. v. Trabridge Occracers, 53 L. J., Q. B. 488; 13 Q. B. D. 339; 51 L. T. 179; 33 W. R. 24; 48 J. P. 740—C. A.

Under Local Act. —By a local act for making a township a distinct parish, it was enacted that a new church and burial-place adjoining should be the parish church and churchyard of the parish, and a vestry was constituted for preserving better order in the parish, and for other enumerated purposes relating to the church. On a mandamus to convene a meeting of this vestry for determining whether a burial-ground should be provided under 16 & 17 Vict. c. 134:—Held, that this vestry was "a vestry elected under the provisions of a local act," within 15 & 16 Vict. c. 85, s. 52. Reg. v. Peters, 6 El. & Bl. 226; 25 L. J., Q. B. 271; 2 Jur. (N.S.) 424; 4 W. R. 480.

Purchase of Parish Land by—Payment into Court—Gosts.]—A burial board duly constituted under the 15 & 16 Vict. c. 85, and the 16 & 17 Vict. c. 134, agree to purchase parish lands on the terms of paying an annual sum, the principal to be secured either on the land or as a charge on the church-into or poor-rate. On petition to carry out this agreement:—Held, that the money must be paid into court in a gross sum, the dividends to be paid to the vendors until invested in land, and the costs to be paid by the burial board. Semble, the court will not sanction a perpetual charge. Barraon, Jarra, 3 W. R. 633.

Consent of Ecclesiastical Commissioners to use of Parish Land for Cemetery.]—See Watford Burial Beard, Ex parte, col. 1339.

Parish divided.]—Where a part of a parish may, under 18 & 19 Vict. c. 128, s. 12, appoint a burial board for such part, severed from the rest of the parish, the rest of the parish may, by implication, appoint a separate burial board of its own. Viner v. Tonbridge Churchwardens 2 El & El 9; 28 L. J., M. C. 251; 5 Jur. (N.S.) 1298; 7 W. R. 558.

The mere fact that a parish has been divided into three separate parishes for all ceclesiastical purposes, under 58 dec. 3, c. 45, does not prevent the vestry of the old parish from appointing a burial board, under 15 & 16 Vict. c. 8, 5, 10; and a burial board having been appointed from the old parish, and it not appearing that either of the new parishes had appointed a burial board mader 20 & 21 Vict. c. 81, 8, 5, the court granted a peremptory mandamus to the overseers of the old parish to pay to the burial board old parish to pay to the burial board out of the poor rates of the entire parish the expenses which they had incurred. Heg. v. Wallot Overseers, 2 B, & 8, 555; 31 L. J., M. C. 217; 6 L. T. 320; 10 W. R. 530

A burial board of a parish comprising within its limits several townships, each having separate overseers of the poor, and separately maintaining its own poor, cannot apportion the sums to be contributed by the various townships, unless they bring themselves within the provisions of the 18 & 19 Vict. c. 128, s. 11, in which case the consent of a secretary of state is rendered a necessary element to their proceedings by 20 & 21 Vict. c. 81, s. 9. Reg. v. Wright, 8 Jur. (s.s.) 260; 5 L. T. 345; 10 W. R. 86.

Where a parish has been divided into separate parishs for ecclesiastical purposes under 58 Geo. 3, e. 45, and the vestry of the old parish collectively has appointed a burial board and established one burial-ground for the whole parish, the vestry of one of the new parishes may also appoint a burial board under 20 & 21 Vict. c. 81, 8, 5. Rey. V. Walcat, St. Sucithn Coerseers, 2 B. & S. 511; 31 L. J., M. C. 221; 6 L. T. 325; 10 W. R. 602.

Joinder of Parish for Ecclesiastical Purposes,]—Where two parishes or places, each maintaining its own poor, are united together for ecclesiastical purposes, a burial board for the whole district, appointed by the vote of the vestry, or meeting in the nature of a vestry, is properly constituted by virtue of 18 & 19 Vict. c. 128, read in connection with 15 & 16 Vict. c. 85, although this would have been otherwise under 15 & 16 Vict. c. 85. Reg. v. Calcabill Decreasers, 2 B. & S. 825; 31 L. J., Q. B. 219; 9 Jur. (N.S.) 226; 7 L. T. 244.

Election of Board.]—In a parish under a local act, a body called the select vestry of the parish had the functions of a board of guardians. There was also a general vestry having the management of the general parochial affairs of the parish: Held, that the members of a burial board for the parish, under 16 & 17 Vict. c. 134, s. 7, and 15 & 16 Vict. c. 83, ss. 10, 11, 52, were to be elected by the general vestry having the management of the general parochial affairs, and not by the body created by the local act. Reg. v. Gladstone, 7 El. & Bl. 375; 26 L. J., Q. B. 213; 3 Jur. (N.S.) 441; 5 W. R. 530.

— Filling up Vacancies.]—By 15 & 16 Vict. c. 85, s. 12, vacancies in a burial board may be filled up when and as the vestry shall think fit.

By 18 & 19 Vict. c. 128, s. 4, every vacancy shall granted to the vicar of the parish, under 51 Geo. 3, be filled up by the vestry within one month after the vacancy; and in case of neglect, the vacancy may be filled up by the burial board :-Held. that the vestry might fill up a vacancy in the board at any time before the burial board did so, though not within one month after the vacancy, Heg. v. South Weald Overseers, 5 B. & S. 391; 33 L. J., M. C. 193; 10 Jur. (N.S.) 1099; 10 L. T. 498; 12 W. R. 873.

### 4. RATES.

When can be laid.]—Querc, whether, under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, a rate can be laid for the purpose of providing additional burying-ground. Reg. v. Abney or Leicestershire J.J., 2 C. L. R. 1488; 3 El. & Bl. 779; 23 L. J., M. C. 154; 18 Jur. 1052; 2 W. R. 489.

If it can, still a single rate, laid for purposes authorised by these acts, and also for purposes for which a church-rate can be laid only at common law, is bad. Ib.

Loans. ]-The vestry of a parish, one for ceclesiastical purposes, but divided into two parts for the relief of the poor and other temporal purposes, appointed a burial board, which borrowed a large sum for the formation of the burinl ground, and by deed charged the future rates to he levied on part A., and also the future rates to be levied on part B., for the relief of the poor of the parish or any part thereof, with the payment of the principal and interest. After a time a sum becoming due for an instalment of the loan and interest, the burial board apportioned the amount between the two parts in the proportion of the value of the property in each part as rated to the relief of the poor, and demanded payment of the overseers of each part for its respective portiou : -Held, that the charge was duly imposed by the deed, and the apportionment made on a correct principle. Reg. v. Coleshill Overseers, 34 L. J., Q. B. 96—Ex. Ch. Affirming 2 B. & S. 825 : 31 Q. B. 96—Ex. Ch. Affirming 2 B. & S. 825; 31 L. J., Q. B. 219; 9 Jur. (N.S.) 226; 7 L. T. 244.

### 5. CHURCHYARDS, CEMETERIES, AND BURIAL-GROUNDS

Grant of ]-A. conveyed a farm, with a meeting-house and burial-ground, vault and tomb thereon, to B, and C, in trust; as to the meetinghouse and burial-ground, to permit a society of Quakers to use the same, so long as they should pay a certain rent, and keep them in repair; and after the determination of that estate, as to the meeting-house and burial-ground, and from the execution of the conveyance, as to all the other property, and during the continuance of the estate, as to the rent to B., to keep the vault and tomb in repair, and to permit them to be used for the interment of A. and her family; and after the termination of that estate, to C. his heirs and assigns for ever : provided that the society might take part of the farm to build a new meeting-house upon if necessary:—Held, first, that the grant of the meeting-house and burial-ground was void by the Statute of Mortmain (9 Geo. 2, c. 36); secondly, that the limitation of the vault and tomb was not a charitable one. Doe d. Thompson v. Pitcher, 2 Marsh. 61; 6 Taunt. 359; 3 M. & S. 407.

c. 115, s. 2, part of the waste of the manor for a burial-ground. To a bill filed on behalf of the parishioners setting up a customary right to this part of the waste as a village green, and seeking to set aside the grant, a demurrer was overruled.

Forbes v. Ecclesiastical Commissioners, 42 L. J., Ch. 97; L. R. 15 Eq. 51; 27 L. T. 511; 21 W. R. 169.

Waste.]-To convert land into a cemetery is waste, Cregan v. Cullen, 16 Ir. Ch. R. 339.

Injunction to restrain.]-A., holding meadow and pasture lands, under a lease of lives renewable for ever, demised a part of the premises to B. for a similar term, with a covenant to keep and deliver up the premises in tenantable order. &c., and with a power of surrender at the end of every three years. The assignees of B.'s interest being about to convert the premises into a public cemetery, the representatives of A. obtained an injunction to prevent them. Semble, the proposed alteration of the property would amount to waste at common law. Hunt v. Brown, San, & Sc. 179.

Parties to Action. ]-The lay rector of a parish. in respect of his freehold property in the parish church and churchyard, can maintain an action in the High Court against a trespasser. A person. not resident in a parish, but owning property within it, in respect of which he pays parish rates, is a "parishoner" and entirled to sue as such. Batter v. Grelge, 58 L. J., Ch. 549; 41 Ch. D. 507; 60 L. T. 802; 37 W. R. 540; 53 J. P. 501.

\_\_\_\_ Jurisdiction.]—The Ecclesiastical Court having full jurisdiction to entertain an action and grant relief in respect of the interference with a churchway-such as a pathway within a parish churchyard-forming an approach for the parishioners to their parish church, the High Court will not exercise jurisdiction in respect of such an interference at the suit of a parishioner.

Marriott v. Turpley, 9 Sim. 279; 7 L. J., Ch.

Distance from Dwelling-house.]-The 18 & 119 Viet. c. 128, which provides that no burialground shall be within 100 yards of a dwellinghouse without the consent of the owner or occupier, applies to all burial-grounds, private as well as public. *Greenwood* v. *Wadsworth*, 43 L. J., Ch. 78; L. R. 16 Eq. 288; 29 L. T. 88; 21 W. R. 722.

The defendant, in 1865, obtained leave from the home secretary to convert a piece of land containing twenty acres into a cemetery. He could not succeed in doing so, and the land remained unaltered. In 1876 an attempt was made to get up a company for the purpose, but the attempt failed. In the following year the plaintiff, who was owner of a dwelling-house within 100 yards of the nearest part of the land, wrote to the defendant to the effect that, unless he would give an undertaking not to use any part of the land for a cemetery, he should take legal proceedings. The defendant replied to the effect that he had no present intention of converting the land into a cometery; that he would not give any undertaking not to do so if he Out of Waste.]—The ecclesiastical commissioners, as loads of a manor in a parish

would give the plaintiff two months notice of profits ratable from the sales ought to be his intention to do so; and he stated that included in the arising value of the cemetery. he should not bury within 100 yards of the plaintiff's house without consent. The plaintiff thereupon commenced an action, and Bacon, V.C., granted an interlocutory injunction restraining the defendant from using, for burial or for a cemetery, the ground in question, or any part thereof:—Held, that the injunction must be dissolved, for that there was no such threat or intention to use any part of the ground for a cemetery as to warrant the interference of the court by injunction, supposing such use to be wilawful. Cooley (Lord) v. Byas, 5 Ch. D. 944; 37 L. T. 238; 26 W. R. 1—C. A.

Held, also, that an injunction in the above form could not, in any case, have been supported, for that, under 18 & 19 Vict. c. 128, s. 9, a cemetery may come within 100 yards of a house, the only thing prohibited being actual burial within that limit. Ib.

Under 18 & 19 Vict. c. 128, s. 9, "dwellinghouse" does not include the curtilage, and the specified distance must be measured from the walls of the dwelling-house. Wright v. Wallasey Local Board, 56 L. J., Q. B. 259; 18 Q. B. D. 783; 52 J. P. 4.

Division between Consecrated and Unconseorated Portions.]-Under 16 & 17 Vict. c. 134, extending 15 & 16 Vict. c. 85, to England, and enabling local boards of health to set apart burial grounds, and to divide the consecrated and unconsecrated parts :—Held, that a division twelve inches high was sufficient, and, therefore, that the ground was in a fit state for consecration. Reg. v. Ticerton Local Board, 6 W. R.

Under 15 & 16 Vict. c. 85-Price of Site-Charity Land. ]—A burial board, being duly constituted under the 15 & 16 Vict. c. 85, made a report to the vestry in accordance with that act, in which it was erroneously represented, while reporting the merits of two rival sites, that one of such sites, being land held by the parish on charitable trusts, would cost the parish nothing. The vestry thereupon voted in favour of taking the land. This land was, in point of fact, belonging to the parish, and was held on charitable trusts for objects within the parish, but not for general parish purposes :-Held, that the report of the board was erroneous, and that the amount of the price was one of the terms which the court would consider and decide upon an application under s. 29. Egham Burial Board, In rc, 3 Jur. (N.S.) 956. Semble, that, if the land had been held for

the general purposes of the parish, no price would have been required by the court to be paid.

Held, that the approval of the vestry, being taken on a misstatement of an important point, was a mere nullity, and must be taken over again. Ib.

Ratability of Site.] - A cometery company sold plots of ground for graves, conveying to the purchasers the legal fec-simple in trust that the purchasers might use the plots for a buryingplace according to the rules of the company, and, subject to that, in trust for the company :-

Reg. v. Abney Park Cometery Co., 42 L. J., M. C. 124; L. R. 8 Q. B. 515; 29 L. T. 174; 21 W. R. 847.

Liability to Income Tax.] — A burial board was constituted under 15 & 16 Vict. c. 85, and in pursuance of the act a burial ground was provided with money charged upon the poor-rate of the parish, and the surplus over expenditure of the income derived from the fees charged by the board was regularly applied in aid of the poorrate :- Held, that the board were liable to be assessed to the income tax in respect of such assessed to the meonic tax in respect of such surplus, inasmuch as the provision requiring it to be applied in aid of the poor-rate did not prevent it from being a "profit" within 5 & 6 Vict. c. 35, s. 60. Puddington Burial Board v. Inland Revenue Commissioners, 53 L. J., Q. B. 224; 18 Q. B. D. 9; 50 L. T. 211; 32 W. R. 551; 48 J. P. 311.

New Parish-Right of Burial in Old.]-Where a district, which has a burial ground, becomes by the operation of 19 & 20 Vict. c. 104, s. 14 a separate and distinct parish for ecclesiastical purposes, the inhabitants of such new parish cease to have any right of burial in the burial ground of the old parish out of which the district was taken. *Hughes* v. *Lloyd*, 58 L. J., Q. B. 122; 22 Q. B. D. 157; 60 L. T. 675; 37 W. R. 381; 53.

Ornamentation of Grave. ]-A burial board granted to R. the right and privilege of constructing a private grave in their cemetery, and structing a private grad of burial and interment the exclusive right of burial and interment therein, "to hold to her in perpetuity, for the purpose of burial and of erecting or placing therein a monument or stone"; with a proviso that, if such monument or stone, with the appurtenances should not be kept in repair, according to such regulations as should be made by the board for the management of the cemetery, the grant should be void. She constructed a grave, and placed a headstone and a kerb round it, and planted the space with shrubs and flowers :-Held, that it was not competent to the board by a regulation subsequently made by them for the management of the cemetery to deprive her of the right of planting and ornamenting the grave. Ashby v. Hurris, 37 L. J., M. C. 164; L. R. 3 C. P. 523; 18 L. T. 719; 16 W. R. 869.

- Wreath, with Glass Shade and Wire Protection.]- The defendants, a burial board, had provided a burial-ground under 15 & 16 Vict. c. 85. By s. 33 of that act the burial board are empowered to sell the exclusive right of burial in any part of their burial-ground, the right of constructing any vault or place of burial, and also the right of creeting any monument, gravestone, tablet, or monumental inscription in such burial-ground. By s. 3s the general management, regulation, and control of the burial-ground are vested in the burial board. For the purpose of burying a deceased daughter, the plaintiff purchased from the defendants, and they conveyed to him, "the exclusive right of burial" in a grave-space in their burial-ground in perpetuity; and they also granted him the and subject to the, in tales for the company:— Light to erect a gine come on the grave. It held, that the company was liable to be rated afterwards placed upon the grave a wreath, and as an occupier of the cemetery, and that the to protect it, a glass shade covered with a wire

frame. It was the general rule of the defendants never to allow the placing of such glas shades on the graves in their burial-ground, and, accordingly, the defendants removed the glass shade and wire frame without the cousent of the plaintiff :- Held, that the plaintiff had only acquired such rights as, under s. 33, the defendants were empowered to sell; that such rights did not include a right to place the glass shade and wire covering on the grave; and that, in the exercise of the control vested in them by s. 38, the defendants were entitled to remove the same. McGough v. Lancaster Burial Board,
57 L. J., Q. B. 568; 21 Q. B. D. 323; 36 W. R.
822; 52 J. P. 740—C. A.

Erection of Tombstone with Inscription. ]-The daughter of a Wesleyan minister was buried in the churchyard of the parish where her father resided. The incumbent of the parish refused to allow a stone with an inscription describing the deceased as daughter of the "Revd." H. K., "Wesleyan Minister," to be erected over the "The Revd." before "H. K., Wesleyan Minister," in the inscription, which was otherwise unobjectionable, was not a sufficient justification for the incumbent's refusal to allow the tombstone to be erected within the churchyard. Keet v. Smith 45 L. J., P. C. 10; 1 P. D. 73; 33 L. T. 794; 24 W. R. 375—P. C.

Property in Tombstone.]—An action may be maintained for taking away a tombstone from a churchyard, and obliterating an inscription made upon it, by the party by whom it was erected, although the freshold of the churchyard is in the parson; as the right to a tombstone vests in the person who creets it, or in the heirs of the deceased in whose memory it is set up. Spooner v. Brewster, 10 Moore, 494; 3 Bing. 136; 2 Car. & P. 34; 3 L. J. (O.S.) C. P. 203; 28 R. R. 613. See Hitchcook v. Walter, 6 D. P. C. 457.

Monuments in a Church.]—A custom for the churchwardens of a parish to set up monuments in a church, without either the consent of the rector or of the ordinary, is illegal. Beekwith v. Harding, 1 B. & Ald. 508; 19 R. R. 372.

Where a rector was cited in the episcopal consistorial court to shew cause why the ordinary should not grant to a parishioner a faculty for stopping up a window in a church, against which it was proposed to erect a monument, to the granting of which the rector dissented : notwithstanding which the court was proceeding to grant the faculty with the consent of the ordinary :-Held, to be no ground for a prohibition, but mere matter of appeal, if the rector's reasons for . dissenting were improperly overruled. Bulwer y. Hase, 3 East, 217.

Application to Secular Purposes. ]-Ground consecrated for burial cannot be applied to secular purposes, nor the bodies of the dead buried in it removed by the owners of the soil without the authority of an act of parliament.

Reg. v. Twiss, 10 B. & S. 298; 38 L. J., Q. B.

228; L. R. 4 Q. B. 407; 20 L. T. 522; 17 W. R. 765.

Compensation under Lands Clauses Act.]—By difficults of the fund in court. Liverpool an act of Will. 3, land belonging to the parish (Rector), 'Ex parte, 40 L. J., Ch. 65; L. E. 11 of Liverpool was set apart and delicated to the Eq. 15; 23 L. T. 354; 19 W. R. 47 use of a burial-ground, and by the sentence of By the Metropolis Improvement Act, 1863, the

consecration the corporation renounced all right to the land. In 1854 the ground was closed against burial by an order in council. In 1866 the corporation, being authorised to take a portion of the burial-ground under an improvement act, served upon the rector, ordinary, and patron of the parish the usual notice to treat, and upon a reference to arbitration a sum of money was awarded for compensation. The corporation subsequently refused to pay, upon the ground that the fee-simple of the land reverted to the corporation, upon its being closed against burials, and the use for which it was dedicated having come to an end :- Held, that by the act of parliament, followed by the sentence of consecration, the land was dedicated for ever to the use of a burial-ground, and there was no reversion of the fee to the corporation; that, if necessary, the court would presume a conveyance of the legal estate by the corporation. Cumpbell v. Liverpool Corporation, L. R. 9 Eq. 579; 21 L. T. 814; 18

Held, also, that the notice to treat, and reference to arbitration, left the question of

title open. Ib.

Land purchased in 1809 for an additional burial-ground was vested in the rector and churchwardens in trust for the inhabitants of the parish, and the burial fees were received by the rector from 1809 to 1849, when part of the land was taken by a railway company, and the purchase-money paid into court. A petition was presented by the rector praying for payment to him of the dividends on the investments representing the purchase-money. A second petition was presented by the parishioners, praying for a scheme :- Held, that the rector was entitled scheme:—neta, that he recor was channed to the dividends. St. Martin's, Birmingham (Rectar), Ew parte, 40 L. J., Ch. 69; L. R. 11 Eq. 23; 23 L. T. 575; 19 W. R. 95. A rector who has enjoyed the right to burial

fees from a burial-ground, the freehold of which is vested in trustees, is the person entitled under the Lands Clauses Act, 1845, s. 70, to the receipt

of the rents and profits. Ib.

By an act reciting the insufficiency of an existing churchyard, the rector and churchwardens and other persons were constituted trustees, and empowered to enlarge the existing chnrehyard and to buy land for an additional burial-ground, to be conveyed to the rector and churchwardens for the use of the inhabitants of the parish. In 1849, a portion of the land purchased under the act was taken by a railway company, and the purchase-money paid into court. The burial-ground was subsequently closed for burials :- Held, that, inasmuch as the land was intended as an addition to the churchyard, the rights of the rector therein were the same as his rights in the old churchyard, so far as they were not affected by the act under which the land was purchased, and that he was entitled to the dividends on the fund in court so long as it remained there. Ib.

A burial-ground provided by act of parliament, but of which the rector was the freeholder, was closed by order in council. Subsequently a portion of the land was taken for public purposes, and a sum paid into court ;-Held, that inasmuch as the freehold was in the rector, and he received the burial fees, he was cutifled to receive the

Metropolitan Board of Works was, for the restrain the holders of the legal estate, though purpose of making a new street, empowered to claiming as mortgagees, from destroying or certain parish churches. The rector claimed compensation in respect of the lands so taken, of which he was owner :- Held, that he was entitled to be compensated for the loss which he suffered, but that he was not entitled to be compensated upon the principle of treating the lands as secularised, and therefore as being of greater value than they were while in his hands, and while they were appropriated and devoted to Spiritual purposes. Stebbing v. Metropolitan Band of Works, 40 L. J., Q. B. 1; L. R. 6 Q. B. 37; 23 L. T. 530; 19 W. R. 73.

The purchase money payable by a railway company on taking part of a burial ground in the metropolis, which had been closed by order in council, was paid into court. Upon two petitions, one presented by certain church trustees, to whom the burial fees would have been payable if the ground had remained open, praying payment of the fund to them, the other by the attorncy-general, asking that the moneys might be applied to charitable purposes :-Held, that the trusts of the closed ground were merely suspended, and the fund must be paid out to the church trustees. St. Paneras Burial-ground, Inre, 36 L. J., Ch. 52; L. R. 8 Eq. 173; 14 W. R. 576.

Right to enter upon. ]-A by-law of a cometery prohibited a discharged servant from being admitted to the cemetery, except by special leave of the directors, and it anthorised his removal. D., the owner of a grave, employed W., a discharged servant, to do some work :- Held, that there was nothing unreasonable in the by-law, and that W. was rightly excluded by force from the cemetery. Martin v. Wyatt, 48 J. P. 215.

- Of Sexton. - Where a new consecrated burial-ground and chapel have been provided for a parish, under 16 & 17 Vict. c 134, and 15 & 16 Vict. c. 85, the parish sexton has a right, at reasonable and proper times and places, and in a reasonable and proper way, to dig the graves of parishioners in the burial-ground, and ring the chapel bell at their funerals, and he may appoint a deputy to do it, who is not liable to an action at the suit of the burial board for entering under such circumstances to do these acts, such board refusing permission on the ground that they are ready and willing to perform these duties by their own servants. St. Margaret's, Rachester, Burial Board v. Thompson, 40 L. J., C. P. 213; L. R. 6 C. P. 445; 24 L. T. 673; 19 W. R. 892.

Closing.]—Persons purchased family graves in perpetuity in a private burying ground, which was afterwards closed by order of the Queen in Council, under 15 & 16 Vict. c. 85; there was no formal grant executed, but their title was merely evidenced by a receipt for the purchase-money, stating the purchaser:—Held, that they were entitled to an injunction in equity to restrain the trustees from removing or injuring the graves or gravestones; but that the relief must be limited to the spot purchased by the plaintiffs, and that the rights of the trustees to the remainder was unaffected. Moreland v. Richardson, 22 Beav. 596; 25 L. J., Ch. 883; 2 Jur. (N.S.) 726; 4 W. R. 765.

cataning as mortgagees, from descrying of defracing such graves, or doing any act which may prevent future interments. S. C., 24 Beav. 33, 26 L. J., Ch. 690; 3 Jur. (N.S.) 1189; 5

The Queen may, by order in council, under 16 & 17 Vict. c. 134, direct the discontinuance of burials in churchyards situate in towns, out of the metropolis, though these churchyards were established under the Church Building Acts. Reg. v. Manchester J.J., 5 El. & Bl. 702; 25 L. J.,

M. C. 45; 2 Jur. (N.s.) 182; 4 W. R. 98. The 16 & 17 Vict. c. 134, excepts cometeries "established under the authority of any act of parliament." On application for a mandamus to justices to hear a complaint against the rector of a district church, built under the provisions of the Church Building Acts, for burying in the churchyard attached to the church, contrary to an order in council :--Held, that such churchyard was not a cometery within s. 5, which contemplated only cometeries established by anthority of a special act, such as the commercial cemeteries enumerated in Schedule (B.) to 15 & 16 Vict. c. 85. Ib.

By a local act, a new church was built and became the parish church, and the old parish church was made a parochial chapel; afterwards, by an order in conneil, the parish burial-ground, which adjoined the old church, was shut up in 1853, and a cemetery was provided; in 1863, by an order in council, part of the parish was assigned to the parochial chapel, and marriages, baptisms, churchings and burials allowed to be performed therein :-Held that the 19 & 20 Vict. c. 104, s. 10, did not vest the burial-ground in the incumbent of the chapel. Champneys v. Champage v. Arrowshith, 36 L. J., C. P. 265; L. R. 2 C. P. 602; J. 6 L. T. 589; J 5 W. R. 1011. Affirmed on appeal, 37 L. J., C. P. 22; L. R. 3 C. P. 107; 17 L. T. 261; 16 W. R. 277—Ex. Ch.

Disused Burial Ground-What. ]-A "disused burial ground " within the meaning of the Metropolitan Open Spaces Act, 1881, and the Open Spaces Act, 1887, s. 4, means a piece of ground set apart for interments, in which interments have or have not taken place, whether it has been partially or wholly closed under any statute or order in council, or has become otherwise Gistused, Ponsford and Newport District School Board, In re, 63 L. J., Ch. 278; [1894] I Ch. 454; 7 R. 622; 70 L. T. 502; 42 W. R. 358— C. A.

The site of a church in the metropolis in which there have been intramural interments is not a disused Burial Grounds Act, 1884, and the Open Spaces Act, 1887, and consequently can be sold for building purposes. Eachesiastical Commissioners v. Kim (14 Ch. D. 213) applied; St. Saciour's Rectory Trustees and Oyler, In re (31 Ch. D. 412) explained. Evelesiastical Commis-Sioners and New City of London Brevery Co., In re, 64 L. J., Ch. 646; [1895] 1 Ch. 702; 13 R. 409; 72 L. T. 481; 43 W. R. 457.

Exception-Sale under Authority of Act of Parliament.]-Sect. 5 of the Disused Burial Grounds Act, 1884, which excepts from the pro-599; 29 L. J., Ch. 885; 2 Jur. (N.S.) 126; \* visions of the act "any purial ground which has N. R. 765.

Where land has been set apart as a burial-ground, in which burial-places have been purachased in perpetuity, a court of equity will Commissioners and New City of London Brewery visions of the act "any burial ground which has

A sale to the commissioners of sewers for the city of London, purchasing for the purpose of street improvements under the powers conferred on them by Michael Angelo Taylor's Act (57 Geo. 3, c. xxix.), is a sale under the authority of an act of parliament within the meaning of s. 5 of the Disused Burial Grounds Act, 1884.

- Building Band-stand upon, ]-Motion by the attorney-general and the vicar of Old St. Pancras for an interim injunction to restrain the defendants, the vestry of the parish, from building or erecting on any part of certain disused burial grounds any stand, building, or other crection, to be used for the purposes of a band-stand or any similar purpose: - Held, that the vestry in similar purpose: — Held, that the vestry in building a band-stand on the burial grounds were acting ultra vires; injunction granted. Att.-Gen. v. St. Puneras Vestry, 69 L. T. 627; 58 J. P. 22.

- Sale of. ]-By the St. Saviour's, Southwark (Church Rate Abolition) Act, 1883, after reciting that, certain land was then vested in trustees upon trust to apply the income for the purposes therein mentioned, the land was (ss. 6 & 7) vested in the trustees appointed by the act, upon trust to apply the income for purposes corresponding to those of the original trust; and, by s. 9, the trustees were empowered to sell the land or let it on building or other leases. The land had formerly been used as a burial-ground, but in 1853 it was closed as such by an Order in Council, and thus became a "disused burial-ground." By s. 3 of the Disused Burial-Grounds Act, 1884, building on any disused burial-ground is prohibited, but s. 5 enacts that nothing in the act contained "shall apply to any burial-ground which has been sold or disposed of under the authority of any act of parliament." In 1885, the trustees, under the act of 1883, put the land up for sale by auction describing it in the particulars as "building land," and stating in the conditions that, although it was a disused burial-ground, they believed that it came within s. 5 of the act of 1884, and that they had therefore power under the act of 1888 to sell it as building ground. The property was knocked down to Messrs. O., who signed the contract and paid the deposit. The purchasers, who bought for building purposes, having refused to complete on the ground has building on the land was expressly pro-hibited by the act of 1884—Held, on a sum-mons by the trustees under the Vendor and Purchaser Act, 1874, that the act of 1883 did not constitute a sale or disposition "under the authority of any act of parliament," and that, having regard to the act of 1884, the contract could not be enforced against the purchasers. St. Savivur's Rectory Trustees and Oyler, In re. 55 L J., Ch. 269; 31 Ch. D. 412; 54 L. T. 9; 34 W. R. 224; 50 J. P. 325.

veyed to the commissioners under the Church A faculty or licence may be granted for the Building Acts as an addition to it. The parish of crection of a school-house on a portion of conse-

Ch., In re (64 L. J., Ch. 646; [1895] 1 Ch. W. consisted of the township of W. and five other 702), followed. Att. Gen. v. London. Parachial townships, each of these six townships having Charitiee, 65 L. J., Ch. 242; [1896] 1 Ch. 541; separate overscers and a separate poor-stee. The 4t L. T. 184; 44 W. R. 395. township of W., was used as the burial-ground for the whole parish until 1854, when it was closed by order in council, and a burial board for the township of W. was formed :—Held, that, under 18 & 19 Vict. c. 128, s. 18, where a burial-ground is closed by order in council, if it is a churchyard, it must be kept in order by the churchwardens, and, if it be a cemetery formed by a burial board then by the burial board : and that therefore the ground in question, being a churchyard, was to be kept in order, not by the burial board, but by the churchwardens. Roy. v. Bishon Wearmouth Burial Board. 5 O. B. D.

Held, also, that the expenses of keeping the ground in order were to be repaid to the churchwardens out of the rate for the township of W. being a place having a separate poor-rate within, which the ground was situate, and not out of the rates of all the townships composing the parish of which it had been the burial-ground. Ib.

\_\_\_\_ Maintenance of Walls, &c.]—Sect. 128 of the Burials Act, 1855, provides that, upon the discontinuance of burials in churchyards, the churchwardens shall maintain such churchyards in decent order, and repair the walls and fences, and "the costs and expenses shall be repaid by the overseers upon the certificate of the . churchwardens' :- Held, that a churchwarden. need not pay such costs and expenses out of hisown booket before calling upon a vestry, as overseers, to provide them, or make a rate for that purpose; and that a letter or requisition by the churchwarden setting out the amounts expended. was a sufficient certificate. Reg. v. St. Mary Vestry, Islington, 59 L. J., Q. B. 462; 25 Q. B. D. 523; 63 L. T. 226; 39 W. R. 10; 54 J. P. 807.

Laying out as Public Garden . - Where a faculty had been decreed to issue allowing a churchyard, closed for burials and containing two private vaults, one in repair and the other out of repair, to be laid out as a public garden, subject to future order as to how such vaults were to be dealt with, the court made an order that there should be no interference with the vault in renair, but that the vault out of repair should be levelled with the ground and filled up. -Rule of the court in such cases. St. Botolph without Aldgate (Vicar) v. Parishioners (No. 2). [1892] P. 173,

On an application for a faculty to sanction the appropriation of a portion of a churchyard, which had been closed for burials under an order in council, for the purpose of a public garden, the court authorised the construction of footpaths in such portion of the churchyard for the; convenience of the parishioners, and the erection of gates to give them access to it. St. George-in-the-East Rector and Churchwardens, In ve. 1 P. D. 311.

— Repairing Ground closed by Order in Council, — The churchyard of the parish of W. having become Insufficient for the purposes of barial, a detached piece of land was in 1888 combarial, a detached piece of land was in 1888 com-

crated ground in which no interments have practice of the consistory court of London on chates ground in which burfuls have been taken place, and in which burfuls have been the grant of faculties for the formation and use prohibited under an order in council issued of private pathways across churchyards closed St. Botolph, Bishopsgute, 5 Jur. (N.S.) 300.

For Burial in reserved Space. By an P. 95. order in conneil a churchyard was closed except as to burials in reserved grave spaces allotted to members of the families of parishioners:—Held, that a faculty for the reservation of a space in the churchyard for exclusive burial could be granted to a living non-parishioner, member of the family of a parishioner. Surgent, In re, 15 P. D. 168.

For Lighting Purposes. ]-In two cases of faculty, it appeared that, for the purpose of lighting two districts in the city of London with electric light, it was necessary that underground chambers should be constructed in two closed churchyards in the districts, there being no other places suitable for their construction, and that it was in the interest of the parishioners and public that electric light should be introduced in the districts :- Held, that the court had jurisdiction in its discretion to decree a faculty on each case anthorising the construction of such a clamber in the churchyard, and the use of the same as a transformer chamber for the term of twenty-oue years, subject to payment of a yearly rent to the rector and churchwardens of the parish. St. Nicholas Cole Abbey, In re. St. Benet Fink

Churchyard, Iu ra, [1803] P. 58. Dence Fine A local act of parliament provided that part of the parish church of St. Benet Fink in the City of London, and one-third part of the burial-ground of that parish, might be taken for the purposes of the act after notice, and should be vested in the corporation of the city of London, on such payment being made as in the act mentioned. By a subsequent local act it was provided that, on complying with certain directions therein contained, the corporation might take down the parish church of St. Benet Fink, or the part thereof not taken down under the last-mentioned act, and the site thereof, and the ground and soil thereof, and also the then present burial-ground of the said parish, and the freehold of the same in fee simple should be vested in the corporation free from all trusts and incumbrances whatsoever, and that, as soon as the site of the said church and the said burialground should be cleared, such portion of the same as was not otherwise appropriated under the act should remain for ever unbuilt upon, and unappropriated to any purpose except such ornamental purpose as the corporation, with the consent of the Bishop of London, might direct.

After the provisions of these acts as to the vesting of the churchyard of St. Benet Fink had become operative, the corporation of the city of London and the rector of the united parish of St. Peter-le-Poer with St. Benet Fink, and the churchwardens of St. Benet Fink, petitioned the court to decree a faculty for the construction in the churchyard of St. Benet Fink of an underground chamber to be used for the transformation of electricity :- Held, that the court was not precluded by the local acts relating to the churchyard from granting the faculty prayed

for burials, and as to the provisoes to be inserted in such faculties. St. Gabriel, Fenchurch Street v. City of London Real Property Co., [1896]

- For widening Public Thoroughfare. ]-The vicar and churchwardens of a parish church in the city of London applied to the court to sanction an agreement between the vicar and the commissioners of sewers for the city of London to appropriate a portion of the parish ehurchyard, closed for burials, for the widening of an adjoining street. At the hearing of the application it was proved that the proposed widening would be of great convenience to the congregation of the church, and to the public generally : - Held, that the court had jurisdiction to authorise by faculty the appropriation of the portion of the churchyard required for the proposed widening of the street, so long as it should be used for the purpose, and the removal to a vanit to be constructed in the churchyard of all human remains disturbed in carrying out the human remains disturbed in carrying out the works authorised by the faculty. St. Botolph without Aldgate (Vivar) v. Parishioners (No. 1), [1892] P. 161.

- Removal of Remains.]-There being no room in the charehyard for the vault directed to be constructed as above mentioned, the court ordered the remains disturbed to be placed in the crypts of the church. The commissioners of sewers and the vicar and churchwardens subsequently petitioned the court to authorise the remains placed in the crypts under the order of the court, as well as certain other remains found in one of the crypts, to be removed to the City of London Cemetery, at Little Ilford in Essex, and it appeared that such removal was expedient on sanitary grounds :- Held, that the court had jurisdiction to authorise the remains to be removed as prayed, and to be reinterred in the consecrated portion of the Hford Cemetery.

Where application is made to the court for a faculty to authorise human remains interred in a church or disused churchyard to be removed therefrom, and re-interred in consecrated ground elsewhere, the court, if it grants the faculty, will insert in it provisions authorising members of families whose relatives are buried in such church or churchyard to remove the remains of their relatives to any particular churchyard or consecrated cemetery selected by them for the purpose of reinterment :- In a faculty authorising, on sanitary grounds, the removal of human remains interred in a parish church, provisions were, by the directions of the court, inserted exempting from the operation of the faculty several ancient family vaults. St. Helews, Bishopsgute (Rector) v. Parishioners, [1892] P. 259.

The powers for preventing vaults or burial-places becoming or continuing dangerous or injurious to public health, which her Majesty is empowered to exercise by order in conneil under s. 23 of the Burial Act, 1857, are not inconsistent with the court of the ordinary possessing exclusive jurisdiction to authorise the removal and re-interment of remains buried in consecrated For Footpaths.]—Observations by the burial-places or vaults in consecrated ground. chancellor of the diocese of London as to the Where, therefore, an order in council made

under the above act directed the churchwardens of a parish church to remove remains buried beneath the church to some other consecrated burial-ground, and there to re-bury them, and it appeared that such removal was advisable on sanitary grounds, the court, on the application of the rector and churchwardens of the parish church, decreed a faculty to issue, giving authority for the removal and reinterment of the remains, but confining the re-interment to a place of burial to be specified in such faculty, and containing provisoes as to the mode and manner in which the removal and reinterment should be carried out, and for safeguarding the interests of the relatives of persons whose remains were proved to have been buried beneath mans were proved to have been buried beneath the church. St. Michael Bassishaw v. Parish-ioners, [1893] P. 233. S. P., St. Mary-a-Hill v. Parishioners, [1892] P. 394; 56 J. P. 824.

In 1854 a local act was obtained to enable the granting of building leases of a certain portion of the cemetery belonging to a parish, which had not previously (it was then supposed) been used for the purposes of interment, and which was particularly described in a schedule to the act. The trustees, under the powers of the act, contracted for the sale of the land so described; but the contractor, on making excavations, found coffins and remains of bodies therein. In 1858. on representation that these did not exceed twenty in number, a licence of faculty issued from the consistory court for the removal of such coffins and remains, in order to their decent and proper interment in the inclosed part of the cemetery. Subsequently, without any further authority, between 400 and 500 more coffins were disinterred —Held, that the vicar and churchwardens, to whom the faculty had been directed, land exceeded the powers confided to them by the ordinary; that they must return the faculty to the registry, be admonished to re-inter decently all the remains that had been disinterred, and to refrain from disturbing the remains of the dead which had been interred in any portion of the cemetery; and that they must pay the costs of the proceedings. St. Pan-eras Vestry v. St. Martin-in-the-Field (Vicar), 6 Jur. (N.S.) 540.

18 & 19 Vict. c. 128, does not apply to Private Burial Grounds.—The 18 & 19 Vict. c. 128, s. 18, has reference to parochial burial-grounds only, and does not apply to private burial-grounds. Reg. v. St. John, Westgate, and Elsavieh Burial Boorni, B. & S. 5.77; 31 L. J., Q. B. 15; 8 Jur. (S. 8) 229; 5 L. T. 346; 10 W. R. 77. Affirmed on appeal, 2 B. & S. 703; 31 L. J., Q. B. 205; 6 L. T. 504; 10 W. R. 602.—Ex. Ch.

20 & 21 Viet. c. 81.]—Orders in council made for the improvement of disused burial-grounds, under s. 20 of this act, do not apply to private burial-grounds. Jacobson v. St. Pancras Vestry, 44 J. P. 184.

The 20 & 21 Vict. c. 81, s. 23, as to closing burial-grounds, does not apply to land in which burials may have taken place, but which has ceased to be applied to such a purpose, and which has changed its character and been treated by the owner and occupier in all respects a private property; but applies only to ground which is a burial-ground defact or de jure in use or in trust. Faster v. Dudd, 8 B. & 8 482, 37 L. J., Q. B. 28; L. R. 3 Q. B. 67; 17 L. T. 614; 16 W. R. 155—Ex. Ch.

Re-interment.]—The court is accustomed in proper cases to grant faculties for the removal of remains buried in consecrated ground for the sole purpose of such remains being re-interred in other consecrated ground, and would not be justified in granting a faculty for enabling remains to be removed after burial for cremation. Dixon, In re, [1892] P. 386; 56 J. P. 841

#### 6. FEES.

Right at Common Law.]—No burial fee is due at common law, but it may be due by custom in any particular parish. Andrews v. Cawthorne, Willes, 536.

Vicar may specially Contract.]—A vicar of a parish, being frecholder of the church and churchyard, may make a special contract for the payment of a fee, other than the customary burial fee (if any), for the burial of a non-parishioner in a particular vault in the parish church. Nerille v. Bridger, 43 L. J., Ex. 147; L. R. 9 Ex. 214; 30 L. T. 500; 22 W. R. 740.

Right of Incumbent to.]-Before 51 Geo. 3, c. 151, the incumbent or minister of the parish of St. Marylebone (which was a lay rectory), by himself or his curate, performed the duty of all burials in the parish, and received the surplice fees thereon, as part of the profits of the living. By this act the vestry of the parish was empowered to provide an additional cemetery for the parish, and erect a chapel thereon : and. by s. 41, the lay rector was empowered to appoint a burying minister to officiate in burying the dead in the cemetery, a reader to perform divine service and preach in the chapel, and (if it should seem right to the vestry) another minister to preach in the chapel, such reader and preacher to receive for their salaries such sums as the vestry should appoint. By s. 89, nothing therein contained was to lessen or alter the title of the lay rector, or the person for the time being entitled to the rectory and advowson, to the ecclesiastical dues, oblations and obventions belonging thereto. By 1 & 2 Geo. 4, c. 21, it was enacted that the parish should remain and be one entire and undivided parish for all ecclesiastical and civil purposes. By 6 Geo. 4. c. 124 (whereby the four districts were made district rectorics for certain purposes), the district rectors were empowered to solemnise marriages and baptisms, and take all fees for the same; but nothing therein contained was to alter or affect the law respecting burials or burial fees within the parish. In 1824 W. was presented by the Crown (in whose hands the lay rectory then was) to the chapel built under 51 Geo. 3, c. 151, and thenceforth performed all the burials there, and received the burial fees, which he paid over to the rector of the parish until 1839, when the defendant, by direction of the vestry, received and retained them :-Held, that the rector was entitled to recover the amount of such fees in an Emperor, 6 M. & W. 639; 10 L. J., Ex. 50.

The 51 Geo. 3, c. 151, empowered the vestry-

The 51 (teo. 3, c. 151, empowered the vestrymen of St. Marylebone to purchase land for erecting a new church and making a ceneteryby s. 35, Dr. H. and his successors were declared to be ministers of the new church, and the patron of the living was empowered to appoint successively ministers of the new church, who were to enjoy such oblations, mortuaries, glebes, cemetery was to be performed by, and the fees tithes, profits, and other ecclesiastical dues as paid to, the incumbent, who might have been the present minister ought to have. By s. 49. the vestrymen were empowered to settle the rates and fees for burial in the cemetery, and to alter and amend the same. By s. 50, the vestrymen were prevented from reducing the burial fees below the amount payable in the then cometeries of the parish. By s. 71, the vestry was empowered to borrow 150,000*l*, upon the credit of the rates and burial fees, and to assign any portion of such rates or fees to the parties advancing the money. In 1733, the then minister and the parish referred to a third party the settlement of the minister's fees, and a table of fees was accordingly prepared by the referee. From 1733 down to 1838 a fee of 1s. 6d. was paid by the parish officers to the rector for the burial of a pauper in any of the cemeteries of the parish. From 1835 to 1847 the 1s. 6d, had been paid to the rector, and Is, to the clerk and sexton, in pursuance of a table of fees settled by the secretary, containing the following item:—"Paupers from the workhouse, 2s. 6d." The defendant had given orders for the burial of certain paupers in the cemetery of the new church. The burial service was not performed by the rector of St. Marylebone, or any of his curates, but by the reader of one of the chapels in the parish :— Held, that the fees in question were due only by immemorial custom, or by some act of parliament; that no such immemorial custom was stated, nor was the court empowered by the parties to infer as a jury the existence of such a custom; and that no such fees were due by virtue of the act of parliament. Spry v. Gallop, 16 M. & W. 716; 16 L. J., Ex. 218.

In 1823 a piece of ground in the parish of St. Margaret, Leicester, was purchased by subscription of the inhabitants, and conveyed to the commissioners for building new churches, who erected a chapel on one part of it, and inclosed the other for a burial-ground. In 1827 the the other for a burial-ground. In 1827 the chanel and burial-ground were consecrated. In 1828 an order in council was made and published, whereby, after reciting the 58 Geo. 3, c. 45, s. 16, which empowers the commissioners to divide populous parishes into two or more distinct and separate parishes; also reciting the 21st section, which empowers the commissioners to divide populous parishes into ecclesiastical districts; also reciting that the commissioners had made a representation to the Crown respecting the increase of population and insufficient church accommodation for the parish; also reciting that it appeared to the commissioners expedient that an ecclesiastical district should be assigned to the new chapel under 59 Geo. 3, c. 134, and that the consent of the bishop had been obtained; his majesty ordered that the proposed divisions should be made and effected, according to the provisions of the acts. The boundaries of the district were enrolled under 58 Geo. 3, c. 143, s. 22. No order in council was made respecting the performance of the offices of the church in the chapel, or the appropriation of the fees payable in respect thereof, nor did the commissioners make any order as to whether the fees for burials were to be reserved to the incumbent of the parish, or assigned to the curate of the chapel, or whether burials should be performed in such chapel. In 1848 the corporation of Leicester established a cemetery within the borough, under shaw v. Wigan Buriat Board, 42 L. J., Q. B. 11 Vict. c. 2, by which the burial service over 137; L. R. S Q. B. 217; 28 L. T. 283—Ex. Ch. 11 Viet. c. 2, by which the burial service over 137; L. R. S Q. B. 217; 28 L. deceased persons removed for interment in the See also cases in cols. 1303 foll.

required to perform the service, and would have been entitled to the fees, if the interment had taken place in his parish or ecclesiastical district:—Held, that the order in council was made under the 58 Geo. 3, c. 45, s. 21, and not under the 59 Geo. 3, c. 143, s. 16, and that upon enrolment of the boundaries the chapelry became a separate district parish for all ecclesiastical purposes, and that after the death of the then incumbent of the original parish the curate of the district parish was entitled to the fees for burial, both in his parish and in respect of deceased persons removed therefrom for interment in the cemetery. Edgell v. Burnaby. Edgell v. Burnaby. 8 Ex. 788.

The ancient parish of St. Mary comprised (inter alia) the district parish of St. Mark, attached to the district church of which was a churchyard wherein the remains of the inhabitants of St. Mark were interred. In 1852 a burial board was formed for the whole of the parish of St. Mary, and in 1853 the churchyard of the district parish of St. Mark was closed by order of the secretary of state, and the remains of the inhabitants of St. Mark were thenceforth interred in the burial ground provided by the burial board of St. Mary. Such burial ground was consecrated in 1854, and from that time became the burial ground of St. Mary. In 1875 a church called St. James was built and consecrated in the district parish of St. Mark, and a distinct part of the district parish of St. Mark assigned to it by order in council. By the sentence of consceration and order in council authority was given to solemnise and perform burials, &c., at the church of St. James, the fees to arise therefrom to be paid and belong to the minister of such church for the time being. The incumbent of St. James having brought an neumbert of St. James having brought an action claiming to perform the burial service in the defendants' burial ground over the bodies of the inhabitants of St. James buried therein, and to receive the fees for such services :- Held, thatthe district of St. James was a "new parish" within s. 5 of 20 & 21 Vict. c. 81, and that the plaintiff, as incumbent of the district, was entitled to the right claimed under that section and s. 14 of 19 & 20 Vict, c. 104, on the death of the incumbent of the ancient parish of St. Mary. Harris v. Lambeth Burial Board, 47 J. P.

In 1851, a church was built and consecrated, In 1852, an order in conneil under 59 Geo. 3 c. 134, s. 16, authorised services to be performed in the new church, assigned a district to it out of the ancient parish in which it was situated, and granted the incumbent the fees. There was then no burial ground in the district, and the persons dying in it continued to be buried as before in the churchyard of the parish. The plaintiff was appointed incumbent of this church in 1854, and in 1856 a burial ground for the whole parish was conscerated, the district of the new church contributing to the rates for providing it. A new rector of the parish was appointed in 1864 :- Held, that the district was a "new parish" within 20 & 21 Vict. c. 81, and that the plaintiff, on the first, avoidance of the rectory, was entitled to the burial fees in respect of inhabitants buried within the parish. *Gron-*

\_\_\_\_\_Under Cemetery Acts. ]—A cemetery act company to the incumbent of the parish or other ecclesiastical district or division from which any body should be removed for interment in the cemetery, and directed that a portion of such fees should be paid over to the churchwardens or chapelwardens, to be by them applied among the persons entitled by law or custom to share in the burial fees receivable in such parishes or districts by the churchwardens or chapelwardens:

—Held, that the fees in respect of intermeuts from a district which had been created since the passing of the cemetery act under an order in council, conferring powers of marrying, churching and baptising, but silent as to burials, were payable to the incumbent of such district, and not to the incumbent of the mother parish. Vaughan v. South Metropolitan Cemetery Co., 1 J. & H. 256; 80 L. J., Ch. 256; 7 Jur. (N.S.) 159; 3 L. T. 727; 9 W. R. 228.

By a private act to establish a cemetery it was provided that certain fees should be paid by the cemetery company to the incumbent of the parish or other ecclesiastical district or division from which any body should be removed for the purpose of interment in the cemetery. also directed that a portion of such fees should be paid over by the churchwardens, or chapelwardens, to be by them applied among the persons entitled by law or custom to share in the burial fees receivable in such parishes or districts by the churchwardens or chapelwardens. After the passing of the act three separate ecclesiastical districts-one with, and the other two without, a burial ground—were formed out of the parish of Clapham, one of the parishes to which the act applied. Before the cemetery was established, the parish churchyard of Clapham was used as the place of burial of persons dying in the parish, and the vicar of Clapham for the time being was entitled to all fees of such burials :- Held, that the act applied to future ecclesiastical districts with or without burial places; and, therefore, that the incumbents of the three districts were entitled to the fees under the act, as against the vicar of Clapham. Bowger v. Stantial, 3 Ex. D. 315; 38 L. T. 271—C. A.

Under Burial Acts. ]—An incumbent of a district church to which a burial ground had been appropriated before 15 & 16 Vict. c. 85, and which district has been carved out of a township which district has been carred out of a township having separate overseers, and maintaining its own poor, is entitled to all the fees formerly enjoyed in respect of burials in his district, for burial services performed by him in a new burial ground provided by the burial board of a parish ground provided by the build b

When an ecclesiastical district having a burialground has been divided into two districts, but no burial-ground has been allotted to the second district, the incumbent of the first created district is entitled to the fees for the burial of

inhabitants of both districts. Ib.

Under the Burial Acts :- Held, that the incumbents of parish or district churches were not entitled to the burial fees in a cemetery provided under the Burial Acts, where those churches had not burial grounds attached to them in which the persons dying within the district would have been buried, as of right, if it had not been for the existence of the cemetery. Hornby v.

Towteth Burial Board, 31 Beav. 52; 31 L. J., Ch. 643; 8 Jur. (N.S.) 531; 6 L. T. 146; 10 W. R.

When a district, being part of a parish, has separate overseers of the poor and separately maintains them, such district is, for the purposes of the 15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 13, to be regarded as a distinct parish. Ib.

A burial-ground attached to a district church. the right of interment in which was not confined to the inhabitants of the district, but could be purchased by any stranger :- Held, not to entitle the incumbent to any part of burial fees derived from a cemetery provided for the district under the Burial Acts. Ib.

In respect of Non-Parishioners. ]-The right to grant sepulture to strangers, which the incumbent might have exercised in the ancient churchyard of his parish, is not preserved to him under the act in the conscerated portion of a cemetery provided by the board, and no fees in respect thereof are payable to him by the board. Wood v. Headingley Burial Board, [1892] 1 Q. B. 713; 66 L. T. 90; 40 W. R. 390; 56 J. P. 326.

Duty of Burial Board to give Notice to Incumbent. -No duty rests upon a burial board to give notice to the incumbent of the parish to perform the funeral service at burials in the perform the functual service at ourists in the cemetery provided by a burial board under the Burial Act (15 & 16 Vict. c. 85), or to give notice to the incumbent that his services are not required under Osborne Morgan's Act (43 & 44 Vict. c. 41), such duty (if any) being in the friends of the deceased person. And the fees for performing the burial service are not payable to the incumbent by the board except in cases where he has actually performed the service or received such notice under Osborne Morgan's Act. Ih.

Separation of Parishes.]—Where a cemetery is formed by a burial board under the Burials Acts, 1852 and 1853, for a parish which never had any burial-ground, the incumbent of the parish is bound to perform the services in the consecrated part of the cemetery over bodies of parishioners and inhabitants of his parish, and is entitled to take any ecclesiastical fees which the board may collect in respect of such services. Hornby v. Toxteth Park Burial Board (31 Beav. Board, 56 L. J., Ch. 425; 34 Ch. D. 314; 56 L. T. 380; 35 W. R. 268.

Under private Act - Right of Vestry Recovery.]-Where by a private act of parliament, burial fees are to be collected and paid to the treasurer of the vestrymen for the purposes of the act and other parochial purposes, they are to be recovered by the burial board under s. 36 of the Burial Act, 1852, and paid to the vestry; and it is no answer to the claim of the vestry to say that the fees are insufficient to pay Warylebone Vestry, 64 L. J., Q. B. 622; [1895] 1 Q. B. 771; 14 R. 172; 72 L. T. 11—C. A.

Right of Sexton to. ] -- A sexton of a chapelry district constituted under 59 Geo. 3, c. 134, s. 16, is not, when the churchyard is closed, entitled to fees in respect of the barial of inhabitants in a burial ground provided pursuant to 15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 134, for the pariel, their case for the establishment of a mortuary from which the district has been taken. Ormerod on the site proposal, directed that a family v. Hlaabburn Burial Board, 28 L. T. 438; 21 should issue for the crection of the mortuary, W. R. 539

But a sexton of a chapelry district constituted under 59 Geo. 3, c. 134, s. 16, and afterwards formed into a district parish under 19 & 20 Vict. c. 104, ss. 11 and 14, is entitled by virtue of the proviso in 20 & 21 Vict. c. 81, s. 5, to such fees. Ib.

Cucler 15 & 16 Vict. e. 85, and 16 & 17 Vict. c. 114, parish clerks and sextons are entitled to perform, when necessary, the same functions and duties, and receive fees therefor in respension of the burnlas of the parishioners and inhabitants of the parishes of which they are clerks and extons, in the new burnla-ground provided by burnla boards mader those acts, and the burnla boards cannot deprive them of such fees by appointing other persons to do their duties. Gett V. Birmingham Corporation, 10 L. T. 497. See Aulton V. Bohards, 21 H. & N. 432; 26 L. J., Ex. 380; antice, col. 1304.

——Formation of District by Annexation.]—Where, nucle nu order in conneil made under 6 & 7 Vict. c. 37, a portion of the parish of N. was detached therefrom and annexael to a neighbouring parish, and a common burial-ground was provided for the district comprising both parishes:—Held, that the sexton of the parish of N., duly appointed before the date of the order in council, was not entitled to the burial fees payable in respect of the portion detached from the parish of N. White v. Norwood Burial Boura, 55 L. J., Q. B. 63; 16 Q. B. D. 58; 54 L. T. 81; 34 W. R. 123; 59 J. P. 100.

Liability of Collectors.]—An action is not maintainable to recover a sum of money path to a churchwarden for burial dues, which he has paid over to the treasurer of the trustees of a chapel previously to the action. Horsfull v. Handley, 2 Moore, 5; 8 Tannt, 136.

An agreement having existed between the successive vients and churchwardens of a parish, that certain fees should be taken upon the burial of strangers in the churchyard, and divided equally between them, and an incoming vient rofused to accord to the agreement, and prevailed on the collector of the fees to pay over to him the whole of what he them had in his hands:—Held, that, the collector having received one-half of these fees to the use of the churchwardens, they were entitled to recover that moiety from the vicer. Littlewood v. Williams, 1 Marsh. 589; 8 Taunt, 277.

#### 7. MORTUARIES.

Not within 7 & 8 Will. 3, c. 6, S.]—Mortuaries are not within the X & Will. 3, c. 6, s. 2, which authorises justices of the peace to adjudicate upon complaints of subtraction of small tithes, offerings, oblations and obventions. Applan v. Abbatt, 14 Q. B. 1; 18 L. J., Q. B. 314; 14 Jur. 314.

Faculty for Erection of, in Consecrated BurialGround.]—The rector, churchwardens, and burial 
board of an utbain parish applied for the grant 
of a faculty to authorise the creation of the 
parochial mortuary with a post-morten room 
attached, in a consecrated burial-ground stirate 
in a populous part of the parish, and closed for 
burials by order in council. The court, being 
of opinion that the petitioners had made out 
shees; and that the court had jurisdiction in

their case for the establishment of a mortuary on the site proposed, directed that a faculty should issue for the erection of the mortuary, but directed that certain conditions to be specified in the faculty should be imposed with respect to the manner of using the mortuary. St. George's, Hanvier Square, Burial Board v. Hall, 5 P. D. 12.

The court, being of opinion that it was requisite for the health of the parish that a northary should be provided, and also that the churchyard was the most suitable site for its erection, decided that it had jurisliction to grant a faculty for the creetion of a mortuary on a portion of the churchyard, with a room to be appropriated to post-mortem examinations. Manuscat v. St. Matthew, Bethinal Green, 4 P. D. 46.

#### 8. CREMATION.

Generally.]—Whether it is lawful to burn a dead body even if the deceased by his will directed some person so to do, quare. Williams v. Williams, 51 L. J., Ch. 385; 20 Ch. D. 659; 46 L. T. 275; 30 W. R. 438; 15 Cox, C. G. 39; 46 J. P. 726.

To barn a dead body, instead of barying it, is not a misdemensor, unless it is so done as to amount to a public nuisance. If an inquest ought to be held upon a dead body, it is a misdemeanor to dispose of the body so as to prevent the coroner from holding the inquest, Rey. v. Price, 53 L. J. M. C. 51; 12 Q. B. D. 247; 33 W. R. 45, n.; 15 Cox, C. C. Ss9, And Rey. v. Schphenson, 53 L. J. M. C. 176; 13 Q. B. D. 331; 52 L. T. 267; 33 W. R. 44; 49 J. P. 486.

After Burial.]—The court would not be justified in granting a faculty for enabling remains to be removed, after burial in consecrated ground, for cremation. Diwon, In re, [1892] P. 386; 56 J. P. 481.

Disposal of Cremated Remains.]—But, semble, where there lad been a previous cremation, in pursuance of directions left by the deceased, there is no logal objection to the ashes resulting therefrom being buried in consecrated ground, with the use of the buriel service. The

Semble, that cremated remains cannot lawfully be intered in or under a parish church except under the authority of a faculty from the ordinary. Korr. In re. [1894] P. 284.

The vicar and churchwardens of a parish church, built under the Church Building Act,

1818, and closed for burials by virtue of an order in council under the Burial Act, 1853, concurred in an application, by the widow of a parishioner whose dead body had been cremated, for a faculty to authorise the formation of a niche in the wall of the church inside the church and above the level of the floor, and the permanently placing therein of a scaled urn containing the cremated ashes of such dead body. A certificate was brought in to the effect that the vestry of the parish was in favour of the remains being interred beneath the church : -Held, that the burial of the cremated ashes of a dead body in the church had not been prohibited by the Church Building Act, 1818, the Public Health Acts, 1848 and 1875, or by the order in council closing the church under the Burial Act, 1853, the provisions in those acts as to "burial" not applying to the burial of the

its discretion to grant the faculty as prayed, but must decline to do so, having regard to the inconvenience which might ensue in case of

alterations in the church, &c. Ib.

Held, also, that the court, having ascertained from the Home Office that no objection on sanitary grounds was entertained by the Home Secretary to the interment of the urn containing the remains below the floor of the church, was prepared to decree the issue of a faculty for the urn and its contents being so interred below the church, subject to a proper fee for the interment being paid to the incumbent of the parish, Ib.

## XXXII. VESTRY.

See Local Government Act, 1894 (56 & 57 Vict. c. 73).

Under Metropolis Management Acts. ]-See METROPORTE

1. CONSTITUTION, POWERS AND LIABILITIES. Constitution of Select Vestry.]-If, in pleading, it is stated, "that from time immemorial

there had been a select vestry, composed of a certain number of select persons," it is incumbent on the party making that averment to prove that the vestry had consisted of a definite number. Berry v. Banner, Peake, 157; 3 R. R. 674.

On an issue, whether a churchwarden ought to be elected by the select vestry, a record between a former churchwarden and another person is admissible. Ib.

A select vestry cannot be constituted by a

faculty from the bishop. Ib.

A custom that there shall be a select vestry of an indefinite number of persons, continued by election of new members made by itself, and not by the parishioners, is valid in law. Golding v. Fenn, 7 B. & C. 765; 1 M. & Ry. 647; 6 L. J. (O.S.) K. B. 178.

By an ancient custom, a select vestry was to consist of the rector, churchwardens, and those who had served the office of upper churchwarden. and other parishioners to be elected by the vestrymen. The practice in modern times had been to elect as vestrymen those parishioners only who had been fined for not serving the office of upper churchwarden :- Held, that they were good vestrymen. Rew v. Brain, 3 B. & Ad. 614: L. J., M. C. 58.

The magistrates were bound, under 59 Geo. 8. c. 12, to appoint all persons nominated and elected by the parishioners to be members of the select vestry, and had no discretion to v. Kent JJ., 4 N. & M. 299; 4 L. J., M. C. 7. S. C., nom. Rox v. Adams, 2 A. & E. 409.

An inhabitant may be a member of a select vestry, although he is a magistrate acting within the parish. 1b.

An overseer may be a select vestryman, by virtue of an election by the parishioners, although he is also a member of the select vestry by virtue of his office. Ib.

Where Parish has been subdivided. ]-In parishes which have adopted the 1 & 2 Will, 4, c. 60, the number of vestrymen to be allotted out at the first election of vestrymen under that act is one-third of those vestrymen who, at the time of the election, were in actual existence, and not one-third of a complete vestry, deducting from such third the number of the vacancies. Rev v. St. Pancras Churchwardens, 3 N. & M. 425; 1 A. & E. 80; 3 L. J., M. C. 90.

In parishes within the metropolitan police district, or the city of London, or in which the rated householders exceed 3,000 persons, persons to be eligible as vestrymen, and to be capable of acting as such within 1 & 2 Will. 4, c. 60, must be resident householders, rated upon a rental of 40l.; but it is not necessary that such rating should be in respect of property in their own occupation. Ib.

So. as to eligibility in parishes not being within the metropolitan police district, or the city of

London. Tb.

A parish is not "divided into districts for A parish is not "divided into districts for ecclesiastical or other purposes," within 1 & 2 Will. 4, c. 60, s. 22, where a small portion of the parish is annexed to a chapelry, created in an adjoining parish, or where the parish has been, for the convenience of collecting the poor-rates, divided into four districts, which districts have there adopted by the returning officer of a borough (within which the parish is situated) for the purpose of taking the poll at an election for

members of parliament, 1h.

An ancient parish was divided, by acts of parliament, into two parishes, St. Giles-in-the-Fields, and St. George, Bloomsbury, which were made separate and distinct for all purposes, except as to church, highway, and poor rates, and separate vestrymen were appointed for the new parishes. By a subsequent act for regula-ting the affairs of the joint parishes of St. Giles and St. George, and of the separate parishes of St. Giles and St. George, the vestry of each parish was to be composed of forty-two persons (besides the rector and churchwardens), elected by the vestrymen duly qualified. Each vestry was to appoint its own churchwardens and auditors, and make its own church-rates, and to manage some other affairs of the separate parish; and the vestrymen of the two parishes were to be the joint vestry of the parishes, and to appoint overseers and directors, and other officers, to manage the poor of the joint parish, to make its poor-rates, and to exercise other powers relative to the poor, and concerning the parishes jointly. Questions before the joint vestry were to be decided by a majority of the vestrymen present : -Held, that the parishioners of one of the parishes could not adopt separately the provisions of the 1 & 2 Will. 4, c. 60, for the election of their own vestry. Reg. v. Basset, 17 Q. B. 332.

Constitution in other Cases. ]-A local act empowered the vestrymen of a parish, or the major part of them, to remove the poor-law collector of the parish from his office :- Held, that the majority must be an actual majority of the vestrymen assembled, and that it was not sufficient at a meeting of thirty-five vestrymen for sixteen to vote for the removal and eleven against it, the remaining eight abstaining from voting altogether. Reg. v. Christchurch Overseers, 7 El. & Bl. 409; 27 L. J., M. C. 23; 3 Jur. (N.S.) 1074; 5 W. R. 755—Ex. Ch.

parish was newly created by a local act, which provided for twenty-four vestrymen being chosen for the purpose of managing the affairs of the church, providing scavengers, &c. This vestry had always acted in all the affairs of the parish:—Held, that this vestry was the proper body to determine whether a burial-ground should be provided for the parish under 15 & 16 Vict. c. 85, s. 51, Reg. v. Peters, 6 El. & Bl. 225; 25 L. J., Q. B. 271; 2 Jur. (N.s.) 424; 4 W. R. 480.

#### 2. PROCEEDINGS OF VESTRY.

#### a. Westings

Notice of . - A committee had been appointed at a vestry duly convened, to report whether it would be expedient to enlarge the parish church. Some time afterwards, notice of another meeting of the vestry was given in the following terms : "Notice is hereby given, that a meeting will be held in the vestry room, on, &c., at nine o'clock precisely, to receive a report from the church committee, and to adopt such measures as may appear necessary for earrying that report into execution" :- Held, that this was a sufficient notice of the meeting under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134 (the Church Building Acts), and 58 Geo. 3, c. 69. Blunt v. Harrood, 8 A. & E.

A notice was affixed by the churchwardens and overseers to the door of a parish church, on Sunday, the 25th of March, 1846, appointing a vestry meeting to be held on the succeeding Wednesday, to nominate officers of the parish for the ensuing year. A vestry was held, in pursuance of the notice, and the parish, after nominating the overseors, proceeded to elect two persons as surveyors of the highways:—Held, that this appointment of surveyors was invalid under 58 Geo. 3, c. 69, s. I, the notice of the meeting not having been given three days at least before the vestry meeting was held. Reg. v. Best, 2 New Sess. Cas. 655; 2 C. B. Rep. 90;

5 D. & L. 40; 16 L. J., M. C. 102; 11 Jur. 489.
Notice was given on a Friday for a vestry meeting to elect churchwardens on the following Tuesday. The vestry met and elected two churchwardens; but, in consequence of doubts as to the notice convening the vestry being in accordance with the provisions of the 58 Geo. 3, c. 69, s. 1, another notice was given on the next Sunday, calling a vestry meeting for the same purpose on the following Thursday, on which day the inhabitants again met and elected the same churchwardens, who entered upon the office and performed its duties. Upon a rule for a same form that the characteristic states the characteristic states are the characteristic states and the same form the characteristic states are the characteristic states and the characteristic states are the characteristic states are the characteristic states and the characteristic states are the characteristi mandamus to the inhabitants to elect churchwardens, on the ground that both elections were invalid:—Held, without deciding which of the two was the valid election, that, assuming the first to be bad, the second was good. Reg. v. St. Faith, 25 L. J., Q. B. 168; 2 Jur. (N.S.) 212; 4 W. R. 267.

The 58 Geo. 3, c. 69, s. 1, requiring notice of a "meeting of the inhabitants in vestry of or for any parish" to be given three days before the day to be appointed for holding it, by the publication of it on some Sunday, applies only to a common-law parish, and not to a district for ecclesiastical purposes created under the Church Ceclesiasical physics elected finder one chains Building Acts, 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134. Reg. v. Barrow, 10 B. & S. 674; L. R. 4 Q. B. 577; 20 L. T. 760; 17 W. R. 928.

- Adjournment. ] - Where notice of the purpose of a vestry meeting has been duly given, and that meeting has begun, but not completed, a certain business, and the meeting is regularly adjourned, such business may lawfully be completed at the adjourned meeting, though the notice for summoning such adjourned meeting does not state the purpose for which it is summoned. Scadding v. Lorant, 3 H. L. Cas. 418; 15 Jur. 955. S. C., in Q. B., 13 Q. B. 706, affirmed.

A vestry being about to be held for the election

meeting would be held in the parish church, but that, if a poll was demanded, it would be adjourned to the town-hall. At the meeting there was a show of hands, upon which a poll was demanded; and thereupon the chairman. without taking the sense of the meeting, adjourned the election to the town-hall, where a poll was taken :- Held, that the proceeding was regular, no business having been interrupted by it, and the adjournment, in a particular event, being part of the original appointment. Rev v. Chester (Archdeacon), 1 A. & E. 342; 2 N. & M. 413; 3 L. J., M. C. 95.

Place of ]—Before 58 Geo. 3, e. 69, the Ecclesiastical Court had jurisdiction, ratione loci, over the proceedings of vestry meetings held in a parish church. Wilson v. M'Math, 4 B. & Ald. 241: 22 R. R. 371.

Authority to fix Hours of .] -The vicar and churchwardens of a parish have power to fix the hour of holding vestry meetings, and the parishioners cannot by mandanus compel them parismoners cannot by mandamus compet them to alter it. Reg. v. Wilson or Tottenham (Vicar), 49 L. J., Q. B. 870; 43 L. T. 550; 45 J. P. 140

—C. A. Affirming, 4 Q. B. D. 357; 27 W. R.

Mandamus - To compel Churchwardens to Call. -The court will not grant a mandamus to churchwardens to assemble the parishioners for the purpose of taking a poll upon a motion, earried by a shew of hands at a vestry meeting, to do an illegal act; as, to apply a portion of a fund, held in trust for charitable purposes, to the crection of a monument to the memory of the donor of the fund. Rev v. St. Sariour's, South-wark, 3 N. & M. 879; 1 A. & E. 380.

Expelling Intruder from.]-In justification of an assault, the defendants pleaded that they were duly assembled as a select vestry; that, plaintiff being an intruder, they forced him out of the room. One of the select vestry not having received any notice of the meeting: - Held, that the justification was not made out, as the meeting was not a legally-constituted vestry, so as to support the allegation that the select vestry was duly assembled. *Dobson v. Fussey*, 5 M. & P. 112; 7 Bing. 305; 9 L.J. (o.s.) C. P. 72.

## b. Presidency.

In Whom. -The minister of a parish has a right to preside at all vestry meetings. Wilson v. M' Math, 4 B. & Ald. 241; 22 R. R. 371, But he is not an essential part of the vestry.

Mawley v. Barbet, 2 Esp. 687.

By an act for paving, lighting, and watching the streets of a parish, the rector, churchwardens, overseers of the poor, and vestrymen, were appointed trustees for putting the act in execution. By a subsequent act, the trustees. appointed to put the first act in execution were appointed trustees for exceuting that act, and the trustees, or any thirteen or more of them, were authorised to elect four constables for the parish:—Held, that the presence of the rector at a vestry for the election of a constable was not necessary if thirteen other trustees were present. Rev v. Brain, 3 B. & Ad. 614; 1 L. J., M. C. 53.

At a vestry meeting summoned by the churchwardens for the purpose of electing new churchof churchwardens, notice was given that the wardens in a parish regulated by 58 Geo. 3, D'Oyly, 12 A. & E. 139; 4 P. & D. 52; 4 Jnr. 8 Jur. (N.S.) 288. 1056. S. P., Reg. v. St. Mary Lambeth, 9 L. J., M. C. 113.

And he may adjourn such meeting, though against the wish of the majority present, on his legal responsibility if in so doing he improperly disturbs the proceedings. Ib.

A poll being demanded, he may, of his own

authority, grant such poll. Ib.

## o. Binding Effect of.

As regards Parish.]—The only legitimate mode in which a parish can express its desire to do an act is, by convening a vestry, and duly conducting the proceedings therein to their legal termination, viz, by shew of hands, or by a poll when a tool, viz. by snew of maios, or by a poll when a poll is duly demanded. White v. Steele, 12 C. B. (N.S.) 383; 31 L. J., C. P. 265; 8 Jur. (N.S.) 1177; 6 L. T. 686.

A parish being indebted to A, for repairs done to the church, the parishioners agreed at a vestry that the parish officers should give a bond for the amount; that A. should give the parish twelve months' notice when he required payment, and the parish should be at liberty to pay the debt by instalments; and, at another vestry held shortly afterwards, it was resolved, that the obligors should be indemnified by the parishioners, ont of the rates; and the parish officers for the time being were authorised and directed to pay the interest and the principal, when required, out of the rates. A., who was himself a parishioner, and several of the other parishioners, signed both the agreement and the resolution, and he received the interest on his debt for several years, and part of the principal also, out of the rates, and never called on the obligors to pay the interest :- Held, that, as the parishioners had no power to bind the parish, the obligors were not exempted from their liability on the bond, notwithstanding A. had signed both the agreement and the resolution. Jacquet v. Lewis, 8 Sim. 480 : 1 Jur. 511.

As regards succeeding Vestry.]—The acts of one vestry are not absolutely binding on a succeeding vestry, and they may be confirmed or. rescinded by such succeeding vestry, but the confirmation of the succeeding vestry is not necessary to make the acts of the preceding one valid. Marcley v. Burbet, 2 Esp. 687.

## d. Voting.

#### i. Qualification.

Plurality of Votes. |-- Where in a parish the poor-rates had, according to an ancient custom, been always assessed without regard to the annual value of property in the parish, but according to the supposed ability of the party assessed :- Held, that persons so rated were not entitled to the benefit conferred by 58 Geo. 8, e. 69, s. 3, as to the plurality of votes, although assessed in respect of property exceeding the annual value of 50l. Nightingale v. Marshall, 3 D. & R. 549 : 2 B. & C. 313.

Where, at a vestry meeting, a person is entitled. to vote in two characters, as an occupier in his own right, and also as an owner in his vicarious right, he cannot exercise his rights separately,

c. 69, the rector has a right to preside. Reg. v. | charge to which he is subject. Lambe v. Grieves,

Under Local Act.]—By a local act, the inhabitants of a parish paying church and poor rates were empowered to elect guardians of the poor; in 58 Geo. 3, c. 69, there is a proviso, that that act shall not affect the right or manner of voting in any vestry held by ancient usage or by special act:-Held, that this provise did not except the parish from the operation of that statute; and that, to bring a vestry within the exception, it must have a peculiar constitution, Rea v. St. James, Clerkenwell, 3 N. & M. 411; 1 A. & E. 317; 3 L. J., M. C. 99.

Voting at Adjourned Meeting.]-Inhabitants who were not present at an original vestry meeting may, if a poll is demanded, vote at the adjourned meeting. Griffin v. Ellis, 4 Jur. 409.

By a local act, the inhabitants of each district in the parish, in vestry assembled, were to nominate a certain number of persons to be returned to justices at petty sessions, who were to select therefrom a certain number to be overseers. a vestry meeting for the above purpose, there was a contest as to the persons to be nominated; and, after a shew of hands, a poll was demanded; -Held, that the nomination was not necessarily to be confined to the persons present at the meeting; but that a poll might be lawfully had on a future day, so that other persons entitled to vote might take part in the nomination. Reg. v. Hedger, 4 P. & D. 61; 12 A. & E. 189.

Rejection of Votes -Result not affected. -At an election of churchwardens, the votes of tenants of small tenements, the owners of which were rated to the poor and highway rates, by virtue of the 13 & 14 Vict. c. 99, tendered on behalf of one of the candidates, were rejected :-Held, that a mandamus to convene a vestry for the election of churchwardens would not lie to try the question whether such tenants were entitled to vote, it not being shewn that the result of the election would have been different if their votes had been received. Marchy or Joyce, Ex parte, 3 El. & Bl. 718; 28 L. J., M. C. 153; 18 Jur. 906; 2 W. R. 473.

Of Owner of Small Tenement-13 & 14 Vict. c. 99.1—Where the 13 & 14 Viet. c. 99 (Small Tenements Act) has been adopted in a parish, an owner of a tenement of a value not exceeding 61., who has been assessed to the poor-rate instead of the occupier, is, by virtue of the 58 Geo. 3, c. 69, entitled to vote at all vestry meetings in respect of such tenement; but the occupier has no such vote. But, for whatever number of tenements such owner is assessed, he can, at the most, give no more than six votes, the restriction in 58 Geo. 3, c. 69, s. 3, being applicable. Richardson v. Gladwin, El. Bl. & El. 138; 27 L. J., M. C. 192; 4 Jur. (N.S.) 377; 6 W. R. 473.

Executors. ]--When a person is assessed to a poor-rate in respect of his own property, and is also executor of a person whose executors are assessed in respect of property of the deceased, he is entitled to vote at a vestry, under 58 Geo. 3, c. 69, if the two assessments amount to 251. Reg. but must combine his qualifications, so as to vote v. Kirby, 1 B. & S. 647; 31 L. J., Q. B. 3; according to and in respect of the aggregate 5 L. T. 280; 10 W. R. 13.

ii. Mode of.

Votes taken per capita. |--Where, under a deed of feoffment, lands were granted to fourteen feoffees, for the maintenance of a schoolmaster to instruct the children of all the inhabitants of a parish, and it was provided that no act concerning the lands should be done but in a vestry or meeting of the feoffees, and ten, at least, of the inhabitants, who should be vestrymen and not fcoffees, in a vestry to be held by them; and a power of removal of the schoolmaster was given, so that it was with the consent and agreement of the feoffees and vestrymen, or the major part of them, who should be assembled in vestry, so always as there should be ten, at least, of the vestrymen who were not feoffees voting at the holding of the vestry in which the putting away of any schoolmaster should be agreed upon :-Held, that, in the execution of the power of the removal of the master, the votes were to be taken per capita, and not according to 58 Geo. 3, c. 69. Att. Gen. v. Wilkinson, 7 Moore, 187; 3 Br. & B. 266.

Irrelevant Vote does not prevent subsequent voting.]-An irrelevant vote on a proposition submitted to a vestry meeting does not prevent those who gave it from afterwards voting on any other proposition relating to the same subject proposed at the same meeting. Gosling v. Veley, 4 H. L. Cas. 479; 1 C. L. R. 950; 17 Jur. 939.

Person not "Present" unless voting.]-Where a statute requires a majority consisting of a proportion of the votes of persons present at a meeting to render valid an act, there must be the specified proportion of those present actually voting for the act, and those who refuse to take any part in the proceedings cannot be considered as absent. Eynshaw, In re, 3 New Sess. Cas. 507; 12 Q. B. 398, n.; 18 L. J., Q. B. 210.

Time during which Votes can be taken, -A vestry meeting was convened for considering the question of the adoption of the Small Tenements Act, and after a shew of hands a poll was demanded, and the time agreed upon, viz. upon two conscentive days between twelve and four, and six and eight o'clock in the evening. The voting was slack on the first day, but on the second so great a rush was made that, out of the whole number of 1,100 ratepayers, 800 or 400 were unable to vote :- Held, that the time appointed was reasonable, and that there would have been time for all to vote, had they used due diligence. Reg. v. Sutton, Lancashire, Overseers, 11 L. T. 487; 13 W. R. 187.

Mode of Election.]—Where, upon a vacancy arising in the office of organist to a church, the vestry unanimously resolved that the course followed at the antecedent election should be pursued, and, in pursuance of this intention, appointed a committee to reduce the number of candidates to six, each of whom should take the service on a particular Sunday; and at a subsequent vestry this resolution was unanimously confirmed; and the committee selected six out of sixty candidates who presented themselves; and, at shew of hands, and refused to grant a poll of the the time of the election, a motion was made and seconded that A., a candidate who had not been thus selected, should be eligible, but this was negatived on a division; and where, afterwards,

of votes was tendered, and received as tendered only, on behalf of A. than on behalf of any other candidate: — Held, that, it not having been objected at the previous meetings that the votes given for A. were lost or thrown away, this was a reasonable mode of conducting the election. Lecrew, Ex parte, or Reg. v. St. Stephen's, Cole-man-street (Vicar), 2 D. & L. 571; 14 L. J., Q. B. 34; 9 Jur. 255.

Taking Poll.]-The proper way of taking the vote at a vestry is by a poll, the meeting being adjourned for that purpose, if necessary or convenient. Egham Burial Board, In re, 3 Jur. (N.S.) 956.

\_\_\_\_ Demand for.]\_On the nomination of eight inspectors to act in the election of vestrymen, under 1 & 2 Will. 4, c. 60, the decision of the chairman, on the shew of hands, that one or the other party has a majority is not conclusive, but he is bound, on requisition from either side, to take steps for ascertaining the numbers. Reg. v. St. Paneras Vestrymen, 11 A. & E. 15; 4 P. & D. 66, n.

At an election of parish officers, a poll, if demanded upon a shew of hands, must be taken. of the ratepayers generally; and the election is a nullity, if the poll is confined to persons present when the poll is demanded. Reg. v. St. Mary, Lambeth, Churchwardens, 3 N. & P. 416; 1 W. W. & H. 398.

Effect of Demand for.]—At a meeting of the vestry of a parish, on the 25th February, 1870, to elect a waywarden, L. and C. were proposed. and seconded; the majority of the ratepayers. present, counting each as a single vote, was infavour of L.; but it was suggested that the votes ought to be counted by giving each ratepayer-his plurality of votes; and, so counting the votes, the majority was in favour of C. A poll was then demanded on behalf of L.; and a poll was appointed to be taken on the 28th February, between ten and two o'clock, at the room in which the vestry was then being held. On the 28th, several ratepayers went to the room to vote; but, in consequence of a notice that C. declined to stand, no one went into the room, and no poll whatever was taken. C. was afterwards informed by the chairman of the meeting; that he was elected by the votes of the meeting, and the chairman gave him a certificate of his election :- Held, that he was not elected; and. that no poll having been taken after it had been duly demanded, the election was void. Reg. v. Cooper, 39 L. J., Q. B. 273; L. R. 5 Q. B.

- Refusal of Demand for.]-A. local act. relating to a parish empowered the "governors and guardians to call a vestry meeting of the inhabitants of the parish on the Easter Tuesday in every year, at which meeting all vacaucies inthe list of governors and guardians shall be filled. np by poll or ballot, or in such way of election as shall be deemed most proper and convenient." At a vestry meeting held in pursuance of this act, the chairman filled up the vacancies by, parish :-Held, that, as a poll of the parish had been demanded by some of the inhabitants present at the vestry, on behalf of some of the candidates, the election by shew of hands a poll having been demanded, a greater number could not be sustained, as it was for the meeting,

and not for the chairman, to decide on the mode of election. Reg. v. St. Mary, Newington, Guardians, 2 B. C. C. 303; 6 D. & L. 162; 17

L. J., Q. B. 220; 12 Jur. 918.

Held, also, that a poll had properly been demanded; that the chairman was bound to grant it, and adjourn the vestry for that purpose, so that all the inhabitants might have an opportunity of voting. *Ib*.

Under 58 Geo. 3, c. 69, —A division of a vestry, to be taken in the manner preserbed by 58 Geo. 3, c. 69, may be taken by a poll of all the ratepayers, such poll being an adjournment of the vestry. At such poll the original proposition and an anendment theonsistent with it being the only one proposed, may be put to the vote, and affirmative and negative votes may be taken upon each, and in that way the sense of the voters may be ascertained. Etc. V. St. Mary's, Islington, Burial Bourd, Kay, 449. See also Reg. v. St. Panerus Vestrymen, ante, col.

- Demand for Second Poll not granted.] At a vestry held under 58 Geo. 3, c. 69, for the purpose of electing surveyors of highways, of which public notice had been given, it was agreed that the vote should be taken by a shew of hands, leaving it open to anyone to propose that the votes should be taken according to the statute. A. and B. were proposed and seconded for the office of surveyor, and on a shew of hands A. had a majority. It was then proposed and seconded on behalf of B, that the votes should be taken according to the statute. No objection was made, and, on the votes being so taken, B. I L. J. (o.s.) C. P. 56. had a majority, and was declared duly elected. A. then demanded a poll of the whole parish :-Held, that, the meeting having agreed to a poll being taken according to the statute, no one was entitled afterwards to demand a poll of the whole parish, that the election of B. was valid, and that a mandamus for another meeting to elect would not lic. Reg. v. Hillingdon (Vicur), 18 Q. B. 718.

#### e. Audit of Accounts.

Mandamus.]—Where a local statute confers a power of investigating accounts upon auditors to be annually elected, and to be summoned by the vestry clerk at certain stated intervals to audit the accounts, the court will not grant a mandamus to compel the latter, when new auditors have been elected for the succeeding year, to call a meeting of the old auditors to audit the accounts of the past year. St. Giles and St. George's, In re, 1 D. P. C. 540.

Production of Accounts by Church Building Trustees, 1—The trustoes appointed and acting under a local act for building a church, which authories them to key rates upon the finabitants of the parish, and directs that the accounts shall be audited and allowed by the quater sessions, are, nevertheless, compellable, under 1 & 2 Will. 4, c. 60, 8. 54, to produce and explain their accounts, appointed under, and in consequence of, the adoption of the last-mentioned act. Rev. 8, Paucra New Church Trustees, 5 N. & M. 219; 3 A. & B. 53 A.

Place of Meeting.] — Auditors of parish accounts, appointed under that act, can hold meetings only in the board-room of the vestry. Ib.

## 3. LIABILITY OF VESTRYMEN.

For Payment of Solicitor employed by them.]—
If several parishioners in the vestry sign a resolution in the vestry minute-book, stating that they
approve of an action brought by the surveyor of
the highways against A., and that they do thereby guarantee to him all legal expenses that are
or may be incurred by him in prosecuting that
suit, this binds them personally. Heudehouvels
v. Lengton, 3 Ct. 8. P. 506. Rule for a new trial
refused. 10 B. & C. 546.

Vestrymen, who signed a resolution ordering the parish surveyor to take steps for defending an indictment for not repairing a road, were held not to be responsible for the payment of the attorney employed by the surveyor. Sprott v. Pometl, 3 Bing, 478; 11 Moore, 398; 4 L. J. (O.S.) C. P. 161; 28 R. R. 665. And see Louchester v. Dreuor, 9 Moore, 688; 2 Bing, 361; 3 L. J. (O.S.) C. P. 162.

Right of Churchwarden to Contribution.]—
Where several parishioners joined at a vestry meeting in signing an order, authorising two churchwardens to pat a new roof on the parish church, and both concurred in giving orders for that purpose, and one of them (the plaintiff) paid the artificers; and, a rute for reimbursing them having been quashed, the plaintiff sued the defendant, being the other churchwarden, for a molety of the money so paid:—Held, that the defendant could not insist on those parishioners who had signed the vestry order being joined with him as co-defendants in the action. Launchester v. Tricker, 8 Moore, 20; 1 Bing. 201; 1 L. J. (O.S.) C. P. 56.

#### 4. VESTRY CLERK.

Admission to Office of ]—A mandamus will not lie to admit a vestry clerk to his office. Rew v. Croydon, 5 Term Rep. 713; 2 R. R. 688.

Objecting to produce Vestry Book. —A vestry clerk, who is called as a witness, cannot, on the ground that it may criminate himself, object to produce the vestry-book kept under 58 Geo. 3. 6. 69, s. 2. \*\*Dradshavo v. Murphy, 7 Car. & F. 612.

Proof of Ofice, —To an action brought by the vestry eleck of a parish under a local act, the defendant pleaded that the plaintiff was not the vestry elerk :—Held, that evidence of his having acted as vestry elerk was sufficient prima facto evidence of his appointment. Mr Gakey v. Maton, 2 M. & W. 206; 2 Gale, 288; 6 L. J., Bz. 29.

Not to be appointed by Parish Council.]—See 56 & 57 Vict. c. 73, s. 17 (4).

A. L.

# EDUCATION.

See SCHOOL-CHARITY.

### EJECTMENT.

A. WHEN IT LIES.

1. For what Property, 1470.

Description of Property Claimed, 1471.
 TITLE OF PLAINTIFF IN ACTION OF.

1. Must be a Legal Title, 1472.

2. Possessory Title, 1475.

- 3. Under Compulsory Powers of Purchase, 1477.
- 4. Joint Tenants, Tenants in Common, and Coparceners, 1478.
- 5. Outstanding and Satisfied Terms, 1480.
- 6. Evidence of Title, 1483.
- 7. Demand of Possession, 1486.
- 8. Adverse Possession, 1487.
- 9. Barred by Lupse of Time See LIMITATIONS, STATUTE OF.
- 10. Estoppel in Cases of Landlord and Tenant-See LANDLORD AND TENANT.

## C. BY PARTICULAR PERSONS.

- 1. Mortgagors and Mortgagees, 1488.
- 2. Execution Creditors, 1494.
- 3. Heirs and Devisees, 1496.
- 4. Personal Representatives, 1499.
- 5. Grantees of Rent-charges, 1500.
- 6. Assignees of Bankrupts and Insolvents-See BANKRUPTCY.
- 7. Copyholders-See COPYHOLD.
- 8. Corporations-See Corporation.
- 9. Overseers-See Poor LAW.
- 10. By Mortgagees of Turnpike Tolls-See WAY.
- 11. In other Cases—See Specific Titles.

## D. BETWEEN LANDLORD AND TENANT.

- 1. When Tenant holds over, 1500.
- 2. Right of Re-entry, 1502.
- Sufficiency of Notice to Quit—See LAND-LORD AND TENANT.
- 4. For a Forfeiture-See LANDLORD AND TENANT.
- 5. For Non-Insurance—See LANDLORD AND TENANT.

## E. PROCEDURE.

- 1. Parties, 1507.
- 2. Writ of Summons, 1508.
- 3. Service of Writ, 1511.
- 4. Tenant's Notice of Writ to Landlord,
- 5. Appearance and Defence, 1513.
- 6. Particulars, 1516.
- 7. New Trial, 1517.
- 8. Judament, 1517.
- 9. Costs, 1519.
- 10. Receiver, 1520.
- 11. Execution, 1521.
- 12. Writ of Restitution, 1523.
- 13. Staying Proceedings, 1524.
- 14. Specially Indorsed Writ-See PRACTICE.
- Pleadings—See PRACTICE.
- Discovery and Interrogatories—See DIS-COVERY.
- 17. Jurisdiction of County Court See COUNTY COURT.

## F. MESNE PROFITS

- 1. Action for, 1526.
- 2. What Recoverable, 1528.
- 3. Pleadings and Evidence, 1529,

## A. WHEN IT LIES. 1. FOR WHAT PROPERTY.

Land.]-Ejectment will lie by an owner of the soil for land which is part of the king's highway; or for an acre of land, described only by the name of land, though there are a wall and porch, and part of a house built upon it. Goodtitle d. Chester v. Alher, 1 Burr. 133; 1 Ld. Ken.

Ejectment lies for land and a beast gate in Suffolk, for it means a certain quantity of land or common appurtenant to the land mentioned. Mellington v. Goodtitle, Andrews, 106; 2 Str.

Messuage "or" Tenement. ]—But not for a messuage "or" tenement: but if it is of a messuage "and" tenement, the court will give leave to strike out the words "and tenement." Goodright d. Welch v. Flood, 3 Wils. 23. And see Doe d. Bradshaw v. Plowman, 1 East, 441; and Doe d. Stewart v. Denton, 1 Term Rep. 11.

Messuage "and" Tenement.]—Where judgment in ejectment for a messuage "and" tenement was entered up generally for the plaintiff, it was no ground for reversal on error. Doe d. Laurie v. Dyball, 8 B. & C. 70; 2 M. & Ry. 184; 1 M. & P. 330; 6 L. J. (o.s.) K. B. 317.

Tin-bound.]—A tin-bound is a mere easement for which an ejectment cannot be brought. Doe d. Falmonth (Eurl) v. Alderson, 1 Gale, 441; 1 M. & W. 210; 4 D. P. C. 701; 1 Tyr. & G. 543; 5 L. J., Ex. 153.

Barn, &c.]—A barn and outhouses standing on a close are attached to the freehold and are the subject-matter of an ejectment. Anthony v. Haney, 1 Bing. 186; 1 M. & Sc. 800; 1 L. J., C. P. 81.

Toll-houses and Gates. ] - Trustees under a turnpike act having demised to one of several mortgagees such proportion of the tolls arising from the road and of the toll-houses and tollgates for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll-gates, in order to repay himself the interest due to him :-Held, that he might well maintain ejectment, notwithstanding a clause in the act that all the mortgagees should be creditors upon the tolls in equal degree. Doe d. Banks v. Booth, 2 Bos. & P. 219 : 5 R. R. 575.

Dower.]—Ejectment does not lie for dower which has not been assigned. Doe d. Nutt v. Nutt. 2 Car. & P. 430.

Rectory.]-Nor for a rectory against a person who has been simoniacally presented. Doe d. Watson v. Fletcher, 8 B. & C. 25; 2 M. & Ry. 206; 6 L. J. (O.S.) K. B. 282.

Canonry.]—Nor for a canonry as such. *Doe* d. *Butcher* v. *Musgrave*, 1 Scott (N.R.) 451; I Man. & G. 625; 9 L. J., C. P. 318; 4 Jur. 631.

Prebendal Stall and House. - Nor for the recovery of a prebendal stall of the king's free Butcher v. Musgrave, 1 Man. & Gr. 625; 1 Scott (N.R.) 451; 9 L. J., C. P. 318.

#### 2. DESCRIPTION OF PROPERTY CLAIMED.

Local Description,]—It is not necessary to aver the premises to be in a parish; if they are described as being in the parish of A. and B., the court will construe it to mean part in the parish of A, and part in B.; B, being the name of a parish. Goodtitle d. Brembridge v. Walter, 4 Taunt. 671.

Lands sought to be discovered were described in a declaration as "situate in the county of S.," without any other local description :- Held, on motion in arrest of indement, that the declara-tion was good. Doe d. Educards v. Gunning, 2 N. & P. 260; 7 A. & E. 240; W. & D. 460. S. P., Doe d. Bassett v. Men, 7 A. & E. 240.

The will in which the demised lands lie may, after verdict, be collected from the vill in which the ejection is laid to have been committed. Goodright d. Smallwood v. Strother, 2 W. Bl.

Semble, that the omission of all local description of the tenement demised, is error, though the county and vill in which the demise was county was stated in the margin, before 15 & 16
Vict. c. 76. Doe d. Rogers v. Bath, 2 N. & M.
440; 3 L. J. K. B. 48.
If the parishes of A. and of B. are united by

act of parliament for the maintenance of their poor, and for no other purpose, it is a misdescription to state premises which are actually within the parish of A., as situate in the united parishes of A. & B. Goodtitle d. Pinsent v. Lammiman,

2 Camp. 274; 6 Esp. 128.

Where the premises were described as being in the parish of Westbury, and it was proved that there were two parishes of Westbury, viz. Westbury on Tyrm, and Westbury on Severn :- Held, that this was not a variance. Doe d. Jumes v. Harris, 5 M. & S. 326.

Evidence as to Parish.]—In ejectment from a house, to shew that it is situated in the parish mentioned in the declaration, it is prima facie evidence that the place in which it stands is watched by the watchman of that parish. Doe d. Gunson v. Welch, 4 Camp. 264.

When Plaintiff proves Title to Part only. ]-Where a defendant in ejectment appears to defend for the whole of the land mentioned in the writ, and the plaintiff at the trial proves his title to the possession of part, the verdict is not to be entered in a general form for the plaintiff, but for the part only of the land as to which he has succeeded. Aleoch v. Wilshaw, 2 El. & El. 633; 29 L. J., Q. B. 143; 6 Jur. (N.S.) 628; 2 L. T. 55.

Before the C. L. P. Act, 1852, the plea of not guilty in ejectment was divisible, and therefore a plaintiff was entitled to a verdict for that part of the premises to which he proved title, and the defendant for the other part. Doe d. Booman v. Lewis, 13 M. & W. 241; 2 D. & L. 667; 14 L. J., Ex. 198. S. P., Doe d. Hellyer v. King, 6 Ex. 791; 20 L. J., Ex. 301.

A plaintiff will recover according to his title.

chapel at Windsor, nor for the house allotted but not e contra. Denn d. Burgess v. Purvis, 1 Burr. 326.

A declaration contained two demises by two different lessors of two distinct undivided thirds; judgment was given that the plaintiff "do recover his said terms": it appeared from the facts stated in a bill of exceptions to the judge's directions on a point of law, that the ejectment respected only one undivided third :-Held, well enough on this record, where the point was only raised by bill of exceptions. Rowe v. Power, 2 Bos. & P. (N.R.) 2.

A plaintiff having proved that he was entitled to recover part of the premises, the question of the precise extent of his claim, as defined by particular metes and boundaries, cannot be inquired into. Doe d. Dravers' Co. v. Wilson, 2

Stark. 477; 20 R. R. 724.

Misdescription in Verdict.]—An objection to a verdict in ejectment, as including the entire interest in lands instead of one-third, is no ground of exception, and cannot be entertained upon a writ of error. Faussett v. Carpenter, 5 Bligh (N.S.) 75.

Identity of Premises.]—Whether the premises sought to be recovered in ejectment are identical with those included in an outstanding mortgage, is a question of fact which must be submitted to made were stated in the declaration, and the the jury. Brown v. Armstrong, Ir. R. 7 C. L.

> Undivided Moiety.]—Under a demise of the whole, an undivided moiety may be recovered. Doe d. Bryant v. Wippel, 1 Esp. 360. S. P., Denn d. Burgess v. Purvis, 1 Burr, 326.

## B. TITLE OF PLAINTIFF IN ACTION OF.

### I. MUST BE A LEGAL TITLE.

In ejectment, the person having the legal title must prevail. Doe d. Da Costa v. Whavlon, 8 Term Rep. 3. R. p. Goodtitle d. Jones v. Jones, 7 Term Rep. 47; Doe d. Hodsden v. Steple, 2 Term Rep. 684; 1 R. R. 545; and live d. Eberall v. Love, 1 R. Bl. 447.

Even in an ejectment by a trustee against his cestni que trust. Roo d. Reade v. Reade, 8 Term Rep. 122; Weakly d. Yea v. Rogers, 5

East, 138, n.

The plaintiff in an action to recover possession of certain land alleged that, though the legal estate was outstanding in a third person, he had the equitable title to possession by reason of an agreement with the owner of the legal estate for the sale of the land to him. It was alleged that the equitable title was in other persons who were not parties to the action. The owner of the legal estate was not a party to the action:—Held, that, under the circumstances, the plaintiff could not maintain the action. Allen v. Woods, 4 R. 249; 68 L. T. 143—C. A. See Sunnder v. Merryweather, 3 H. & C. 902; 35 L. J., Ex. 115; 11 Jur. (N.S.) 655; 13 W. R. 814.

Where the assignee of a legal mortgage of lands sub-mortgaged his security, conveying the legal estate to the sub-mortgagee, and afterwards, while the sub-mortgage was subsisting and the principal debt due thereon, brought an ejectment on the title, without the concurrence of the subwhere he demands more than he has a title to, mortgagee, against a person in possession deriving title under the original mortgagor :- | named, A. to pay interest. The purchase was

Trustee for Creditors.]—The trustee of a term to satisfy creditors, not having notice of an agreement for a lease before the grant of the term, may maintain an ejectment against the tenant in possession under the agreement. Goodtitle d. Estwick v. Way, 1 Term Rep. 735.

Bankrupt. ]-A., being tenant in fec-simple of customary land, which passed by bargain and sale, with surrender and admittance, became bankrupt, and the commissioners assigned the land to the assignees. Afterwards the bankrupt died; and after that the assignees were admitted. Ejectment being brought, on the demises of the bankrupt's heir-at-law, and of the assignees, both laid between the bankrupt's death and the admission :- Held, that the plaintiff must recover on one or the other demise, for that the title was on one of the other dentise, for that the latte was not in abeyance; but, if the assignees' title was not perfect, it was in the heir. Dow d. Danson v. Parko, 4 A. & E. 816; 6 L. J., K. B. 272.

An uncertificated bankrupt purchased premises which he had occupied, and which he continued to occupy for the purposes of his business. These premises were conveyed to A., in trust for the bankrupt, by a deed which recited that the legal estate was outstanding in a third person. Subsequently A., on the order of the court of chancery, conveyed the premises to the assignees appointed under the bankruptcy. After this their attorney took possession of the bankrupt's goods, and threatened to turn him out of the premises unless he signed an attornment to the assignees. which he accordingly did :- Held, that they had sufficient title to enable them to maintain the action. Conper v. Lands, 14 L. T. 287; 14 W. R. 610.

Settlement-Power of Appointment. ]-By a deed of settlement premises were limited to such uses as A. B. should appoint; and in default of appointment, to the use of C. D. in fee, in trust for A. B. in fee. In exercise of the power, A. B. denised the premises for a term of years, the desired yielding and paying during the term a yearly rent unto A. B., his heirs and assigns. The lessee covenanted with A. B., his heirs and assigns, for payment of the rent, and also for repair, during the term; and the lease contained a proviso that in case of nonpayment of the rent, or nonperformance of any of the covenants, it should be lawful for A. B., his heirs and assigns, to re-enter :- Held, that as A. B. (having only an equitable estate) was a stranger to the estate, the reservation in the lease to him and his 1366; 23 L. J., C. P. 185; 18 Jur. 1014; 2 W. R. heirs and assigns might be rejected, and that the 498. party entitled under the settlement to the A. reversion had a right to recover in ejectment, under the power of re-entry for breach of any of the covenants. Greenaway v. Hart, 2 C. L. R. 370; 14 C. B. 340; 23 L. J., C. P. 115; 18 Jur. 449 : 2 W. R. 702.

Completed. ]—A., being in possession of land, avoid the deed, and a court of law being agreed by writing that H. should sell, and he, petcht to o perfect justice between the A., should purchase the land for an estate pur Hastle v. Pate, S fr. C. L. B. 35—Ex. Cl autre vie; that A. "shall be entitled to the possession or to the rents on or from this day;" H. to make a good title in twenty-one days; if appeared at the trial that the elegit had issued the purchase should not be completed by a day upon a judgment entered up under a warrant of

Held, that the action could not be sustained.

Held, that the action could not be sustained.

Fechan v. Mundeville, 28 L. R., Ir. 90. notice to a tenant from year to year :- Held, in the absence of any evidence as to right of possession in A., that H., on those facts, might recover against A. in ejectment. Doe d. Bord v. Burton, 16 Q. B. 807; 15 Jur. 990.

> Possession of Father is Evidence of Title of Son. |-- A plaintiff relied on her own possession for thirteen years, and her husband's before her for eighteen years, but in so doing shewed that her hisband died leaving children. The defen-dant, in whom the legal estate was before the twenty years, had turned the plaintiff out of possession:—Held, first, that the possession of the plaintiff, not being connected by right with that of her husband, s. 34 of 3 & 4 Will. 4, c, 27, did not give her the right of possession against

the defendant. Due d. Carter v. Barnard, 13 Q. B. 945; 18 L. J., Q. B. 306; 13 Jur. 915. Held. scondly. that the possession of the husband of the plaintiff was prima facie evidence of the title of his heir, against which the possession of the plaintiff could not prevail.

Conveyance from Trustee to Cestni que trust cannot be presumed. |-- A inry is not to be directed to presume a conveyance by a trustee to the cestui que trust, unless it is reasonably probable that such a conveyance was in fact executed. M'Queen v. Meude, 28 L. T. 768.

By a will, trustees were directed to hold a leasehold estate for A. for life, and after the death of A. for the plaintiff absolutely. A. died in September, 1871. The plaintiff brought eject-ment for part of the estate in March, 1873. One of the trustees had died, the survivor was not joined in the writ, nor had he, in fact, assigned the legal estate to the plaintiff. The court held that the jury could not have been directed to presume an assignment of the legal estate to the plaintiff, but made absolute a rule for a new trial, allowing the plaintiff to amend by adding the name of the surviving trustee. Ib.

Title Founded on Fraud-Illegality or Mistake, ]-A. procured B. to grant him a lease of premises, by means of a false representation that he intended to carry on a lawful trade therein. Having obtained possession, A. converted the premises into a common brothel, whereupon B. forcibly expelled him:—Held, that A. might maintain ejectment, the fraudulent misrepresentation and the subsequent illegal use of the premises not being sufficient (at law) to avoid the lease. Feret v. Hill, 15 C. B. 207 ; 2 C. L. R.

A. procured B. to execute to him an assignment of a lease, by means of a false and fraudulent representation, that he, A, was executor and devisee of C., and in that capacity a creditor of B.; B. was, in fact, indebted to C. for part of the alleged consideration-moneys:—Held, that Agreement to Sell to Tenant—Purchase not representations not being sufficient (at law) to avoid the deed, and a court of law being incompetent to do perfect justice between the parties.

> Land of L. having been delivered to H. upon elegit, H. brought ejectment against L. It

than twelve months to run, which were given It being upon a loan at usurions interest. objected that, so far as regarded the land, the proviso in 2 & 3 Vict. c. 37, s. 1, took the facts out of the protection of that act, as being a security upon land, and therefore the execution was bad, as being founded on a usurious contract : -Held, that supposing the judgment or execution bad, the objection could not be taken in the ejectment, but that the proper course would have been to move to set the judgment or execution aside. Hughes v. Lumley, 4 El. & Bl. 274; 3 C. L. R. 241; 24 L. J., Q. B. 57; 1 Jur. (N.S.) 422; 3 W. R. 109.

The 6 & 7 Will, 4, c. 115 (extended by the The 0 & 7 Will. 4, 6, 110 (extended by the wines care is formed incredible as subsequent 4 & 5 Vict. 0, 31), authorises the exchange of adverse possession for less than twenty years, lands on conditions therein prescribed. One Asher v. Whitelock, 35 L. J., Q. B. 7, L. B. Q. B. of these is the written consent of the councils [1, 11] Jur. (x.8.) 125; H. B. T. 234; J. H. W., E. S. of the lands intended to be exchanged. The landowners of a parish determined to carry this act into execution, and appointed a commissioner for that purpose. B., one of the landowners, authorised his agent to attend for him at the meetings held for the purpose of carrying the act into execution, but desired him not to exchange a particular wood except for woodland. A.'s lands were to be exchanged against those of B., and this restriction was communicated to A.'s agent, who, being asked to exchange another wood against the wood in question, said that his principal had no power to do so. The answer was communicated to B. who took no further notice of it. The restriction on the anthority of B.'s agent did not appear to have been brought to the knowledge of the commissioner. The commissioner allotted the lands to be exchanged, and among them included the wood, but did not give woodland for it. Possession of the exchanged lands and of this wood (although the award of the commissioner had not been formally executed) was delivered by B.'s agent to N., who immediately began to exercise acts of ownership over B. some time afterwards, discovered what had been done, and brought ejectment against N. for the wood. N. filed his bill in chancery to restrain B. from proceeding with the action, and compel him to perfect the exchange; and B. filed his bill to prevent the commissioner from executing the award, alleging the consent given to him had been signed by mistake :- Held, that N. was entitled to an injunction as prayed by his bill, and that B. had no equity on which to ask for the interference of the court in his favour. Beaufort (Duke) v. Neeld, 12 Cl. & F. 248 : 9 Jur. 813.

#### 2. Possessory Title.

Prior Possession.]-Prior possession, however short, is a sufficient prima facie title in ejectment against a wrongdoer. Doe d. Hughes v. Dyeball, M. & M. 346; 3 Car. & P. 610.

If it is proved that the plaintiff let the locus in que to a tenant, who held peaceable possession for about a year; this is sufficient evidence of title as against a party who came in the night, and forcibly turned such tenant out of possession.

In ejectment against a person who has entered forcibly, without any title, evidence of prior possission is sufficient to entitle the plaintiff to 416; 7 L. T. 795; 11 W. R. 429.

attorney given before 17 & 18 Vict. c. 90 (which | recover; and the plaintiff does not lose his right repeals the usury laws) by L. to secure sums to to insist on such possession by setting up a title become payable on bills of exchange, having less which he fails to establish in proof. Davison v. Gent, 1 H, & N. 744; 26 L, J., Ex. 122; 3 Jur. (N.S.) 342; 5 W. R. 229.

Mere possession is not sufficient to sustain an ejectment against a wrongdoer, where it is shewn that the title is out of the plaintiff. Nagle v.

Shea, Ir. R. 8 C. L. 224.

Possession creates devisable Interest. ]-The mere possession of land for more than twenty years confers upon the possessor a prima facie heritable and devisable interest in fee therein good against all the world but the true owner of the soil, and the devise in fee of such possessor may maintain ejectment against any person whose title is founded merely on subsequent

Possession under Deed having Covenant to convey Legal Estate.] — Possession for many years under a deed declaratory of a beneficial interest, in which a covenant to convey the legal estate is inserted, will not raise a presumption that such estate has been conveyed to the possessors, nor entitle them to bring an ejectment. Goodright v. Swymmer, 1 Ld. Ken. 385

Statute of Limitations. ]-A., more than twenty years before, without the permission of the lord, inclosed a small portion of the waste of a manor, on which he built himself a hut. In 1835, the encroachment having been presented at the lord's court, the then lord of the manor, accompanied by his steward, went to the premises, A.'s family being there, and, stating that he took possession, directed that a stone should be taken out of the wall of the hut, and that a portion of the fence should be removed. All this was done in the absence of A. The lord and his steward then retired, and nothing more was done :- Held, that the acts so done by the lord did not amount to a dispossession of A., and a resumption of possession by the lord, so as to entitle the latter to maintain ejectment within twenty years from that time. Doe d. Baker v. Coombes, 9 C. B. 714; 19 L. J., C. P. 306.

A tenant by the curtesy affected to devise the estate to B. for life, with remainder to C. The heir did not interfere, and B. took and held possession under the will for more than twenty years, B. then conveyed the premises in fee to the defendant. Afterwards B. died. The assignee of C. the remainderman, brought ejectment :- Held, that B. had acquired no title by possession under the Statute of Limitations as against persons claiming under the will, and that the defendant was estopped from setting up the invalidity of the will. *Board v. Board*, 43 L. J., Q. B. 4; L. R. 9 Q. B. 48; 29 L. T. 459; 22 W. R. 206.

Evidence to shew Possession Rightful.]-Parol evidence having been given of the assignment of a lease to the occupier of land, and of the payment to the owner of the fee of the conventionary rents, during several years included in the lease;—Held, that the possession of the occupier must be held to be a rightful possession under the term. Metters v. Brown, 1 H. & C. 686; 32 L. J., Ex. 138; 9 Jur. (N.S.)

3. Under Compulsory Powers of Purchase.

Company taking Land under Act of Parliament. - Ejectment to recover a portion of the land and banks of the Swansea Canal. In 1779, P., being seised of the land, demised the same to M. & Co., for sixty-five years. In 1793 the Swansea Canal Company was formed for making a canal, which was intended to pass in part through the land in question, and they obtained an act for that purpose. In 1797, M. & Co. and B. widened a canal made by M. & Co., and extended the same through part of the land, which canal joined and formed a continuation of the Swansea Canal. The powers for making a portion of the canal which passed through a portion of the lands sought to be recovered, were obtained by B. and M. & Co. By that act it was enacted, that upon payment or tender of certain sums of money adjudged by commissioners, or assessed by juries, for the purchase of any such lands, it should be lawful for the canal company to enter upon such lands, or before such payment or tender, by leave of the owners and occupiers, and thereupon such lands should be vested in such company. The lands sought to be recovered formed part of the lands authorised to be taken by the canal act. No payment or satisfaction was made or agreed to be made to the owners of the lands, but everything was done by B., with the full consent and approbation, and in accordance with the wishes of such owners and proprietors. The defendant in 1835 became the assignee of B. C. in 1800 became the purchaser of the lands, and the interest therein afterwards became vested in the plaintiff at the expiration of the lease in 1845;—Held, that the plaintiff was entitled to recover possession of the lands. Doe d. Patrick v. Beaufort (Duke), 6 Ex. 498; 20 L. J., Ex. 251.

Lands Clauses Act. ]-A company took possession of land for the purposes of its railway, by an agreement with R., who was in possession of the land. While the parties were treating for the price, the plaintiff, on the 30th August, 1860, informed them that he was the mortgagee in fee of the land, and claimed compensation from them. The company did not admit, or acknowledge, or dispute his title, but asked for a short delay during the absence of its legal adviser. On the 25th October, 1860, the plaintiff brought ejectment to recover possession of the land :-Held, that as the title was not in dispute, the action could not be maintained, and that the company had a right to the undisturbed possession of the land, under s. 124 of the Lands Clauses Act, 1845. Jolly v. Wimbledon and Dorking Ry., 1 B. & S. 807; 31 L. J., Q. B. 95; 8 Jur. (N.S.) 1037; 5 L. T. 615; 10 W. R. 253—Ex. Ch.

A railway company having complied with the provisions of s. 85 of the Lands Clauses Act, 1845. entered upon and took land within the time prescribed by s. 123 for exercising their compulsory powers, and continued in possession after the prescribed period, without having had compensation assessed and the land conveyed to them : -Held, that their continuance in possession was not nevertheless unlawful, and that an ejectment could not be maintained against them under such circumstances. Due of Armistead v. North Staffordskire Ry., 16 Q. B. 526; 20 L. J., Q. B. 249; 15 Jur. 944. S. P., Doe d. Hudson v. Leels and Bradford Ry., 16 Q. B. 796; 20 L. J., Q. B. 486; 15 Jur. 946.

4. JOINT-TENANTS, TENANTS IN COMMON. AND COPARCENERS.

Joint-tenants. ]-An ejectment will lie on the several demises of three joint-tenants. Doe d. Lulham v. Fenn, 3 Camp. 190.

The plaintiff in ejectment under the several demises of two, may, after notice to quit, recover the possession of premises held by the defendant as tenant from year to year, upon evidence that the common agent of the two had received rent from the tenant, which was stated in the receipts to be due to the two lessors, even assuming such receipts to be evidence of a jointtenancy; for a several demise severs a jointtenancy; and, supposing the contract with the tenant to have been entire, no objection lies on that account to the plaintiff's recovery in this ease, as he had the whole title in him. Doe d. Marsack v. Read, 12 East, 57.

Where, by an underlease, power was reserved, on nonpayment of rent, to the lessors and the original lessor to enter :- Held, that the demise was properly laid to be by the lessors alone, and that it need not be a joint demise by the lessors and the original lessor. Doe d. Bedford v. White,

4 Bing. 276; 12 Moore, 526; 5 L. J. (O.s.) C. P. 173.
C. and P. leased land jointly to H., who covenanted with the two jointly, and power of re-entry for breach of covenant was reserved to C. and P. jointly; but in the lease it appeared that C. and P. were tenants in common. Quiere, whether ejectment against H. for breach of whether ejectment against H. for breach of covenant could be maintained out the joint demise of C. and P. Per Denman, C.J., and Erle, J., it could. Per Colertige and Wightman, JJ., it could not. Doe d. Compbell v. Hamilton, 13 Q. B. 977; 19 L. J., Q. B. 99. See Beer v. Beer, 12 C. B. 60, 72—per Maule, J.

— Of Copyhold Property.]—One joint-tenant may maintain ejectment for his own share of copyhold, descending by custom to all the children equally of the tenant last seised. Roe d. Roper v. Lonsdale, 12 East, 39.

Tenants in Common.]-In ejectment by one tenant in common against another, it is necessary to prove an actual onster. Doe d. White v. Cuff, 1 Camp. 173.

Where houses had been pulled down by a railway company, and a railway constructed on the site of them :-Held, that this was such an occupation as amounted to an actual ouster of

occupation as amounted to an actual observer of a tenant in common of the premises. *Doe* d. *Wawn* v. *Horn*, 5 M. & W. 564; 9 L. J., Ex. 129. Ejectment is not maintainable by one tenant in common against another without actual ouster. Prince v. Heylin, 1 Atk. 494.

Two tenants in common may join in a writ of ejectment, stating that they, or some or one of them claim to be entitled; and the whole of the property to which they are entitled in common may be recovered by such writ. Elliss v. Elliss, El. Bl. & El. 81; 27 L. J., Q. B. 316; 4 Jur. (N.S.) 1181.

An ejectment is maintainable by one of two tenants in common, who had agreed to divide their property, if after such agreement the defendant, who held under both as occupier, pays rent under a distress to such co-tenant alone; and it is no defence to such action, that the deeds of partition between the co-tenants have not been executed. Doe d. Pitcher v. Mitchell, 3 Moore, 229; 1 Br. & B. 11. they paying out of the same, into four persons therein named, 101., to be paid to them when they should attain their several ages of twentyone years, by the testator's executrixes, and he appointed E. C. and J. H., two of the devisees in remainder, his executrixes. The survivor of the devisees for life died in 1777, and S. H., one of the devisees in remainder, continued to reside on the premises devised. John H., another of the devisees in remainder, died in November, 1790, having devised his freehold estates to his wife for life, and after her decease to his three daughters. By indentures made in 1791 and 1792, James H., described as heir-at-law of John H., his brother deceased, and the two other devisees in remainder named in the will of J. C., covenanted to levy a fine of the devised premises, to enure to such persons as they should by deed appoint: and afterwards, by indenture, reciting that a fine had been levied, appointed the premises to P., in fee, who, in 1792, entered thereupon, and continued thenceforth in undisturbed possession of the whole :-- Held, in ejectment brought against P. by the heir-at-law of one of James H,'s daughters (which daughter, on the death of her mother, the tenant for life, under the will of James H., was under coverture), that the deeds of 1791 and 1792, under which P. claimed, were, as against him, evidence of the seisin of James H., at the time of making his will and of his death; and that independently of those deeds, the seisin of S. H., the co-tenant in common, being the seisin of John H., there was no ground for presuming an oaster of John H. Doe d. Thorn v. Phillips, 3 B. & Ad. 753; 1 L. J., K. B. 187

— Eridance of.]—In ejectment upon the joint denise of several trustees of a charity, it is not enough for the defendant, who had paid one entire rent to the common clerk of the trustees, to show that the trustees were appointed at different times, as evidence that they were tenants in common i for as against their tenant, his payment of the entire rent to the common agent of all, is at all events sufficient to support the joint demise, without making it necessary for them to shew their title more precisely. Doe d. Clarke v. Grant, 12 East, 221.

— As to Fortion of Fremises entitled to.]
—In ejectment by tenants in common, it appeared, on cross-examination of their witness, that there had been other tenants in common, but there was no evidence of their number:—Held, that they could not recover, if not being shewn to what portion of the premises they were entitled. Dec d. Hellyer v. Kring, 6 Ex. 791; 2 L. M. & F. 493; 20 L. J., Ex. 300.

—— Statute of Limitations.]—In ejectment, by the heir of T. for two acres of land, it appeared, that his father, more than fifty years before, had devised four acres (comprising the two in question) to his widow, for life, and then to T. and his sister S. in remainder in fee. For more, than twenty years T., by arrangement between his mother and S., occupied the two acres in question, and devised them to his widow for life, and on her death or marriage to his daughter; and then there was a devise in similar terms on the same event to his son the heir.

J. C. devised a dwelling-house to his brother and sister for their lives, and the life of the survivor, and after their decease to John H. E. C., and the death, and he, without giving any survivor, and after their decease to John H. E. C., and the survivor and after their decease to John H. E. C., because the paying out of the same, unto four persons therein named, 104, to be paid to them when therein named, 104, to be paid to them when they should attain their several ages of twenty-nevers, by the testator's executrives, and he Johnson, 20 L. J. Ex. 91.

Oppareamers, ]—Semble, that where a power of re-entry for breach of covenant is reserved in a lense, and the reversion descends to copareeners at common law, one alone cannot maintain ejectment for breach of the covenant. José d. Rutzew v. Leuk, 5 A. & E. 277; 2 H. & W. 102.

A testator, in 1804, devised his real property

to his brother-in-law, P., but at that time had no interest in the land in question. In 1814 he purchased the land, on which occasion the residue of an ontstanding term of 500 years, created in 1793, was assigned to P. in trust for the testator, to attend the inheritance. The testator died in 1820, when the fee-simple descended, as to one moiety, to the testator's four neices, and, as to the other, to his sister, the wife of P. P. and his wife shortly afterwards entered into possession of the whole of the premises, and received the rents, without accounting to the other coparceners; and in 1823, P. and his wife executed a feoffment, with livery of seisin; and after-wards a fine sur cognisance de droit come ecowas levied with proclamations, in which the feoffee was plaintiff and the feoffers defendants. At the time of the testator's death, and of the fine, his nieces were under coverture. P. died in 1828, having continued in sole possession. By his will, he devised to the defendant, but made no mention therein of the term. The defendant entered and continued in possession to the time of the ejectment brought against him in 1838, In 1837 the wife of P. died, and in the same year administration de bonis non of P. was granted to B., the husband of one of the coparceners. In 1836 one of the coparceners died, leaving her husband surviving; and in 1837 the husband of another copareener died :- Held, that by the feoffment and fine with proclamations, there had been an absolute disseisin of the coparceners, and not a disselsin at election, and that an entry within five years was necessary to avoid the fine. *Due* d. *Blight* v. *Pett*, 11 A. & E. 842; 4 P. & D. 278.

Also, that the enty was too late as to the two-husbands, and being too late as to them, was too late as to their wives, the copareeners, also, during coverture, although they would have five years to enter after discoverture. Ih.

#### 5. OUTSTANDING AND SATISFIED TERMS.

Outstanding Term—Nature of.]—For the nature of a term to attend upon the inheritance, see Willoughby v. Willoughby, 1 Term Rep. 763; 1 R. R. 397.

— When a Bar to Ejectment, ]—A mortgage term outstanding will bar an ejectment, even between heir and devisee claiming subject to the charge: the only remedy, therefore, is in a court of equity. Barnes v. Cron. 4 Brs. C. C. 2.

between his mother and S. occupied the two | The defendants, in an ejectment, were lessees acres in question, and devised them to his widow for life, and on her death or marriage to his reserved under their lease, which contained in daughter; and then there was a devise in similar terms on the same event to his son the heir; nevertheless, to an indenture of lease, bearing

date, &c., and made between G. D., of the first the lapse of twenty years from 1812, and the part, J. D., E. D. and R. B. D. of the second right of the lessor of the plaintiff claiming the part, and W. K. of the third part, whereby the premises were demised to W. K., his executors, administrators and assigns, for a term of twentyone years from, &c., subject to the covenants and agreements therein mentioned." At the time of ejectment, which was for breaches of covenants contained in the defendants' lease, the term demised in the previous lease was outstanding in W. K. :-Held, that the defendants were not entitled to set up this outstanding term as a defence to the ejectment. Duke v. Ashby, 7 H. & N. 600; 31 L. J., Ex. 168; 8 Jur. (N.S.) 236; 10 W. R. 273

In 1838, H. mortgaged premises for 1,000 years to D., and in 1839, conveyed the fee, subject to the mortgage term, to her daughter, the wife of defendant; this conveyance was unknown to the parties to the subsequent deeds. In 1842, H. mortgaged the premises in fee to M., and in October, 1844, conveyed the equity of redemption to C. In October, 1844, M. assigned the mort-gage of the fee to R. T., and the representatives of D. assigned the term of 1,000 years to J. T., as trustee, to secure the mortgage-money and afterwards to be reconveyed as C. should direct. In September, 1847, part of the premises being required for a railway, C. received the purchasemoney from the company, and therewith paid off the mortgagees :- Held, that the term had not become attendant upon the inheritance by construction of law, so as to be determined by 8 & 9 Viet. c. 112, s. 2; and therefore C. was entitled to recover upon the demise of J. T. Doe d. Clay v. Jones, 13 Q. B. 774; 18 L. J., Q. B. 260; 13 Jur. 824.

- Set up by one Tenant in Common against another.]-One tenant in common cannot set up an outstanding satisfied term in bar to an ejectment for a moiety by another tenant in common. Doe d. Bristow v. Pegge, 1 Term Rep. 760, n.; 4 Dougl. 309.

In ejectment the tenant will not be allowed to set up an outstanding term in trustees to secure an annuity, provided the lessor of the plaintiff does not seek to disturb the possession of the trustees. Ib.

- Statute of Limitations. ]-A., the devisee of a term for lives in a messuage, in 1793 conveyed it to Richard, his heirs and assigns, during the remainder of the term, with reversion to A., her heirs and assigns, in case Richard should die without children. A. died in 1799. In 1811, Richard purchased the reversion in fee, and at the same time a satisfied outstanding term was for his protection assigned to a trustee to attend the inheritance. In 1812 Richard died without issue, leaving Lewis, the ancestor of the plaintiff, his heir-at-law. Lewis was also the heir-at-law of A. Lewis did not take possession in 1812, and the messuage continued to be occupied by others than those entitled to it. The last life in the lease fell in 1835, when the lessor of the plaintiff, being heir-at-law of Lewis, and also of Richard, brought ejectment :- Held, first, under 3 & 4 Will. 4, c. 27, s. 3, that the title of Lewis to the term accraed in 1812, and by the 5th section his right to the reversion accrued in 1835; that the 5th section applying only to the cases where another person than the termor was the reversioner, and the land not having been recovered be right (which the court greatly doubted), the

reversion through him was barred also. Doe d. Hall v. Moulsdale, 16 M. &. W. 689; 16 L. J., Ex. 169.

Where a term has been assigned to a trustee to attend the inheritance more than twenty years before action brought, and no possession has accompanied the legal estate, the right to recover in respect of that term is barred by 3 & 4 Will. c. 27, ss. 2, 3. Doe d. Jacobs v. Phillips, 10
 B. 130; 16 L. J., Q. B. 269; 11 Jur. 692.

Presumption of Satisfaction of Term. - Under certain circumstances, the jury may presume a satisfied term to have been surrendered to the cestui que use; but if no such presumption is made, and it appears in a special verdict in ejectment that such a term is still outstanding in a trustee who is not joined in bringing the ejectment, the cestui que use cannot recover. Good-title d. Jones, v. Jones, 7 Term Rep. 47. S. P., Doe d. Bowerman v. Sybourn, 7 Term Rep. 2; 2 Esp. 499; 4 R. R. 363.

No less time than twenty years will raise a presumption that a mortgaged term has been assigned or surrendered; although the defendant in ejectment, setting up the mortgaged term as a bar, neither proves that interest continues to be paid, nor accounts for his possession of the mortgage deed, Doe d. Brandon v. Culvert, 5 Taunt, 170; 14 R. R. 733.

A term assigned to attend the inheritance will not be presumed to have been surrendered, unless there has been a dealing with the estate in such a manner as reasonable men would not have dealt with it unless the term had been put an end to. Garrard v. Tuck, 8 C. B. 231; 18 L. J., C. P. 338; 13 Jur. 871.

The relation of the owner of the estate, who is in possession of the land, to the trustee of a term assigned to attend the inheritance, is that of tenant at will, and it is only on the determination of such tenancy that there is a vested right of entry in the trustee, within 3 & 4 Will. 4, c. 27, s. 2. Ib.

C. being, under a deed of settlement of 1813, tenant for life, with remainder to such of his children as he should appoint, but covenanting that he was seised in fee, sold the estate in 1840 to the defendant, who had no notice of the settlement; and the residue of two terms, each of 1,000 years, was assigned by the personal representatives of H. to a trustee for the defendant, to attend the inheritance. These terms had originally been created for mortgage purposes, and in 1773, the mortgage debt having been satisfied, were assigned to H. in trust to attend the inheritance, for the benefit of the then owner in fee. The estate had been settled in 1778, and had also been mortgaged in 1836 and the three following years, but in none of the deeds, nor in the settlement of 1813, was any notice taken of the outstanding terms. In 1844, C. duly exercised his power of appointment, limiting the estate after his death (which took place in 1853) to the plaintiff, his eldest son in fee. In an ejectment, a verdict having been taken for the plaintiff, subject to a case disclosing these facts :- Held, first, that the court could not presume a surrender of the terms, which was not stated as a fact; for that, even assuming the decision in Doe d. Put-land v. Hilder (2 B, & Ald. 782; 21 R. R. 488) to by any person, the right of Lewis was barred by presumption, if to be made at all, must be made S. P., Doe d. Egremont (Earl) v. Langdon, 12 Q. B. 711; 18 L. J., Q. B. 17; 13 Jur. 96.

Held, secondly, that as the terms were on the 31st December, 1845, attendant on the inheritance by express declaration, and would, if sub-sisting, have afforded to the defendant such protection against the settlement of 1813 as a court of equity would not have restrained him from setting up in a court of law, they were within the exception of 8 & 9 Vict. c. 112, s. 1, and must be considered as subsisting terms. Ib.

A term was created in 1813, to secure repayment of a loan, which was repaid in 1837. In 1840 the land was demised for lives by the heirat-law of the creator of the term. In 1843 the term was re-assigned by the satisfied creditor to a new incumbraneer, by the direction of the heirat-law of the creator of the term :-Held, that the term was not satisfied so as to enure to the benefit of the lessee for lives. Owen v. Owen, 3 H. & C. 88; 38 L. J., Ex. 237; 10 Jur. (N.S.)

884; 11 L. T. 137.

In 1829, A. died seised in fee of lands, of which his eldest son, B. was his tenant. B., supposing him to have died intestate, entered on the lands, claiming them as heir-at-law; and in 1830, mortgaged them in fee, and levied a fine to comfirm the mortgage; and, at the same time, an out-standing term of 500 years was, by his direction, assigned to a trustee for the mortgagee. In 1835 B. sold the estate to the defendant, who paid off the mortgage. The legal estate in fee and the equity of redemption were conveyed to the defendant, and the term was assigned to a trustee for him, to attend the inheritance. In 1845 it was discovered that A. had executed a will, whereby he devised the lands in fee to his second son, who thereupon brought ejectment to recover the estate from the defendant, and laid a denise in the name of the trustee to whom the term was assigned in 1835:—Held, that, by the operation of the 8 & 9 Vict. c. 112, the term had absolutely determined; and the plaintiff could not recover upon the demise laid in the name of the trustee. Doe d. Cadwalader v. Price, 16 M. & W. 603; 16 L. J., Ex. 159; 11 Jur. 131.

## 6. EVIDENCE OF TITLE.

Generally. ]-Where, in ejectment, the plaintiff commenced his title by showing a conveyance in fee from S. in 1807, evidence that S. was in possession of the property in 1806 and 1807, is evidence of his seisin in fee, unless there is something to show that he had a less estate. Doe d. Hall v. Penfold, 8 Car. & P. 536.

A title having been proved in A., who con-tinued in possession from 1809 to 1814, and from whom the plaintiff derived title in 1815, it is not sufficient for the defendant to prove a bare possession by himself during 1814. Doe d. Pitcher v. Anderson, 1 Stark. 262; 5 M. & S. 161.

A defendant, failing to justify under a habere the judgment in ejectment having been set aside as irregular, is entitled, either under a plea that the plaintiff was not possessed, or that a third party else was, to go into proof of the title upon which he recovered in the ejectment. Bikker v. Beeston, 2 F. & F. 410.

Onus of Proof.]-In an ejectment to recover

by the jury, and not by the court. Cottrell v. of a lease under which they were held, the plain-Hughes, 15 C. B. 532; S. C. L. R. 496; 24 L. J., tiff proved the lease which was excented by both C. P., 107; I. Jur. (N. S.) 448; 3 W. R. 248. lessor and lessee and the term of which had expired, and also proved that she was heiress at law of the lessor, but gave no further evidence. No evidence was given by the defendants. The original lessee was not a defendant nor in possession at the time of action brought. The judge at the trial having directed a verdiet for the defendants :- Held, that it was not incumbent on the plaintiff to connect by affirmative evidence the possession of the defendants with that of the lessee, but that such possession should, in the absence of evidence to the contrary, be presumed Me Gragh to be by devolution from the lessee. McGrav. Dwyer, 12 L. R., Ir. 17. Reversed in C. A.

A plaintiff in ejectment gave evidence of possession for thirteen years, and of acts of ownership by fencing and allowing other persons to use the land; also that the defendant came on the land five or six years before without permission:—Held, that this was sufficient evidence to justify the refusal of a nonsuit. Whale v. Hitchcoch, 34 L. T. 136.

Receipt of Rent.]—A joint demise by husband seised in right of his wife, and his wife, is disproved by evidence of a receipt for rent given by the husband only. Parry v. Hindle, 2 Taunt.

Evidence that the lessor of the plaintiff received rent for the premises from A., who formerly occupied them, and also from the parish officers, is admissible, although the defendant does not claim under A. or the parish officers. Doe d. Lichfield (Earl) v. Stavey, 6 Car. & P. 139.

In ejectment and in trespass, payment of the rent under a lease for a series of years is sufficient prima facie evidence that the leaschold interest has been assigned to the party so paying; and a devise by such party of the tenement is prima facie evidence of title in the executor, notwithstanding a specific bequest of it. Bikker v. Beeston, 1 F. & F. 685.

In an ejectment against two for premises of which the husband of one had formerly been tenant to the plaintiff, evidence that after his death, above twenty years ago, she had remained for some time in possession, but that within the twenty years, the premises being occupied by the other (her son-in-law), she admitted that she had paid rent, is evidence that such other was undertenant to her. Hogg v. Norris, 2 F. & F. 246.

In ejectment annual payments having been made by the defendant and his ancestor to the owners of a manor, it was left to the jury whether such payments were by way of rent. Amphlett

v. Cooke, 1 F. & F. 526.

In ejectment by reversioners, the lessor's counterpart of a lease was received in evidence on their behalf, he stating that he had occupied under it; and though the date was more than twenty years before suit, and no rent had been paid under it by the defendant, and he had not come in under the lessee, yet, it appearing that the lessee's assignee had paid rent under it, and that it had expired within the twenty years :-Held, that the reversioners were entitled to recover. Homes v. Pearce, 1 F. & F. 283.

In ejectment to recover five houses, it was proved that the plaintiff had received the rents of some of them for four quarters, and of the others for five quarters, down to March, 1841, and that in that mouth the plaintiff's receiver of possession of certain lands, upon the expiration rents found the door of one of the houses secured was his freehold :- Held, that this was evidence to go to the jury on the part of the plaintiff ; and if there was no evidence given on the part of the defendant, it would be for the jury to consider whether they were satisfied upon this evidence, that the property really belonged to the plaintiff. Doe d. Humphrey v. Martin, Car. & M. 32.

By Tax-gatherers, |- In ejectment for a house, the land-tax assessment of the parish, in which the collector of taxes charged himself with the receipt of money from A., as tenant of a particular house, is evidence that the latter was tenant at that time. Doe d. Smith v. Curtwright, 1 Car. & P. 218; R. & M. 62; 28 R. R. 774

Declarations of Deceased Occupiers.]-The declarations of a deceased occupier of land, of whom he held the land, are evidence of the seisin of that person. Peaceable d. Unole v. Watson, 4 Taunt, 16; 13 R. R. 552.

But it must first be shewn that the land the deceased occupied was the laud now in the tenant's possession. Ib.

Map.]—In ejectment, the only case in which a map of property is receivable in evidence is. where it is undisputed that, at the time the map was made, the property belonged to the person from whom both parties claim. *Doe* d. *Hughes* v. *Lakin*, 7 Car. & P. 481.

Conversation.]—In ejectment, to prove the grant of a new lease, a witness was called, who deposed to a conversation which took place, fourteen or fifteen years back, with the owner of the property in dispute, under whom the plaintiff claimed, in which conversation such owner admitted the premises had been released, without stating the term or lives, rent or any other particulars:—Held, that such evidence could not be made available as proof of a new lease having been granted. Doe d. Lord v. Crago, 6 C. B. 90; 17 L. J., C. P. 263.

Documentary.]-In ejectment by the reversioner (on the expiration of a building lease) to recover possession of a house, which adjoined one that the lessor of the plaintiff had sold to the defendant, and the description of which in the surrender (it being copyhold) contained the words "as now occupied by A. or his undertenants," an under lease (granted pending the existence of the original building lease), under which A. claimed the ground upon which both houses were built, was received as evidence of the mode in which the property had been enjoyed. Doe d. Tims v. Jordan, 4 Car. & P. 146.

Where a vicar brings ejectment claiming in right of his vicarage, a letter written by a former vicar is admissible for the defendant, and a witness for the lessor of the plaintiff may be asked as to what is inscribed on a tablet fixed up in the church. Doed. Coylev. Cole, 6 Car. & P. 359.

If a lessor, who has only an equitable title, grants a lease, he has, as against his lessee, a good title by estoppel; but if, after the lease, the lessor, by a mortgage deed, grants all his interest in law and in equity to a mortgagee, the lessee may give in evidence this deal, and thus prevent the lessor from recovering in ejectment on a forfeiture of the lease. Doe d. Marriott v. Edwards, 6 Car. & P. 208; 5 B. & Ad. 1065; 3 N. & M. 193.

by a chain, and the defendant in it, who said it into an agreement for the purchase of them. The purchase not being completed, the vendor brought ejectment :- Held, that the agreement was an acknowledgment by A. that the title was in the vendor. Doe d. Bord v. Burton, 16 Q. B. 807; 15 Jur. 990.

Admissions. ]- Ejectment against T., the tenant in possession, and L., who came in to defend as landlord. The lessor of the plaintiff having proved his title against L., the latter set up the title of the tenant T., who paid rent to the lessor of the plaintiff as tenant from year to year. In order to shew the determination of T.'s interest, the lessor of the plaintiff produced an admission, signed by T., after the commission day of the assizes, whereby he acknowledged having attorned to L., upon L.'s executing a writ of possession in a prior ejectment :--Held, that this admission was evidence against L. as well as T. Doe d. Mee v. Litherland, 4 A. & E. 784: 6 N. & M. 313: 6 L. J., K. B. 267.

A, having made a deposit of deeds to B., on an equitable mortgage, gave a schedule of the deeds, in which he described one as the deed of C. :-Held, that in an ejectment by B. against a person. who came in under A., this admission by A. did not dispense with proof of the execution of this deed. Due d. Hall v. Penfold, 8 Car. & P. 536.

In ejectment, brought by a trustee, the question was whether certain freehold premises passed under a mortgage deed. To prove that they did, the defendant produced a deed, containing an admission of that fact by the cestui que trust for life of the premises, under a devise from the mortgagor. It appeared that the cestui que trust, by the deed, procured the forbearance of a loan of 1001, and the advance of 501, more:— Held, that the cestni que trust had an interest both ways, and that the evidence was, therefore, inadmissible. Doe d. Rowlandson v. Waimoright, 3 N. & P. 598 : 5 A. & E. 520 : 1 W. W. & H. 508 : 7 L. J., Q. B. 222.

Evidence in Former Trial. ]-Evidence given by a witness on the trial of a former action of ejectment is not, on the death of such witness, admissible for a plaintiff in a subsequent action brought to recover the same property, if the last action, though against the same defendant, and involving the same question of title, is not brought by the same plaintiff as in the former action, or by one claiming under him, but by the Tather of the plaintiff in such former action.

Morgan v. Nicholl, 36 L. J., C. P. 86; L. R. 2:
C. P. 117; 12 Jur. (N.S.) 963; 15 L. T. 184; 15
W. R. 110. S. P., Dao d. Foster v. Derby (Early, S. N. & M. 782; 1 A. & E. 783; 3 L. J., K. B. 191.

Where, on a former trial of the title to the same property on an ejectment by the same lessors of the plaintiff against a different defendant, a deed was given in evidence on the part of the defendant, and the limitations in it were stated in court by the defendant's counsel :-Held, that a copy of the shorthand notes of that statement was not receivable, on the part of the same lessors of the plaintiff, in a second ejectment against another party. Doe d. Gilbert v. Ross, 7 M. & W. 102; 10 L. J., Ex. 201.

## 7. DEMAND OF POSSESSION.

When necessary. ]—Several brothers and sisters divided certain property between them at their mother's death, supposing it to have been hers, and verbally allotted a house to a sister. A., being in possession of premises, entered property really had been their deceased father's: —Held, in ejectment by the father's devisee, one | rent for fifteen years before his death, and of those brothers, that he could not recover | devised the house (with power of sale, under without a demand of possession. Date d. Laceumbe | such conditions as might be thought expedient)

v. Clifford, 2 Car. & K. 448.

In ejectment on a forfeiture, wrought by breach of condition against assigning without the lessor's consent, it is not necessary as against the assignee, to prove demand of possession or re-entry by the lessor; although, after the assignment and before action brought, and while the assignment and before action brought, and while the assignment may be assigned to the lessor's and the assignment possession under the assignment, negotiations had taken place between the lessor's and the assignee's solicitors upon the subject of the lessor's giving his consent to the assignment. Tabhot are Malchaidar v. Odum, Ir. R. 5 C. L. 302.

Where a lease provided that, on nonpayment of a half-year's rent, the landlord might enter on the premises for the same until it should be fully satisfied:—Held, that the # Geo. 2, c. 28, did not operate to dispense with a formal demand of possession. Due d. Durke v. Bounditch, 8 Q. B. 373, 15 L. J., Q. B. 266; 10 Jun. 637.

The defendants, in 1825, were put in possession of land by the owner, who, in 1827, excented a conveyance of it to them, which was void by reason of the Statute of Mortmain, 9 Geo. 2, e. 36. The devisees of the vendor brought an ejectment in 1843. A demand of possession was made by the attorney, who riterwards brought the action, under a written authority, purporting to be signed by the lessors of the plaintiff; but the attorney being unacquainted with their handwriting, a witness stated that he had, a few days before the trial, called on the lessors, and shewed them the authority, when they acknowledged the signatures to be theirs:—Held, first, that a demand of possession was necessary. Die d. Puther v. Walker, 14 L. J., Q. B. 181.
Held, secondly, that the recognition of the

Held, secondry, that the recognition of the demand by bringing the action was insufficient. Ib. Held, thirdly, that the acknowledgment of the signatures by the lessors afforded no legitimate evidence that it was signed by them. Ib.

A railway act contained clauses giving a company powers for the compulsory purchase of lands, and the company was not, except by the consent of the owner, to enter upon any lands which were required for the purposes of the act until they had paid or deposited in the Bank of England the purchase-money or compensation agreed or awarded to be paid. In 1845 the plaintiff permitted the company to enter upon land, and agreed to refer the amount of compensation to an arbitrator; and in 1847 the company entered, and continued in possession until 1840, when the plaintiff demanded possession:—Held, that such demand of possession did not nake the company trespassers, and that eject-ment could not be maintained against them. Doe & Hudson v. Leeds and Bradford Ry, 15 Q. B. 709; 20. L. J., Q. B. 85; 15 Jun 346.

Ejecting without—Liability incurred thereby.]
—A tenant at sufferance, who is turned out of possession by his landlord, without any demand of possession, cannot maintain ejectment but may maintain trespass. Due d. Harrison v. Marrell, 8 Car. & P. 194.

## 8. ADVERSE POSSESSION.

Possession adverse to Will.] — One, after gages, if occupying a house for several years as tenant gage. Gfrom year to year, found no one to receive the Rep. 755.

rent for fifteen years before his death, and devised the house (with power of sale, under such conditions as might be thought expedient) for the benefit of his write and children. His chiest son occupied the house, paying a rent to the widow, for fifteen years after the death of the father, when the widow diet:—Held, that, notwithstanding the infirmity of the testator's title, the son could not insist on retaining possession of the house adversely to the devisees beneficially interested under the will; but that the latter were entitled to require that the property should be sold and distributed according to the directions of the testator. Hawkshee v. Hawkshee, 11 Hane, 231.

Semble, that if a person to whom a particular estate is given by will for his life takes possession, and is allowed to keep, as part of that estate, something not strictly belonging to it, he cannot set up a title as gained by adverse possession against the remainderman. Another v. Nelms, 1H, & N, 225, 261 L.J., Ex. 5: 4 W. B., 612.

Re-entry no Revivac of Rights.]—The effect of the 3 & 4 Will. 4, c. 27, ss. 2, 3, 4, as to land, is, that affer twenty years' possession adverse to a title, it is extinguished, so that it cannot be revived or revested by a re-entry after that period upon the dectrine of remitter, because such an application of that doctrine requires that the former title should be in existence at the time of the re-entry; and the express provision in the statute that no person shall be deemed in possession of lands merely by reason of an entry thereon, applies to cases of such re-entry. Breasington v. Llewellyn. 27 L. J., Ex. 297. S. C., at nis privas, 1 F. & F. 27.

S. C., at nisi prius, I. P. & F. 27.
A defendant in an ejectment to recover a piece of woodland, addinced evidence of adverse possession for more than twenty years, and the action was discontinued. Subsequently the plantiff in the action from time to time walked in the wood, and turned his cattle into it, in order to assert his alleged right, and to bar the Statute of Limitations. At length he cut down a tree in the wood, whereupon the defendant filed a bill for an injunction:—Held, that as the result of the action of ejectment shewed the defendant for that action to be in possession of the wood, he was entitled to the injunction prayed for. \*Kentford v. Hurstatone, L. R. 9 Ch. 116; 80 L. T. 140; 22

#### C. BY PARTICULAR PERSONS.

#### 1. MORTGAGORS AND MORTGAGEES.

Mortgagor in Possession.]—Where the mortgagor remains in possession and the money is not repaid on the day stipulated, the mortgagor, who has a power of entry and sale on nonjuyment, may eject the mortgagor without notice to quit. Doe d. Fisher v. Giles, 5. Bing. 421; 2 M. & P. 749; 7 L. J. (J. S.) C. P. 134; 301; R. 686, Or denand of possession. Doe d. Robey v. Moisey, 3 M. & R. 740; 2 Sl. & C. 767.

Second Mortgages having the Title-deeds can eject first Mortgages.]—A second mortgages, who takes an assignment of a term to attend the inheritance, and has all the title-deeds, may recover in ejectment against the first mortgage, if he had no notice of such prior mortgage. Goodditte d. Norris v. Margan, 1 Term Rep. 755.

Mortgagee—Against Tenant of Mortgagor.]— and release:—Held, that without surrender to A mortgagee may recover in ejectment (without the lord, this was not sufficient title to support granted after the mortgage, without the privity of the mortgage. Keech d. Warne v. Hall, 1 Dougl. 21. S. P., Hanson v. Burke, Ir. R. 10 Ch.

If a lease is granted by a mortgagor prior to the mortgage, the mortgagee has the same rights against the lessee and those claiming under him that the mortgagor had, and no other than he had; and his remedy must be on the lease as assignee of the reversion, so long as the lease is in existence, and the tenant acknowledges his title. If, however, the lease is subsequent to the mortgage, then the mortgagee may treat the lessee and all those who may be in possession as wrongdoers and may bring ejectment, but he cannot distrain or bring any action for the rent they have contracted to pay, as there is no relation of landlord and tenant between them. If the tenant chooses to pay the rent to the mortgagee, and he accepts it, a relation of landlord and tenaut is created between the mortgagee and the tenant; and the remedy of the mortgagee will depend upon the particular circumstances of each case. Rogers v. Humphreys, 4 A. & E. 299; 5 N. & M. 511; 1 H. & W. 625; 5 L. J., K. B. 65.

A, seised in fee, mortgaged in fee to B., and afterwards leased to the defendant, D. parchased the legal estate from B., and also the equitable estate from a party who derived it from A., which party also joined in the conveyance of the legal estate:—Held, that D., though he had received rent from the defendant, was not bound by A.'s lease, but might recover against the defendant in electment after the expiration of a notice to quit, or sue him for use and occupation after the payment and receipt of rent. Doe d. Downe (Lord) v. Thompson, 9 Q. B. 1037.

A tenant, let into possession by mortgagor before mortgage, subsequently paid his rent to the mortgagee:—Held, in ejectment by mortgagee against the tenant, that the latter might defend himself, by shewing that there had been a prior mortgage, and that he had received notice from the prior mortgagee to pay rent to him, and had paid it accordingly, as the tenant did not thereby deny that the mortgagor, who gave him possession, had title, but simply that the lessor of the plaintiff had not a good derivative title.

Doe d. Higginbotham v. Barton, 11 A. & E. 307;

3 P. & D. 194; 9 L. J., Q. B. 57; 4 Jur. 432. So also a tenant who has been let into possession by the second mortgagee himself. may shew such prior mortgage and notice; for the tenant thereby admits that his lessor with respect to the first mortgagee, was, in substance, mortgagor in possession, not then treated as a tresposser, and so had title to demise : and the tenant is at liberty to go on to shew that his lessor has subsequently been treated as a trespasser by the first mortgagee, whereby his (the lessor's) title, and the tenant's rightful possession under him, have been determined. Ib.

Against Widow of Mortgagor. - Ejectment by mortgagee against the widow of mortgagor. The premises were copyhold, and the mortgagor died in possession in 1828, after which his widow continued in possession up to the time of the ejectment brought. The only title set up by the lessor of the plaintiff was an assignment of the

giving notice to quit) against a tenant who an ejectment, as, by his own shewing, the claims under a lease from the mortgagor, plaintiff's lessor had not any legal interest, but harman s resort and not any legal interest, but an equitable interest only. Due d. North v. Webber, 3 Bing. (N.O.) 922; 5 Scott, 189; 3 Hodges, 203; 6 L. J., C. P. 319.

> How far Title of Mortgagee can be resisted by Third Party.]—A mortgagor cannot defeat his mortgagee's title in ejectment, by setting up the title of a third person. Doe d. Bristwo v. Pegge, 4 Dougl. 309; 1 Term Rep. 760, n. S. P., Good title d. Edwards v. Bailey, Cowp. 601.

> In ejectment by a mortgagee, a defendant, not being a mortgagor, but in reality defending for his benefit, cannot set up a prior mortgage executed by him. Doe d. Hurss v. Clifton, 4 A, & E, 813; 6 L. J., K. B. 274.

> Sufficiency of Mortgage. ]—A railway company was empowered to assign and charge the property of the undertaking, and the rates, tolls and other sums arising by virtue of the act, as a security for money borrowed; and by a deed executed in the form provided, assigned, "the undertaking, and all and singular the rates, tolls and other sums arising by virtue of the act, and all the estate, right, title and interest, of, in and to the same," to a person from whom a sum was borrowed:—Held, that the deed did not convey any interest in the land of the company, or entitle the mortgagee to maintain ejectment. Doc d. Myatt v. St. Helens and Runcorn Ry., 1 G. & D. 663; 2 Railw. Cas. 756; 2 Q. B. 364; 11 L. J., Q. B. 6; 6 Jur. 641.

Mortgagor estopped from denying Title.]-V. mortgaged land in fee to O; afterwards, and while V. remained in possession, S., claiming by a title anterior to the mortgage, brought ejectment against V., and a verdiet was taken against him by consent, subject to arbitration as to what lease S, should grant to V, in pursuance of the award made:—Held, that V, was estopped from setting up such lease as an answer to an ejectment by O. Doe d. Oyle v. Vickers, 4 A. & E. 782: 6 N. & M. 437; 6 L. J., K. B. 266.

A., by a deed which recited that he was seised in fee of an estate, conveyed the same by way of mortgage to B. By an endorsement of a subsequent date upon this deed, C. wrote and signed the following:—" Memorandum, that, by indenture of surcharge, the within premises were charged by me, C., the purchaser of the equity of redemption of the within-mentioned premises, with the further sum of 3251." :- Held, in cjectment, in which B. was one of the plaintiffs, that this menorandum operated as an admission by C. that he was in possession under A., and that as A. was estopped from disputing B.'s title, so therefore was C. Doc d. Guisford v. Stone, 3 C. B. 176; 15 L. J., C. P. 234; 10 Jur. 480;

Mortgagee against Third Party.]-In ejectment on the several demises of a mortgagor and mortgagee, the defendant offered to prove that, seven or eight years back, and after the execution of the mortgage, he brought ejectment against the mortgagor (at that time in possesssion) ; that the cause was referred to arbitration ; and that the award was in favour of the now defendant, who thereupon entered under a writ of possession, and had occupied the premises ever since :- Held, that these proceedings were not copyhold by a common-law conveyance of lease admissible for the defendant against the mortgagee, although he was present at one meeting before the arbitrator; it not appearing that he took any part in the proceedings. Dor d. Smith v. Webber, I A, & E, 119; 3 N. & M, 746; 3 L. J., K B. 148.

Assignment by Mortgagor giving no right of Entry.]—A demise by a mortgagor and a mortgage of leasehold premises contained a proviso for re-entry for either of them, if the lessee should assign without the mortgagor's consent. After several mesne assignments with the mortgagor's consent, the premises were assigned to M. by a deed to which S. (assignee of the mortgage) and the mortgagor were parties, and which contained a proviso for re-entry by the mortgagor on M.'s assigning without his consent. M. paid rent to the mortgagor, and subsequently assigned without his consent, whereupon S. and the mortgagor brought ejectment :- Held, that M. was not estopped from shewing that the mortgagor was not the legal reversioner; and also, that neither the mortgagor nor S. could recoverthe one having only an equitable title to the premises, and the other having no right of entry reserved to him. Saunders v. Merryweather, 3 H. & C. 902; 35 L. J., Ex. 115; 11 Jun. (N.S.) 655: 13 W. R. 814.

By indenture of the 31st March, 1852, H. demised to B., for ninety-nine years, a piece of land and four unfinished houses, and B. covenanted that he would, on or before the 25th June, 1852, finish the houses, under the direction and to the satisfaction of the surveyor of H., provided that, if default should be made, it should be lawful for H, to enter into the demised premises or any part thereof in the name of the whole, and repossess, retain and enjoy the same as of his former estate. By a subsequent indenture of the same date, B. mortgaged the premises to the plaintiff. By indenture of the 30th July, 1852, between H. of the one part, and the defendant of the other part, reciting that H. had entered into several underleases affecting the premises, the particulars of which were known to the defendant H, assigned to the defendant the leashful premises, and all estate, right, title, and interest of him, H., into or out of the premises, for the residue of the term of years granted by the aforesaid indenture of lease, subject, nevertheless, to the underleases therein referred to. B. did not complete the houses on the 25th June, and no surveyor was ever appointed. In July, 1852, B. gave up possession of the premises to the defendant. The plaintiff having brought ejectment as mortgagee :—Held, that, assuming there was a sufficient clause of re-entry, and also a forfeiture of which H. might have availed himself, the indenture of assignment did not shew any intention, or use sufficient words, to pass a right of entry to the defendant, even if such a right is assignable under the 8 & 9 Vict. c. 106, s. 5, which, semble, it is not. Hunt v. Romnant, 9 Ex. 635; 23 L. J., Ex. 135; 18 Jur. 335; 2 W. R. 276—Ex. Ch.

Mortgage Term outstanding. ]—C. demised lands to B. as a yearly tenant, and subsequently mortgaged them. B. paid rent to C., and, after the mortgage, gave up possession to A., who continued to pay rent to C. and his executors:— Held, that the mortgage term granted to B. was outstanding, and that the mortgagee could not bring ejectment against A. without a notice to quit.

Acceptance by Mortgagee of Mortgagor's Tenant. The attorney of a mortgagee, who was also the attorney of the mortgager, applied to the tenant in possession of the mortgaged premises for rent to pay the interest due on the mortgage, and threatened to distrain if the rent was not paid :- Held, that the mortgagee thereby recognised the possession as legal, and that he could not maintain ejectment on a demise laid previously to such application by his attorney. Doe d. Whitaker v. Hales, 5 M. & P. 132; 7 Bing. 322; 9 L. J. (o.s.) C. P. 110.

In ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a time later than the day of the demise in the declaration, does not amount to a recognition by him that the mortgagor was in lawful possession of the premises, till the time when such interest was paid, and consequently is no defence to the ejectment. Doed. Rogers v. Cud-

wallader, 2 B. & Ad. 473.

If a person who has an estate borrows money on it upon mortgage, and the mortgagor afterwards grants a lease to a tenant for twenty-one years, that lease, being made after the mortgage, cannot be set up by the tenant to prevent the mortgagee from recovering possession, and the mortgagee may put the tenant out of possession by an ejectment; and the only remedy the tenant has for thus being put out of possession is against the mortgagor. But if, instead of the mortgagee turning the tenant out of possession, he consents to take the tenant as his tenant, the mortgagee will not thereby set up the twentyone years' lease, but will make the tenant his tenant from year to year only. Doe d. Hughes v. Buchnell, 8 Car. & P. 567.

The father of the defendant mortgaged premises, consisting of two estates, called A. & B., and the defendant joined in the deed, and covenanted for the payment of the money. After the death of the mortgagor, the defendant, to whom the property had been devised by him, remained in possession of estate A., estate B. being in possession of tenants who had paid rent to the mortgagor, and to whom no notice to quit had been given. The defendant afterwards appointed one of the plaintiffs a receiver of both estates, which were recited to be in the defendant's occupation, empowering him to receive the rents, to proceed by action or distress for the recovery thereof, and to bring ejectments. defendant defended as tenant :- Held, that the plaintiffs were not entitled to recover estate B., which was in possession of the tenants, as no notice to quit had been given to them; and that the defendant was not estopped from setting up this defence. Doe d. Bowman v. Lewis, 13 M. & W. 241; 14 L. J., Ex. 198.

Where a mortgagor, who continues in posses-sion of the premises with the consent of the mortgagee, makes a lease to a third party who expends money in improving them, the circumstance of the mortgagee's having occasionally gone to look at the improvements is not of itself evidence for a jury that he has accepted the lessee as his tenant. Doe d. Parry v. Hughes, 11 Jur. 698.

Acceptance by Mortgagee of Mortgagor as Tenant.]—Where a mortgage deed for securing payment of an annuity conveyed the land in trust, to permit the mortgagor to receive the rents until default made for sixty days in pay-Calle v. Moody, 30 L. J., Ex. 385; 7 Jur. (N.S.) 1249. ment of the annuity :- Held, that the conby him in his own name to a tenant let into possession by him before the mortgage, enabled him to recover in ejectment on his own demise. Doe d. Lyster v. Goldwin, 2 Q. B. 143; 1 G. & D. 463; 10 L. J., Q. B. 275.

The defendant, by indentures of mortgage of the 4th and 5th April, 1837, conveyed freehold land in fee, and assigned leasehold premises for ninety-nine years, with a proviso for reconveyance on payment of principal and interest on the 5th October next ensuing; and with a covenant, that, on default of payment, it should be lawful for the mortgagee, after giving one month's notice, demanding payment, to enter, and, whether in or out of possession, to sell or lease; and the mortgagee covenanted that no sale or lease should be made until one month's notice had been given to the mortgagor :- Held, that there was no re-demise to the mortgagor, and that the mortgagee might bring ejectment without giving notice to him. Doe d. Parsley v. Day, 2 Q. B. 147; 2 G. & D. 757; 12 L. J., Q. B. 86; 6 Jur. 913.

A mortgage deed reciting a loan of 8501. at 51. per cent. interest, contained an agreement that the mortgagor, during his occupation of the premises, should yield and pay for the same to the mortgagee the rent of 50L, payable halfyearly; and that it should be lawful for the mortgagee to use such remedies, by distress and sale, for the recovery of the rent as landlords have on common demises; provided that the reservation of such rent should not prejudice the mortgagee's right to enter and evict the mortgagor at any time after default made in payment of the moneys secured, or any part thereof :-Held, that after default made in payment of the principal and of one half-year's rent, the mortgagee might eject the mortgagor without any notice to quit, though he had treated the mortgagor as fenant by distraining on him for a previous year's rent. Doe d. Garrod v. Olley, 12 A. & E. 481; 4 P. & D. 275; 9 L. J., Q. B. 379; 4 Jur. 1084.

T. mortgaged land to B., and, by the deed, attorned to B. as tenant, at a quarterly rent, which was stated to be done for the purpose of securing the principal and interest, and in contemplation and part discharge thereof. The deed also gave B. a power of entry in default of payment:—Held, that B., or his assignee, might bring ejectment against T., without giving him notice to quit. Doe d. Snell v. 70m, 4 Q. B. 615; 3 G. & D. 637; 12 L. J., Q. B. 264; 7 Jun. 847.

Ejectment by mortgagee against mortgagor. The deed contained a power to the mortgagee to enter and distrain upon the premises for interest, if unpaid as for rent, and the mortgagee had so entered and distrained at a period later than that of the demise laid in the declaration, but for interest accruing before the day of demise :-Held, that the power to enter and distrain was not inconsistent with the right of the mortgagee to recover in ejectment, and the exercise of it was no recognition of the mortgagor as tenant Doe d. Wilkinson v. Goodier, 10 Q. B. 957; 16 L. J., Q. B. 435; 11 Jur. 892.

Tenancy at Will.]—A mortgage deed contained the following clause: — "C. (the mortgager) the following clause: — "C. (the mortgager) agrees to become tenant to B. (the mortgagee) of the premises hereby assigned, from henceforth Hughes v. Jones, 1 D. (N.S.) 352; 9 M. & W. during the will and pleasure of B., at and after 372; 11 L. J., Ex. 50; 6 Jur. 302.

veyance operated as a re-demise to the mortgagor the rent of 24l. 10s, payable quarterly in every until default; and that a notice to quit, given year":—Held, that the tenancy thereby created was a tenancy at will. Doe d. Barstow v. Cox, 12 Q. B. 122; 17 L. J., Q. B. 8; 11 Jur. 991.

H., seised in fee of a house and land, died in

1798, leaving a widow and his son, a minor above fourteen years of age. The widow (with whom the son lived) continued to occupy the house and land in 1798. The son being still a minor, the widow married the defendant, who continued thenceforward to occupy the house and land in 1805. The son left the premises, but occasionally resided there afterwards, for two or three weeks at a time with defendant and his wife. The wife died in 1841. In 1842, the son mortgaged the premises in fee to the plaintiff for money, which was paid to the defendant, the defendant himself being present at the execution of the deed, and privy to its contents, and receiving the money from the son :- Held, that in ejectment by the mortgagee the jury was warranted in presuming that the defendant occupied as tenant at will to H. Doe d. Groves v. Groves, 10 Q. B. 486; 16 L. J., Q. B. 297; 11 Jur. 558.

A mortgage contained a power of sale and a provise and covenant by the mortgagee, that no sale should take place, nor any means of obtaining possession of the premises be taken until the expiration of twelve calendar months after notice in writing of such intention had been given to the mortgagor. It also contained a covenant by the mortgagee for quiet enjoyment by the mortgagor as tenant at will to the mortgages, on payment of a yearly rent in lien of and as interest upon the mortgage money. The mortgagor remained in possession of the premises, but no livery of seisin was made to the mortgagor. Prior to the action, there was a demand of possession; but no notice to quit was ever given to the mortgagor:-Held, that the effect of the deed was to create a tenancy at will only, and that a demand of possession without any notice to quit was sufficient to entitle the mortgagee or his assignces to maintain ejectment. Due d. Dixie v. Davies, 7 Ex. 89; 21 L. J., Ex. 60.

Persons Claiming under Mortgage. - See LIMITATIONS (STATUTES OF).

Restraining Action-Breach of Agreement.]-Agreement in writing not to call in a mortgage for two years, the mortgagor fulfilling his covenants. On one occasion, within two years, interest was not paid on the day, and the mortgagor shortly afterwards, after giving notice that was no longer bound by the agreement, demanded and received payment of the interest and incidental costs:—Held, that this was a waiver of the default, and injunction granted to restrain an ejectment brought within the two years. Langridge v. Payne, 2 Johns. & H. 423; 10 W. R. 726.

### 2. EXECUTION CREDITORS.

Sale by Sheriff-Position of Purchaser. -A sheriff having taken in execution a term of years, the judgment creditor became the purchaser, took possession and paid rent to the owner in fee. but no assignment was executed to him :-Held, that the term remained in the debtor, and he was entitled to recover it by ejectment. Doe d.

If a sheriff sells a term under a fi. fa. which is afterwards set aside for irregularity, and the produce of the sale directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the sheriff. Doe d. Emmett v. Thorne, 1 M. & S. 425; 14 R. R. 485.

A lessor in ejectment, who claims title as a purchaser from the sheriff, who sells by virtue of a fi. fa, at the suit of such lessor must prove the judgment as well as the writ. Doe d. Bland v. Smith, 2 Stark, 199; Holt, N. P. 589; 19 R. R. 702. S. P., Hoffman v. Pitt, 5 Esp. 22.

In ejectment by a vendee of a term, sold under a fi. fa. against the defendant, it is sufficient to produce the fi. fa. without proving a copy of the judgment. Doe d. Batten v. Murless, 6 M. & S. 110; 18 R. R. 325.

Where it appeared that the term had been granted to the defendant's father, and that on his death, intestate, his son B. entered and took out administration, and was possessed till his death, and that, on his death, the defendant, his brother, entered, and that by indenture between the defendant and M. (concerning other premises) it was recited that the defendant was legal personal representative of B. :- Held, that this was prima facie evidence that the term was vested in the defendant. Ib.

Against Tenant of Judgment Debtor. ]-A plaintiff who claims under an elegit, subsequently to a lease granted to the tenant in possession. cannot recover in ejectment, though he gives the tenant notice that he does not mean to disturb his possession, only wishing to get into the receipt of the rents and profits of the estate. Doe d. Da Costa v. Wharton, 8 Term Rep. 2.

Where an elegit creditor brings ejectment against a debtor, whose prima facie title to the whole property sought to be recovered is proved, it is incumbent on other parties in possession as under tenants or otherwise, to shew their better title (e.g. by tenancy anterior to the judgment or the like), or the elegit creditor must recover against all. Doe d. Ecans v. Owen, 2 Tyr, 149; 2 C. & J. 71; 1 L. J., Ex. 43.

Action by-Evidence in. |- In ejectment by a judgment creditor on a writ of elegit, the writ, with the inquisition and the return therenpon, stating that the judgment debtor was possessed of the property, constitutes sufficient evidence of the plaintiff's title to recover; and as between the elegit creditor and the judgment debtor the return to the inquisition is conclusive, at all events down to the date of the return, so that the judgment debtor cannot set up a title in a third party arising prior to that date. Martin v. Smith, 27 L. J., Ex. 317.

- Defence to. |- In ejectment by an execution creditor under an elegit, it is no defence to say that the elegit was executed upon a judgment founded on a warrant of attorney given to secure upon land an usurious loan, because even though the warrant was voidable on the ground alleged, yet the proper mode of avoiding it would be by application to set it aside, it being too late to do so on such grounds at the trial of the ejectment. where the judgment, appearing to be in existence, must be taken to be valid. Hughes v. Lumley, 4 El. & Bl. 274; 3 C. L. R. 241; 24 L. J., Q. B. 57; 1 Jur. (8,8.) 422; 3 W. R. 109.

#### 3. HEIRS AND DEVISEES.

When Action Maintainable by. - An heir, on whom a contingent remainder in a copyhold has devolved, may bring ejectment before admittance. Doe d. Hinton v. Rolfe, 3 N. & P. 648.

A will recited that the devisor had charged the land with 3,000%, on his daughter's marriage; then followed a devise to trustees to keep down the interest, and apply the surplus rents as directed till the lessor of plaintiff should come to the age of twenty-three; and then to him, subject to the charge:—Held, that this did not shew a legal estate out of the lessor of the plaintiff. Doe d. Beek v. Heahin, 6 A. & E. 495 : 2 N. & P. 660.

Where J., who was tenant at will to W., died, and the heir-at-law to J. entered into possession, and claimed the land as his own :-Held, that the devisees of W, might bring an electment against him, without giving him notice to quit, or demanding possession. Doe d. Burgess v. Thompson, 1 N. & P. 215; 5 A. & E. 582; 2 H. & W. 451; 6 L. J., K. B. 57.

A testator, after giving a life estate to his daughter-in-law in his real estates, devised the remainder to her son T. (who was his heir), in fee, upon condition that he should within three mouths after the death of the testator convey certain leaseholds to his three sisters ; but in case he should refuse to do so, upon failure thereof, he devised his real estates to his three grand-daughters. The testator died in 1808; his daughter-in-law then entered upon her life estate, and continued in possession till her death in 1827; the three grand-daughters then entered and continued in possession up to an ejectment brought by the heirs of T. —Held, on a special ease stating the will and the above facts, that as it was not expressly stated that T, had notice of the will within three months of the testator's death, the court could not infer the fact : and. therefore, as it did not appear that the conditional limitation had taken effect, the lessors were entitled to maintain ejectment. Doe d. Taylor v. Crisp, 1 P. & D. 37; 8 A. & E. 779; 8 L. J., Q. B. 41.

T., being seised in fee of premises, devised the same to his son, W., for life, with remainder to the issue of W. as tenants in common in fee. In April, 1845, W. died, having by will appointed executors, who managed the estate for the infant children of W., and in 1845 and 1846 received rent from the defendant, who had been in possession prior to the death of W .: - Held, that the acts of the executors did not bind the infant children; and that the latter might maintain ejectment against the defendant, without a previous notice to quit or a demand of possession. Doe d. Thomas v. Roberts, 16 M. & W. 779.

Ejecting Tenant-at-will of Devisor. ] - The owner of a cottage, divided into two parts, in 1808 put in two servants, H. & W., to occupy it, who occupied each part severally till his death in 1814, without paying any rent. They continued to occupy, undisturbed, after his death, till 1821, when H. died, having devised his moiety to W.; H., some time before his death, tool, in I to live with him tool. took in L to live with him as a servant, and after H.'s death L. continued in possession :-Held, on ejectment brought by W., that, by proving L. to have come in under H., he had shown a primă facie title. *Doe* d. Willis v. Birehmore, 1 P. & D. 448; 9 A. & E. 662; 8 L. J., Q. B. 108.

When Estopped ]—In ejectment, the plaintiff | pecuniary position and circumstances before and claimed as devises of  $A_\ell$ . The defendant claimed | at the time of the forgeries was admissible on the as heir-at-law of A., but had come into possession by agreement with B., who was originally tenant to A., but had attorned to the plaintiff :- Held, that the defendant was estopped from disputing the title of the plaintiff. Doe d. Marlow v. Wiggins, 4 Q. B. 367; 3 G. & D. 504; 7 Jur.

Possession creates Devisable Interest. - A person in possession of land without title has a devisable interest, and the heir of his devisee can maintain ejectment against a person who has entered upon the land, and cannot shew title or possession in any one prior to the testator. Asher v. Whitelock, 35 L. J., Q. B. 17; L. R. 1 Q. R. 1; 11 Jur. (N.S.) 925; 13 L. T. 254; 14 W. R. 26,

W. in 1842, inclosed some waste land; in 1850 he inclosed more land adjoining, and built a cottage. He occupied the whole till 1860, when he died, having devised it to his wife, so long as she remained unmarried, with remainder to his daughter in fee. On his death the widow and daughter continued to reside on the property. and in 1861 the defendant married the widow, and came to reside with them. Early in 1863 the daughter died, aged eighteen years, and the mother died soon after. The defendant continued to occupy the property, and in 1865 the daughter's heir-at-law brought ejectment against him :-Held, that she was entitled to recover the whole property. Ih.

Evidence in Action, of Possession.] - The receipt by a party, claiming as heir, of rent accruing due on a day preceding the payment, is not evidence of seisin on such day, Doe d. Lidybird v. Lawson, 8 B. & C. 606; 3 M. & Ry. 114; 7 L. J. (o.s.) K. B. 119.

Death of Elder Brothers. |- In ejectment, where the lessor of the plaintiff claims as heir by descent, the death of his elder brothers, and also that they died without issue, must be proved. Richards v. Hichards, 15 East, 294, n.; 13 R. R.

---- Competency of Testator.]-Where, in an ejectment by heir against devisee, the testator's competency was disputed, and the defendant, after proving that the testator had given a reasonable account of the real property left to him by his father, offered, in confirmation of his account, to put in the father's will, which was in court; but on an objection to its admissibility on the part of the plaintiff, it was withdrawn, and the judge adverted to the fact in his summing up, and told the jury they might infer from the plaintiff's objecting to the will being put in, that it was conformable to the statement made by the testator :-- Held, that there was no misdirection. Satton v. Decomport, 27 L. J., C. P.

Forgery of Will. ]-In ejectment by heirat-law, claiming also under a will, against parties claiming under a dead of grant, and also setting up a later will, the plaintiff undertaking, by anticipation, to prove that the deed and the later testator, who had confessed and been convicted of the forgeries, and was called as a witness to of that will, and that the plaintiff was prima prove them :- Held, first, that evidence as to his facie entitled under it, and proposed to set up a

part of the plaintiff. Roupell v. Haws, 3 F. & F.

Held, secondly, that evidence of forgery by him of other deeds (leases of the same property at enhanced rents, to increase the apparent value) in the course of the transaction, and in pursuance of the same design, was also admissible for the plaintiff. Ib.

Held, thirdly, that evidence of the forgery by him of a letter of authority, purporting to be from his father to the attorney who drew such other deeds, and also the deed in question, was

admissible for the plaintiff. Ib.

Held, fourthly, that evidence on the part of the plaintiff, to prove the later will a forgery, although the defendants disclaimed it, was admissible. Ib.

Held, fifthly, that the onus of proof being on the defendants, who relied on the deed, of proving its execution (as against the heir-at-law, who was prima facie entitled to it), if the jury was not satisfied of its execution, they ought to find for the heir. Ib.

proved to have died seised, and also under a devise, revoked by what purported to be a later will, forged; the defendant setting up such forged will, and also claiming as purchaser from the forger mider a forged deed of grant to himself, the deed of conveyance to the defendant not reciting the forged deed, but falsely reciting that the pretended grantor, the forger, was seised and the forged deed reciting the deeds of the testator's title:—Held, that all the deeds might properly be presumed to be in the possession of the defendant claiming to hold the estate as purchaser, and that the plaintiff, on a noticeto produce, was entitled to call for them, and, that the defendant would, at his peril, decline-to produce them. Roupell v. Waite, 3 F. & F.

- Other Matters. In ejectment, the plaintiff made out his title as the heir of W. G. Thedefendant put in the will of W. G., made in 1837, devising the property to the plaintiff and T. G.:
—Held, that the plaintiff might put in another will of W. G., made in 1838, devising the whole property to the plaintiff, and that the plaintiff was not bound to make this will part of his original case. Doe d. Gusley v. Gosley, 9 Car. & P. 46; 2 M, & Rob, 243.

In ejectment by the heir-at-law of F, against a devisee under F,'s will for the devised estates, the plaintiff may give parol evidence that the property was purchased by J., as agent for F., the testator, although J. had contracted in writing for the purchase in his own name. Murston v. Ros d. Fox. 8 A. & E. 14; 2 N. & P. 501; 8 L. J., Ex. 293.

Practice at Trial.]—In ejectment by heir against devisee, the heirship being admitted, the defendant is entitled to begin. Sutton v. Sadler,. 3 C. B. (N.S.) 87. S. P., Martin v. Johnston, 1 F. & F. 122.

The lessor of the plaintiff claimed as deviseewill were forgeries by an illegitimate son of the under a will of S. At the trial the defendant admitted the seisin of S. and the execution. dant began:—Held, that the plaintiff should sessed of the term. Doe d. Woodhouse v. Powell, have been permitted to begin. Doe d. Bather v. 8 Q. B. 576; 15 L. J., Q. B. 189; 10 Jur. 635. Brayne, 5 C. B. 655.

## 4. PERSONAL REPRESENTATIVES.

Administrator. ]-An administrator of a tenant from year to year may maintain an ejectment. Doe d. Porter v. Shore, 3 Term Rep. 13.

Where a tenant died intestate, in the possession of premises, and his widow, after continuing to occupy them for several years, and paying rent to the landlord, married a second time, and her husband entered into possession, and paid rent for several years to the landlord, and, upon the death of the wife, the personal representative of the first husband obtained administration of his estate and effects, and brought ejectment to evict the second husband :- Held, that the action was maintainable, without giving a formal notice to quit. Doe v. Bradbury, 2 D. & R. 706.
In ejectment by an administrator to recover

possession of land leased to the intestate, it was proved that the lease had been burnt, and then that the intestate had been in possession, and had paid rent :- Held, that the evidence of the lease was sufficient to entitle the administrator to recover. Metters v. Brown, 1 H. & C. 686; 32 L. J., Ex. 138; 9 Jur. (N.S.) 416; 7 L. T. 795; 11 W. R. 429,

Lease by Administratrix-Action by Administrator de bonis non.]—An administratrix made a lease, in 1854, of premises forming portion of the intestate's assets for a term of twenty-one years. The lease did not purport to be made by her in her representative capacity. The lessee admit-tedly went into possession under the lease, but never paid any rent. He continued in possession until 1883, when the administrator de bonis non of the intestate brought an ejectment for non-payment of rent. The jury having found that the defendant had continued in possession on the terms of the lease :- Held, that the plaintiff (the administrator de bonis non) was entitled to a verdict for possession and arrears of rent. Doyle v. Maguire, 14 L. R., Ir. 24.

Executrix. ]—An executrix may lay a demise in ejectment before probate granted. Roe d. Bendall v. Summerset, 2 W. Bl. 694; 5 Burr. 2608.

Two out of three Executors.]-Two of three co-executors may recover lands of their testator in ejectment on a joint demise. Doe d. Stace v. Wheeler, 15 M. & W. 623; 16 L. J., Ex. 312.

Evidence-Of Probate or Letters of Administration.]-In ejectment for leasehold property, the plaintiff, after proving the creation of the term in 1730, shewed it to be vested in E. in 1760; he then proved a deed-poll executed by W. in 1784, by which (after reciting the deed of 1760, the death of E., and that E. had duly published her will in 1778, and that under the will the premises had vested in M.) W. released to M. No probate of E.'s will, nor any letters of administration, were produced, nor was any excuse given for their non-production. The plaintiff then deduced title from M., and showed the enjoyment of the property since 1784 to have been consistent with the documentary title :of administration could be presumed, and that

subsequent will, revoking the first will. The defent the plaintiff had failed to show himself pos-

#### 5. GRANTEES OF RENT-CHARGES.

Where a rent-charge is granted with power to the grantee, in case the rent should be in arrear for a certain space of time, to enter and enjoy the lands charged, and to receive and take the rents, issues and profits for his own use and benefit, until satisfaction of the arrears of rent, with all costs; the grantee may, upon the rent becoming in arrear, maintain ejectment against the terre-tenant, without proof of a previous demand of the reut. Dos d. Biuss v. Horsley, 3 N. & M. 567; 1 A. & E. 766; 3 L. J., K. B. 183.

When an annuity is secured, not only by a right of entry and distress, and by a right of entry and perception of the profits given to the grantee, but also by a term limited by the same deed to a trustee for him to raise arrears by devise, sale or mortgage, the rights of entry will not destroy the term, nor will the term defeat the right of entry—both kinds of remedies may coexist. Doe d. Butler v. Krasington (Lord), 8 Q. B. 429; 15 L. J., Q. B. 153; 10 Jur. 158. An owner of a first rent-charge on house pro-

perty, which had fallen into decay, entered into possession, his rent-charge being in arrear, and having expended a considerable sum of money in repairs, he received rout sufficient to pay all arrears of the rent-charge. Thereupon the owner of a second rent-charge, whose rent-charge was in arrear, brought ejectment to recover possession. A bill in equity by the defendant to restrain the action, except upon payment of the money expended in repairs, was dismissed for want of equity. *Hooper* v. *Cooke*, 25 L. J., Ch. 467; 2 Jur. (N.S.) 527.

## D. BETWEEN LANDLORD AND TENANT,

## 1. WHEN TENANT HOLDS OVER.

Recognisances to pay Costs — Common Law Procedure Act, 1852, s. 213.]—The statute did not apply where the tenant holds under a lease which has not expired by lapse of time; but a right of re-entry is claimed for nonperformance of the covenants. Doe d. Cundey v. Sharpley, 15 M. & W. 558; 15 L. J., Ex. 341.

A tenant holding from quarter to quarter, subject to a determination of the tenancy by three months' notice to quit, cannot be compelled to enter into the recognisance to pay costs. Doe d. Carter v. Roc, 10 M. & W. 670; 2 D. (N.S.) 449;

12 L. J., Ex. 27.

If a tenancy from year to year has been executed by a written agreement, the fact that a supplemental agreement is entered into, whereby the landlord agrees that the tenant shall continue tenant so long as landlord shall continue the vicar of A., does not make the tenancy uncertain so as to preclude the tenant from entering into recognisances. Doe d. Newstend v. Roc, 1 B. C.

Rep. 86; 10 Jur. 925.

The statute only applied to cases where the tenancy is under a lease, and had expired by effluxion of time; or under an agreement from enjoyment of the property since 1784 to have been consistent with the documentary title. When the documentary title the documentary

A tenant who had surrendered his term, but

refused to quit the premises, could not, on eject- | signed "A. B., agent for the plaintiff," is suffiment brought by the laudlord, be compelled to enter into the recognisance. Ib.

And where a tenant holds from year to year,

without a lease or an agreement in writing, not within the statute. Doc d. Bradford (Eurl) v. Roc, 5 B. & Ald. 770.

An agreement, in writing, of apartments for three months certain, comes within the statute. Doe d. Phillips v. Roe, 1 D. & R. 433; 5 B. & Ald.

766

A letter from the tenant claiming title as son of the last yearly tenant, at his death, and requesting leave to keep possession for two years, which was granted, is not an agreement within the statute. Roed, Stepney v. Thrustout, M'Clel.

A tenancy for years determinable on lives is not a holding within the statute. Doe d. Pemberton v. Roe, 7 B. & C. 2; 5 L. J. (o.s.) K. B. 289; 31 R. R. 135.

In ejectment by landlord against tenant, if the title to the premises is disputed between them, the latter is not compellable to give the undertaking, and enter into the recognisances required by the statute. Doe d. Saunders v. Roc, 1 D. P. C. 4.

It is immaterial in an application under 1 Geo. 4, c. 87, s. 1, that the lessor of the plaintiff is the original lessee, and the tenant his sub-lessee. Doe d. Watts v. Roc, 5 D. P. C. 213; 2 H. & W.

If a landlord allows his tenant to hold over above a year, without taking any step to recover the premises, he is not entitled to the benefit of the I Geo. 4, c. 87, s. 1. Doe d. Thomas v. Field, 2 D. P. C. 542.

Practice-For what Security may be Given. ] The court will not include, in the security to be given by the tenant, damages alleged to have been caused by the tenant, or those under him, to the trade of the premises, Doe d. Marks v. Roe, 6 D. & L. 87.

The recognisance is to be taken for one year's value of the premises, and a reasonable sum, to be settled by the master, for the costs of the action. Dae d. Levi v. Roc, 6 C. B. 272.

- Affidavits used in Application for Security. ? -An affidavit in support of a rule stating that the tenancy was determined by a certain notice to quit, and not by a regular notice to quit, is insufficient. Doe d. Platter v. Bell, 8 Jur. 1100.

An affidavit referring to the agreement required by the statute (such agreement being certified by the signature of the commissioner administering the oath) is sufficiently identified. Ib.

The affidavit should show that the tenancy was

determined by a regular notice to quit. Doe d. Topping v. Boast, 7 D. P. C. 487.

The lease or agreement which the landlord

must produce in court on motion calling upon the tenant to enter into the undertaking, and give the bail prescribed, should be annexed to the affidavits in support of the motion. Doe d. Foucan v. Roc, 2 L. M. & P. 322.

Sufficiency of Notice. ] - A demand of possession is sufficient notice, so as to entitle the plaintiff to the benefit of the undertaking and security required by 15 & 16 Vict. c. 76, s. 213.

Doe d. Anglesey (Marquis) v. Roc, 2 D. & R. 565; 1 L. J. (o.s.) K. B. 137.

cient. Such a notice is sufficient, although it only requires the tenant to appear and be made defendant, and find such bail, &c., "and for such purposes as are specified in the act of parliament," without going on to state those purposes in detail. Doe d. Beard v. Roe, 1 M. & W. 360; 2 Gale 48; 1 Tyr. & G. 870.

If the notice given to the tenant has been signed by an agent, it is not necessary that there should be an affidavit, that the person signing it is agent. Doe d. Geldart v. Roe, 1 W. W. & H. H. 346.

- Who can Apply. ]-An application that the defendant should give security may be made by one of several tenants in common. Doe d. Morgan v. Rotherham, 3 D. P. C. 690; 1 Gale, 157.

- Attesting Witness to Execution of Lease.] -It is not necessary that the attesting witness should depose to the execution of the lease-it is sufficiently proved by other witnesses. Ib, S. P., Doe d. Gowland v. Roe, 6 D. P. C. 35; W. W. &

Where the attesting witness to the execution of the lease is an attorney, the court will compel him to depose to such execution, though he is an attorney of the defendant. Doe d. Avery v. Roc, 6 D. P. C. 518; 1 W. W. & H. 178; 2 Jur, 468.

Rule Nisi. ] - The rule nisi need not specify all the particulars thereby required, as the court may mould the rule conformably to 15 & 16 Viet. c. 76, s. 213, in shewing cause. Doe

d. Phillips v. Roe, 1 D. & R. 483; 5 B. & Ald. 766. To entitle a lessor of the plaintiff to call for bail, he must move on production of the original lease or a counterpart, or a duplicate, and the instrument must be stamped at the time. It is not sufficient to move on a copy, or on an instru-ment stamped after the rule nisi, and before cause shewn. Doe d. Cuuldfield v. Itoe, 3 Bing. (N.C.) 329; 5 D. P. C. 365; 6 L. J., C. P. 40; 3 Scott, 756; 2 Hodges, 279.

- Allegation of Reletting.] - Where the lessor of the plaintiff upon affidavit that a tenancy under a written instrument has been duly determined, moves that the defendant may give security for costs, a subsequent retaking, if an answer to the motion, must be alleged with particularity and precision. Rue d. Durant v. Doe, 6 Bing. 574; 4 M. & P. 391.

 Defendant bringing Error—Sureties.] A defendant in ejectment must give two addi-tional sureties on bringing error, although he has before given two streties on commencing the action. Roe d. Durant v. Moore, 7 Bing. 124; 4 M. & P. 761; 1 D. P. C. 203; 9 L. J. (0.8.) C. P. 38.

## 2. RIGHT OF RE-ENTRY.

Entry whether Necessary.]-An actual entry is not necessary to take advantage by ejectment of a clause in a lease to re-enter for nonpayment of rent. Goodright d. Hare v. Cutor, 2 Dougl, 477.

A., tenant for life, remainder to P. in fee, leased for her life, and died in 1799, and the ov d. Anglessy (Marquis) v. Roc, 2 D. & R. lessee continued in possession, without paying rent, till his death in 1805, when his son took A notice given by a landlerd in ejectment and in 1807 levied a fine with proclamations :- | distress on the premises on some day in May, the Held, that the heir of P., the remainderman, might maintain ejectment against the son, without an actual entry to avoid the fine, or a notice to determine the tenancy. Doe d. Burrell v. Perkins, 3 M. & S. 271.

Sufficiency of .] -- A lessor, finding the demised premises out of repair, intending to take advantage of a clause of forfeiture contained in the lease, entered into an agreement with an undertenant, and subsequently received rent from him: —Held, a sufficient re-entry to avoid the lease. Baylis v. Le Gros, 4 C. B. (N.S.) 537; 4 Jur. (N.S.) 513.

On Nonpayment of Rent. ]-The rule that a tenant holding over, after the expiration of his lease, without entering into a new contract, continues to hold, upon the terms of the lease, so far as they are applicable to a tenancy from year to year, applies to a proviso for re-entry for nonby marker of the rent. Thomas v. Packer, 1 H. & N. 669; 26 L. J., Ex. 207; 3 Jur. (N.s.) 143; 5 W. R. 816.

In ejectment brought upon a right of re-entry, it must appear that the landlord had a power to re-enter, in respect of the nonpayment of half a year's rent, at the time of affixing the declaration and notice upon the premises. Doe d. Dixon v. Roe, 7 C. B. 134.

An agent of the lessor of the plaintiff may make affidavit of rent in arrear, required in cjectment on a vacant possession. Doe d. Charles

v. Rac, 2 D. P. C. 752; 3 M. & Scott, 751.

Three quarters' rent being in arrear under a lease containing a clause of re-entry on nonpayment of rent within twenty-one days after each quarter-day, the lessors, on the 2nd of October, distrained, and after sale of the distress, there remained due more than a quarter's, but less than a half-year's rent. The lessors, on the 2nd of November, served the lessec with a writ in ejectment :- Held, that the action was not maintainable, there not being half a year's rent The arrest at the time of the service of the writ. Cotesworth v. Spokes, 10 C. B. (N.S.) 103: 30 L. J., C. P. 220; 7 Jur. (N.S.) 803; 4 L. T. 214; 9 W. R. 436,

After Demand. ]-P. let premises to B. on an agreement that rent was to be payable at the usual quarter days, with right of re-entry reserved to P. if default should be made "in payment of the rent or any part thereof within twenty-one days after the same shall become due (being demanded)." In an ejectment by P, to enforce forfeiture for default in payment of rent :- Held, that the period of twenty-one days' grace must clapse before a demand could be made, for noncompliance with which ejectment could be brought, and that therefore a demand made during the running of the twenty-one days was not the demand contemplated by the parties according to the terms of the agreement, noncompliance with which would create a forfeiture. Phillips v. Bridge, 43 L. J., C. P. 13; L. R. 9 C. P. 48; 29 L. T. 692; 22 W. R. 237.

Necessity of Demand.]—Under a provise in a lease for the entry of the landlord, in ease the

demise being laid on the 2nd of May, and the declaration served on the 6th of June; the defendant giving no evidence to rebut the inference, that there was no sufficient distress on the premises within the terms of the proviso; as by shewing that there was a sufficient distress on the premises in May, up to the date of the demise inclusive, or on the 6th of June, when the declaration was served, if that were material with reference to the 4 Geo, 2, c, 28. On such proof. by the plaintiff, the statute dispenses with proof of a demand of the rent on the day it became due. Doe d. Smelt v. Fuchau, 15 East, 286; 13 R. R. 472.

Sufficiency of Demand.]-By a lease rent was reserved payable on the usual quarter-days, provided that if the rent should be in arrear for the space of twenty-eight days next after any of the days appointed for payment after the same had been lawfully demanded, it should be lawful for the lessor to re-enter and take possession of the premises without bringing an ejectment. The rent being unpaid :- Held, that a demand made on the premises at half-past ten o'clock on the morning of the last day was not sufficient to entitle the lessor to re-enter without action. Acocks v. Phillips, 5 H. & N. 183,

A lease for years contained a covenant to pay rent, and a proviso for re-entry on nonpayment, the rent being first lawfully demanded. The property being vacant, the landlord usked for payment of rent from the person liable to pay it. and not receiving it re-entered :-Held, that there had been sufficient demand, and that the lease was effectually determined. Manser v. Diw,

3 Jur. (N.S.) 252-I.JJ.

Insufficiency of Distress. ]-Goods sufficient to countervail arrears of reut are not to be found in the premises, unless they are so visibly there that a broker going to distrain would, using reasonable diligence, find them so as to be able to distrain them. Doe d. Haverson v. Franks, 2 Car. & K. 679.

Under a clause of forfeiture, upon a distress previously to a re-entry, on the ground that no sufficient distress can be found upon the premises, every part of the premises must be scarched. Rees d. Powell v. King, Forrest, 19; 2 Br. & B. 514.

A laudlord may recover without shewing that there was no sufficient distress, if he shews that he was prevented by the tenant from entering on the premises to distrain, by his locking up the doors. Doe d. Chippendale v. Dyson, M. & M.

If a tenant leaves the premises locked up the landlord may recover, as no sufficient distress can be found. Hammond v. Mather, 3 F. & F. 151.

In ejectment for forfeiture of a lease of a house by reason of there being no distrainable goods to countervail the arrears, it is not sufficient to shew that there were no goods on the ground floor, but the search must extend throughout the premises. Price v. Worwood, 4 H. & N. 512: 28 L. J., Ex. 329; 5 Jur. (N.S.) 472; 7 W. R. 506

In ejectment for a forfeiture, the lessor sought rent should be in arrear for fourteen days, and to recover possession of two houses, numbered 13 no sufficient distress found upon the premises, he and 14, which, in 1849, with two other houses, is entitled to recover in ejectment, on proof of numbered 15 and 16, were demised by him to half a year's rent due at Lady-day, and no L. for twenty-one years, at an annual rent of

73l. 10s., payable quarterly. The lease contained | Midsummer, 1858, a year's rent was due, and in July, 1858, the houses, Nos. 15 and 16, were deserted, and a police constable entered, and for some time kept possession of them, but afterwards, by the direction of the lessor's agent, gave possession to T. to take care of them for him; but upon a verbal understanding that if he could get possession of Nos. 13 and 14, the four houses should be let to T. In December, 1859, a distress for 73*l*., one year's rent, due Michaelmas, 1858, was put in on Nos. 13 and 14, which were then occupied by the defendant. At that time the property on the premises was only worth a few shillings, and there never was, up to the commencement of the action, a sufficient distress to satisfy the arrears of rent. No distress or search was made in Nos. 15 and 16, after T. took possession, and it was uncertain whether, at the time of the service of the writ, there were or were not goods on those premises sufficient in value, if distrainable, to satisfy the arrears of rent :- Held, that there was evidence of no sufficient distress, since the lessor was not bound to show that there were no goods of sufficient value in Nos. 15 and 16, inasmuch as the possession of T. must be considered as the lessor's possession, and, under the circumstances, justitable. Wheeler v. Stevenson, 6 H. & N. 155; 30 L. J., Ex. 46; 3 L. T. 702; 9 W. R. 233.

In ejectment for breach of covenant, brought by a landlord against his tenant, it appeared that the plaintiff had sought to re-enter on the premises for a forfeiture for breach of a covenant not to assign without consent, but found them shut up and empty :-Held, that in order to entitle the plaintiff to recover, it was not necessary for him to shew that there was no sufficient distress found on the premises at the time when he attempted to re-enter. Wedgwood v. Hart, 2

Jnr. (N.S.) 288.

Effect of Distress after Action is a Waiver of. -When a landlord brought ejectment against his tenant on the 21st of July, claiming as from that day, and after action, distrained for rent due on 24th of June previous :- Held, that he might still rely, in the action of ejectment, on a forfeiture accruing before the 24th of June. Grimwood v. Moss, 41 L. J., C. P. 239; L. R. 7 C. P. 360; 27 L. T. 268; 20 W. R. 972.

Affidavit-No sufficient Distress.]-An affidavit of there being no sufficient distress on the premises must be positive; the deponent's belief will not do. Dor v. Roe, 2 D. P. C. 413.

Where premises are kept locked, and access refused by the parties in possession, so that it cannot be ascertained whether there is a sufficient distress thereon or not, an affidavit stating those facts is sufficiently positive, if it states a belief only that there is no sufficient distress on the premises. Doe d. Cow v. Roe, 5 D. & L. 272. S. P., Ramily v. Fyeroft, 4 W. R. 26.

Quare, whether upon a motion for judgment against the casual ejector, under 4 Geo. 2, c. 28, s. 2, an affidavit stating that an amount exceed ing half a year's rent was in arrear, and that there was no sufficient distress to be found upon the premises countervailing the arrears of rent due, was sufficient; or whether the afficiavit should have stated that the property upon the premises was insufficient to countervail half a

Where judgment had been obtained upon an a provise for re-entry on nonpayment of rent. At affidavit which the party was apprehensive might be held to be defective in this respect, the court allowed such judgment to be superseded, and another judgment to be signed upon an amended affidavit. Ib.

Upon a motion for judgment on a writ of ejectment, an affidavit, which states that three quarters of a year's rent were due from the tenant before the copy of the writ was affixed to the premises, and that at the time the copy was affixed no sufficient distress was to be found upon the premises, countervailing the arrears of rent is sufficient. Cross v. Jordan, 8 Ex. 149; 22 L. J., Ex. 70; 17 Jur. 93.

Proof of Service of Writ.]—Upon trial of an ejectment under the 4 Geo. 2, c. 28, s. 2, for a forfeiture for nonpayment of rent, it was essential that the plaintiff should prove the date and the fact of the service of the declaration. Doe d. Gooth or Gooch v. Knowles, 1 D. & L. 198; 12 L. J., Q. B. 332; 8 Jur. 19.

The record in the action was not sufficient evidence of the time of the service of the declara-

tion. Ib.

Judgment and Execution. ] - A motion for leave to sign judgment and issue execution under the 210th section of the 15 & 16 Vict. c. 76, may be made to the court, and is absolute in the first

instance. Youens v. Keen, 2 C. B. (N.S.) 384.
Where half a year's rent was due before service of the declaration in ejectment, and no sufficient distress was found on the premises; if the defendant, having entered into a consent rule, did not appear at the trial, and the plaintiff was thereupon nonsuited, he might, under 4 Geo. 2, c. 28, s. 2, have judgment, although there had been no formal demand of rent or re-entry; but the judgment was only against the casual ejector, not the defendant. Doe d. Bedford Charity v. Payne, 7 Q. B. 287; 14 L. J., Q. B. 246; 9 Jur. 869.

Staying Proceedings. ] - A sub-lessee of the original tenant, or his assignee, may apply to stay proceedings upon payment of the rent and costs in ejectment, brought upon a forfeiture by reason of the nonpayment of the rent reserved by the original lease. Doe d. Nott v. Byron, 1 C. B. 623; 3 D. & L. 31; 14 L. J., C. P. 207.

In ejectment upon the forfeiture of a lease for nonpayment of rent, where the proviso was, that, if the rent was in arrear for twenty-one days, the lessor might re-enter, "although no formal or legal demand should be made for payment there-:-Held, that an ejectment for nonpayment of the rent within the time stipulated, might be maintained against the lessee, without demanding the rent or actually re-entering the premises; and although this case might not be strictly within the statute, yet the court refused to relieve the tenant by staying proceedings apon bringing the rent in arrear and the costs of the ejectment into court after trial. Doe d. Harris v. Masters, 4 D. & R. 45; 2 B. & C. 490; 2 L. J. (o.s.) K. B. 117; 26 R. R. 422.

- Previous to 15 & 16 Vict. c. 76, s. 212.7-The court will not, after a trial, stay the proceedings on payment of the rent and costs ; 4 Geo. 4, c. 28, s. 4, only warranting such application before trial. Ros d. West v. Davies, 7 East, 363.

The 4 Geo. 4, c. 28, s. 4, was not confined to year's rent. Doe d. Gretton v. Roc, 4 C. B. 577. | cases of ejectment brought after half a year's

rent due, where no sufficient distress was to be

found on the premises. Ib.

A tender of rent before the declaration was delivered would stay the proceedings under 4 Geo. 4, c. 28, s. 4. Goodright d. Stevenson v. Noright, 2 W. Bl. 746.

Upon a motion to set aside an ejectment, and restore the possession upon payment of the rent due and costs, the rent must be calculated only to the last rent-day, not to the day of computing. Dog d. Harcourt v. Ro. 4 Tannt. 883.

After execution in an ejectment, the court will not set the proceedings aside on payment of the rent due and costs of the action, if there are other grounds of forfeiture besides the non-payment of rent. Dee d. Lambert v. Roe., 3 D. P. O. 557.

#### E. PROCEDURE.

#### 1. PARTIES.

Adding Plaintiffs.]—In an ejectment by a mortgage of trust property, the judge may amend the record by adding the numes of the trustees as claimants. Bluke v. Done, 7 H. & N. 465; 3 H. A.J., Ex. 100; 7 Jur. (N.S.) 1306; 5 L. T. 499; 10 W. R. 175.

If there is a dispute as to the inheritance, the court will not compel the trustee of an outstanding term attending the inheritance to lend his name to either party in an ejectment. Doe d. Prosser v. King, 2 D. P. C. 580.

Use of Name Unauthorised.]—Where a plaintiff obtained a vertilet on a count on a supposed demise by a party, without his authority, and without his concurring in the action, the court set asile the vertilet. Due d. Hammek v. Fillis, 2 Chit. 170.

Ejectment was brought against the tenant in possession of the several demises of A. and B. Application was made to strike out B.'s name, on affidavit that the tenant claimed under B. that the action was idended to protect B.'s interest against A., and that A. claimed under a conveyance from B., which was asserted to be invalid by reason of fraud. The court granted the application, though B., who was in the East Indies, had not expressly authorised it, grounds being shewn for inferring a general authority, in the party making the application, to act for B.'s interest with respect to the premises. Dae d. Hunt v. Clifton, 4 A. & E. 809; 6 L. J., K. B. 274.

Partnership. — If A lets part of a house to a firm, consisting of himself and B., for the carrying on of the business of the firm, and the partnership of A. and B. is dissolved, A. may bring an ejectment against B., and recover possession of the part of the house thus let, without giving B. a notice to quit. Doe d. Connaghi v. Hinch, 8 Car. & P. 464.

A., having let premises to a company from year obtaining the trenary by a notice to quit, and brought an ejectment to recover possession; A., on the day of the demise laid in the declaration, was a partner in the company—Held, that the fact of his being a member of the company, was no objection to an ejectment on a demise by him. Francis v. Doe d. Harrey, 4 M., & W. 881; 1 H. & H. 362; 8 L. J., Ex.

Where Defendant is a Servant.]—The plaintiff is entitled to recover, although the defendant in possession is the servant of another. Doe d.

Cuff v. Stradling, 2 Stark. 187.

A mere servant of a beneficial occupier cannot be made a defendant in an ejectment; but where a servant, in the visible occupation of premises, assumes the character of tenant in possession, he is liable to be made defendant, and his conduct is evidence to go to the jury, to presume that he is tenant in possession, unless the fact is rebuilted by other evidence. Due d. James v. Stanuton, 1 Chit. 119; 2 B. & Ald. 371. S. P., Gulliver v. Soft, 2 Ld. Kon. 511.

Defendant Wife of one Plaintiff.]—It is no defended to ne ejectment that the defendant is the wife of one of the plaintiffs. Doe d. Daley v. Daley, 8 Q. B. 934; 15 L. J., Q. B. 295; 10 Jur. 691.

## 2. WRIT OF SUMMONS.

Form.]—In ejectment for a vacant possession, a writ directed to the assigness and personal representatives of B., deceased, is good. *Harrington* v. *Bythum*, 2 C. L. R. 1033.

Joinder of Causes of Action.]—An application for leave to join another action with an action for the recovery of land must be made before the writ is issued. *Pilcher In re, Pilcher v. Hinds*, 48 L. J., Ch. 587; 11 Ch. D. 305; 40 L. T. 882; 27 W. Il. 789—C. A.

Where another action had been joined with an action for the recovery of land without leave, the court refused to grant leave to continue the action in that form, although the defendants had appeared. Ib.

— Applies to Counter-claim.]—The provision of z. 2 of Ord. XVII., that no cause of action, except those specified in that rule, shall, unless by leave of the court, be joined with an action for the recovery of land, applies to a counter-claim as well as to an original action. Compton or Counten x. Previou, 51 L. J., Ch. 680; 21 Ch. D. 138; 47 L. T. 122: 30 W. R. 658.

When Leave Necessary.]—An action to establish title to hand is an action for the recovery of land so as to require the leave of the court for its joinder with another cause of action. Whattone. Device, 45 L. J., Ch. 49; 1 Ch. D. 99; 33 L. T. 501; 24 W. R. 93.

An action "to establish title to land," not claiming possession, is not an action "for the recovery of land," so as to require the leave of the court, under Rules of S. C., r. 2 of Ord. XYII, for its jointer with another cause of action. Whetsiene v. Deubs (1 Ch. D. 99) not followed. Gledhill v. Henter, 49 L. J., Ch. 333; 14 Ch. D. 492; 42 L. T. 392; 28 W. R. 530.

Where the writ was indorsed for declaration of title, declaration that a lease was granted under a mistake, recovery of rents and profits, and a receiver, and the statement of claim asked also for possession:—Held, that this was an action for the recovery of land and nothing elsa, and that there was no joinder of any cause of action which required the leave of the court.

An action was brought by the plaintiffs to establish their title to certain waste lands, and

that they might be quieted in the possession agreement to grant a lease and build a house thereof; and for an injunction to restrain the defendants from trespassing on the lands, and from interfering with the plaintiff's rights or molesting their tenants and agents:—Held, that, having regard to Gledhill v. Hunter (14 Ch. D. 422), the action was well founded. Norwich Corporation v. Brown, 48 L. T. 898.

A foreclosure action was not an action for the recovery of land with Ord. XVII. r. 2, of the Rules of 1875. Tawell v. Slate Co., 3 Ch. D.

629. Sec Ord. XVIII. r. 2.

What Claims may be Joined.]—A purchaser of real property brought an action claiming quiet possession of the property purchased, and an injunction to restrain the defendant from interfering with such possession :- Held, that the claim for an injunction was not a separate cause of action, and could be joined with that for possession without the leave of the court. Kendrick v. Roberts, 46 L. T. 59; 30 W. R. 865.

An action for the administration of personal estate may be joined with an action to establish title to real estate where the plaintiff claims both estates under a common gift in the same will.

Whetstone v. Dewis, supra.

Leave will be given to join with an action for the recovery of land an action for the recovery or delivery up of a deed relating to the land also for the recovery of personal estate comprised in the same instrument. Cook v. Enchmarch, 45 L. J., Ch. 504; 2 Ch. D. 111; 24 W. R. 293.

In an action by the heir-at-law, who was also one of the next of kin of an intestate, against the administratrix, who was in possession of the intestate's real estate, leave was given to join a claim for the recovery of the land, and a claim for the administration of the estate. Kitchina v. Kitching, 24 W. R. 901.

Leave was given to join with an action for the recovery of land, a claim for a receiver. Allen

v. Kennet, 24 W. R. 845.

Where an agreement for a tenancy had failed and the plaintiff brought an action for recovery of the land, and the defendant, who had entered into possession of the land, set up the agreement as a defence; on summons brought by the plaintiff for leave to amend the indorsement on the writ by claiming a valuation which he alleged that the defendant had agreed to pay on entering into possession of the land, but had not paid :-Held, that the plaintiff had a right to claim the valuation under the agreement as an alternative, in case he failed in recovering the land, and that the amendment should be allowed. brooke v. Farley, 54 L. J., Ch. 1079; 52 L. T. 572: 33 W. R. 557.

2; 33 W. R. 557. A mortgage was created of certain land by A., who subsequently went into liquidation. trustee in the liquidation sold the equity of redemption to B. An action was brought by the mortgagee against B. for foreclosure. The security was insufficient, and it was necessary to obtain possession as soon as possible. On demanding possession, however, the mortgagee found that A. was in possession and refused to go out. The mortgagee asked for leave to amend the writ in the action by adding the name of A. as a defendant, and by including, as part of the relief sought, a claim for recovery of possession of the mortgaged property:—Held, that the leave could not be granted. Satellife v. Wood, 53 L. J., Ch. 970; 50 L. T. 705.

issue had been joined, the pleadings shewed no real dispute between the parties, and the action had been set down for trial. The plaintiff had taken possession under the agreement :-- Held, that leave ought not to be given to the defendant to amend his counter-claim by adding thereto a claim for recovery of the land agreed to be let. Clark v. Wray, 55 L. J., Ch. 119; 31 Ch. D. 68; 53 L. T. 485; 34 W. R. 69.

Irregularity-Objection by Defence. ] - The plaintiff, without obtaining leave of the court, joined a claim for recovery of land with other claims. By his statement of claim he altered his claim for relief by omitting the claim for recovery of land. The defendant by his defence raised the objection that the writ of summons was issued without leave of the court :- Held, that the defence ought not to be struck out as embarrassing. Wilmott v. Freehold House Property Co., 51 L. T. 552—C. A.

Semble, that such an objection is properly pleaded in the defence, that the plaintiff cannot cure the irregularity in his writ by omitting his claim for recovery of land from his statement of claim, that to cure the irregularity the writ of summons must be amended, and that such amendment cannot be made without the consent of the

defendant. Ib.

- Time for taking Objection. ]-An action was commenced against a trustee and the executors of his deceased co-trustee for the administration of the estate of a testatrix. The plaintiffs subsequently amended their statement of claim without the leave of the court, and asked that one of the executors of the deceased trustee might be ordered to give up possession of a certain inn belonging to the trust estate. It was pleaded by the defence and urged at the trial that this pleading was irregular, as joining two causes of action without leave:—Held, that the defendant should have applied at once to have the pleadings set right, and the objection was now untenable. Derhon, In re, Derbon v. Collis, 58 L. T. 519; 36 W. R. 667.

Special Indorsement - Ord, XIV. ] - See PRACTICE.

Date of Title. - When the writ contains no retrospective words the only question is, whether the plaintiff was entitled to possession at the time of the date of the writ. And although the defendant may have entered before then, that entry will not sustain the action, though it might sustain an action of trespass. Longhurst v. Elworthy, 3 F. & F. 323.

In ejectment by an heir by descent, the demise laid on the day his ancestor died was well enough after verdict. Roe d. Wrangham v. Hersey, 1

Wils. 274.

Where a notice given by a rector to the tenant of his glebe land expired previously to the time when a sequestration was read :-Held, that the rector might, after receiving a weekly allowance from the tenant, still maintain an ejectment, laying the demise between the time of the expiration of the notice and the reading of the sequestration. Doe d. Morgan v. Bluck, 3 Camp. 447; 14 R. R. 804.

ave could not be granted. Sutelife v. Wood, Where an entry was necessary, the demise 3. J., Ch. 970; fou L. T. 705.

In an action for specific performance of an Hickey Term Rep. 435, 727.

A demise laid on a day on which the forfeiture of a lease was incurred, to commence from two days previously, was good. Doe d. Grares v. Wells, 2 P. & D. 396; 10 A. & E. 427; 8 L. J., O. B. 265.

Striking out Part.]-Where parties had been served, the court would not, before appearance, entertain an application to strike out some of the demises on the ground that the lessors of the plaintiff named in those demises were dead. d. King William the Fourth v. Roe, 13 L. J., Ex. 304 ; 8 Jur. 476.

#### 3. SERVICE OF WRIT.

On Tenant. ]-It is unnecessary, on serving a writ of ejectment, to read over or explain its purport or object, as all that can be said by way of explanation is, that the writ means what it says. Fothergill v. White, 14 L. T. 768. See Edwards v. Griffith, 15 C. B. 397.

Where a writ of ejectment has not been addressed to, but has been served on the tenant in possession, it is questionable whether the tenant can apply to set the writ aside as irre-

gular. Thompson v. Slade, 25 L. J., Ex. 306. But if, instead of so applying, he applies for particulars, or for other information, and allows ten days to elapse, he will be deemed to have waived the irregularity, supposing it to be such, and his application should then be not to set aside the writ, but to be allowed to appear and defend. Ib.

Where a process server, after stating his business, was ejected from the presence of the tenant by parties on the premises, whereby the tenant was not personally served :—Held, good service. Due d. Mann v. Roc, 11 Man. & W. 77.

- When Lunatic. Service upon a lunatic in an asylum is sufficient. Doe d. Gibbard v. Roe, 3 Scott (N.R.) 368; 3 Man, & G. 87.
- On Agents.]-If the tenant resides abroad, service on an agent who resides on the premises is sufficient. Dov d. Treat v. Rae, 4 D. P. C. 278; 1 H. & W. 526.

But service on an agent of a tenant who is in the kingdom, is not. Doe d. Tomkins v. Roc. W. W. & D. 49,

Service on a person appointed by the Court of Chancery to manage an estate for an infant is insufficient. Goodtitle d. Roberts v. Budtitle, 1 Bos. & P. 385.

Service on a person described as a mortgagee in possession, by delivering it to his attorney, who undertook to appear for him, is not sufficient without an acknowledgment by the mortgagee. Dos d. Collins v. Roc. 1 D. P. C. 613.

On Joint or Several Tenants.]—Service on an under joint tenant is good service on him and a joint tenant. Doe d. Hutchinson v. Roe, 2 D. P. C. 418.

Service on one of two tenants in possession is good service on both. Doe d. Builey v. Roe, 1 Bos. & P. 369.

Personal service on one of two joint tenants is sufficient. Doe d. Williamson v. Roe, 10 Moore, 493. S. P., Doe d. Clothier v. Roe, 6 D. P. C.

Service upon one of two joint tenants, the notice being addressed to that one only, was not sufficient. Doe d. Braby v. Roe, 10 C. B. 663,

Where there are three several tenants, each copy of the notice might be directed to the individual tenant on whom it was served. Doe v. Roe, 8 Jur. 360.

On Wife.]—Service of a declaration in ejectment on the wife of the tenant in possession is good, Goodright d. Waddington v. Thrustout, 2 W. Bl. 800.

And it may be served on the wife either on the premises, or at the husband's house elsewhere. Doe d. Morland v. Bayliss, 6 Term Rep. 765. S. P., Doe d. Wingheld v. Doe, 1 D. P. C.

But service on the wife of the tenant is not sufficient, unless it appears that she is on the premises at the time she receives it. Due d. Royle v. Roe, 4 C. B. 258; 16 L. J., C. P. 249.

Service on the wife in a shed, where the husband carried on his business, is a good service, although not forming part of the premises sought to be recovered, but closely adjoining them. Doe v. Roe, 1 D. P. C. 67.

Service on a woman upon the premises, who represented herself to be the wife of the tenant in possession, was sufficient. Doe d. Walker v. Roe, 4 M. & P. 11.

- On Members of Family.]-Service upon the mother of the tenant in possession is not sufficient. Doe d. Smith v. Roe, 1 D. P. C. 614.
- On Personal Representatives.]—Service upon one of two joint executors is sufficient. *Doe* d. Strickland v. Roc., 1 B. C. Rep. 210; 4 D. & L. 431 : 11 Jur. 89.

Where a tenant had died, service on his widow in possession, who was administratrix, is suffi-cient. Doe d. Pamphilon v. Roe, 1 D. (N.S.) 186.

On Officers of Public Companies. - In ejectment against a railway company, personal service of the declaration upon the secretary of the company was good under 8 & 9 Vict. c. 16, S. 135. Doe d. Bayes v. Roe, 16 M. & W. 98; 16 L. J., Ex. 273. S. P., Doe d. Burgess v. Roe, 4 D. & L. 311; 10 Jur. 984.

Premises Vacant. -- Where a landlord or a lessor proceeds by ejectment for the recovery of a dwelling-house and other premises demised by one lease, if the dwelling-house is unoccupied and the rest of the premises is in the occupation of a tenant, service of the writ may be effected by personally serving the tenant with a copy, and affixing another on the front door of the house, Clinton (Lord) v. Wales, 2 Jur. (N.S.) 1096; 5 W. R. 113.

Affidavit of Service. ]—An affidavit of service on two persons, tenants of different parts of the premises, must distinctly allege a service on each of them. Doe d. Cock v. Roe, 6 Man. & G. 273; 6-Scott (N.R.) 961.

4. TENANT'S NOTICE OF WRIT TO LANDLORD. C. L. P. Act, 1852, s. 209,

Liability to Penalty-Mortgage. -A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties. Buckley v. Buckley, 1 Term Rep. 617 ; 1 R. R. 338.

liberty to dig for ore in other mines under the surface of other lands not demised: the tenant fraudulently concealed a declaration in ejectment delivered to him, and suffered judgment to go by default; the declaration did not mention mines at all, but the sheriff in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines in which he had liberty to dig :- Held, that although the latter could not be recovered under the declaration, still that the tenant, by his own act, had estopped himself from taking that objection; and that in an action for the value of three years' improved rent, the landlord might recover the treble rent, in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig. Crocker v. Fothergill, 2 B. & Ald. 652; 21 R. R. 438.

The improved or rack-rent is not the rent reserved, but such a rent as the landlord and tenant might fairly agree on at the time of delivering the declaration in ejectment, in case the premises were then to be let. Ib.

- Setting aside Judgment.]-A regular judgment against the casual ejector was set aside upon terms, where the tenant had neglected to give notice to his landlord, who was an infant. Doe d. Thoughton v. Roc, 4 Burr. 1996.

The court will not, after a plaintiff has obtained judgment and possession in an undefended ejectment, without collasion, and has sold part of the premises, and transferred the possession, let in a landlord to defend, from whom his tenant had concealed the ejectment. Goodtitle v. Badtitle, 4 Taunt, 820 : 14 R. R. 674.

Where a tenant, without giving notice to his landlord, suffered judgment by default in ejectment, the court let in the landlord to defend, upon payment of costs. Doe d. Meyrick v. Roe,

C. & J. 682. Where judgment and execution were regularly obtained without collusion with the tenants in possession, the court refused to set it aside at the instance of a party who stated that he was landlord of the premises, and had not received any notice of the declaration in ejectment. Doe d. Martin v. Roy, 1 Hodges, 223. S. C., nom. Doe d. Thompson v. Roy, 2 Scott, 181; 4 D. P. C. 115.

The court, in its discretion, will set uside a writ of habere facias possessionem executed, and let in a landlord to try an ejectment on sugges-tion of collusion, Due d. Grocers' Co. v. Roc. 5 Taunt, 205; 14 R, R, 742,

## 5. APPEARANCE AND DEFENCE.

By Landlord-Right of ]-A landlord, on complying with the requisites of 15 & 16 Vict. c. 76, s. 172, is entitled as a matter of right to be let in to defend, and the court or a judge has no power in the case of a landlord residing out of the jurisdiction to impose upon him the condition of finding security for costs. Butler v. Meredith, 11 Ex. 85; 24 L. J., Ex. 239; 1 Jur. (N.S.) 451; 3 W. R. 113.

- Effect of. |- Ejectment by one tenant in common against his three co-tenants in common. and a railway company, to whom the other three had demised the premises in question. The three co-tenants in common defended as landlords, and to appear and defend. Ib.

No Notice given.]-Demise by lease of lands, the company as tenant. It was proved on the together with the mines under them, with trial that rent had formerly been paid to all the tenants in common by certain other persons; and there was no evidence to shew that any notice to quit had been given, or that the tenancy had been otherwise determined :- Held, that the railway company, who defended as tenant, was not procluded, by the order admitting the landlords to defend, from insisting that the former tenancy still existed, and therefore, that the legal title was not in the lessor of the plaintiff on the day of the demise. Due d. Wawn v. Horn, 3 M. & W. 333; 1 H. & H. 75; 7 L. J., Ex. 98. Where a copyhold tenant makes a lease under

a licence from the lord, and afterwards is guilty of forfeiture, the lease continues to subsist as against the lord, and a defendant actually in possession by receipt of rent, defending as land-lord, is entitled to set up the lease in an ejectment by the lord. Clarke v. Arden, 16 C. B. 227; 3 C. L. R. 781; 24 L. J., C. P. 162; 1 Jur. (N.S.) 710; 3 W. R. 444.

In ejectment by A. against B. and C., where B. defends as landlord of C., a right of possession either in B. or in C. will defeat the action. Doe d. Mee v. Litherland, 6 N. & M. 313; 4 A. & E. 784; 6 L. J., K. B. 267.

But if it appears that B. has no title, and that C. has no right to the possession, except as tenant under A., evidence of a disclaimer by C. of such holding under A. rebuts the defence, both as to B. and C. Ib.

Where a defendant came in as landlord, it was necessary to shew that he was in the receipt of the rents and profits of the premises to which the lessor of the plaintiff made title, or that the declaration in ejectment was served upon the tenant in possession of the premises. Frun d. Phillips v. Cooke, 3 Camp. 512. And see Doe d. Schoffeld v. Alexander, 3 Camp. 516; 2 M. & S. 525 ; 14 R. R. 830.

A third person cannot defend as landlord, where it appears that the tenant in possession came in as tenant to the lessor of plaintiff, and paid rent to him, under an agreement which has expired. Due d. Knight v. Smythe, 4 M. & S. 347; 16 R. R. 486.

By Tenant—When allowed.]—Upon an application to be allowed to appear and defend, it is enough if the affidavit shews a prima facie case of possession by the applicant or his tenant. Craft v. Lumley, 4 El. & Bl. 608; 24 L. J., Q. B. 78; 1 Jnr. (N.S.) 424; 3 W. R. 284.

Therefore, in an ejectment to recover the Opera House, in the Haymarket, an affidavit in support of an application to appear and defend in respect of part of the premises mentioned in the writ, which stated that one of the boxes had been demised by deed to the applicant for a term of years, with free and uninterrupted admission, egress and regress, and the full use of the same, by tickets of admission during the nights of public performances, and all profits, advantages, and appurtenances to the box belonging, with a covenant for quiet enjoyment, and that after the execution of the deed the applicant entered into possession of and had ever since continued in possession of the box, with all the rights, privileges, and appurtenances, is sufficient. Ib

But where an applicant was a tenant by elegit, who had recovered the premises in ejectment against the defendant, but had not been put into actual possession, the court refused to allow him

The court will not allow a lessee to defend (alone) an ejectment against his landlord, or those claiming under him, on a supposed defect of title. Driver d. Oxenden v. Lauvence, 2 W. Bl. 1252.

By Devisee, Heir and Remainderman,]—The court will not permit a devisee, not having been in possession, to be made defendant in ejectment instead of the tenant, as landlovd. Lovelock d. Norris v. Dancaster, 3 Term Rep. 783.

But they will permit the heir-at-law, or remainderman, claiming under the same title.

Or a devisee in trust. Lovelock d. Norris v. Dancaster, 4 Term Rep. 122. And see Doe d. Heblethwaite v. Roc, 3 Term Rep. 783, n.

W. having been in possession of certain land by her tennuts, died in 1855 without issue. The plaintiff, claiming as devisee under her will, hrought ejectment against the tennuts who attorned to him. Certain parties alleging that G. had been seised in fee, and had devised the land to W. for life, claimed as heits of G. The seishin free of G. and the title of the applications as his heirs were denied by the plaintiff —Held, that these persons were not entitled to be let in to appear and defend, as having been in possession by themselves or by their tennuts, under 15 & 172. Wistorent v. Hawphrey, 5 H. & N. 185; 29 L. J., Ex. 118; 6 Jur. (N.S.) 231; J. L. T. 301; 8 W. R. 215.

Party who has obtained Judgment but not Possession. 1—A person who has recovered judgment in ejectment upon a forfeiture of a lease, but has not actually obtained possession, is not by 15 & 16 Vete. 6.76, s. 172, enabled to come in and defend an action of ejectment. Thompson v. Tombisson. 11 Ex. 442.

By Mortgagees.]—So the court permitted a mortgagee to be made defendant with the mortgager. Dae d. Tilyard v. Cooper, 8 Term Rep. 645.

But not a mortgagee to come in and defend as landlord, unless he is interested in the result of the suit. *Dae d. Pearson v. Hoe, 6* Bing. 613; 4 M. & P. 437; 8 L. J. (o.s.) C; P. 228.

After Judgment and Execution.]—The court will not set aside a judgment and execution, in order to let in a person to defend, though he makes an affidavit setting forth a clear title, and offers to pay costs. Doe d. Ledger v. Rec., 3 Taunt. 508.

The plantiff is abous, and signed judgment in default of appearance. The sheriff ejected H., who was in possession, and put the plantiff in. H. had no knowledge of the action, and did not claim to hold through J. H. applied to have the writ und subsequent proceedings set saide for irregularity —Held, that the right order was that the judgment and subsequent proceedings be set aside, the plaintiff to go out of any possession obtained under the judgment; the order to take effect only if H. within twelve days elect to be acticed as defendant; H. to be at their time of the issue of the write have an in possession by himself or his temant; the order to be without prejudice to any right the plantiff without prejudice to any right the plantiff inglight threather have to sign judgment against 5. upon filing a proper affidavit, Minet y. Alatona, 63 1. T. 507—C. Matona, 63 1. T. 507—C. Maton

Mistake in Order.]—Where a defendant defended as owner, but, by mistake, was desoribed in the consent rule as landbud!—Held, that he was not thereby precluded from shewing that a third party had been recognised by the plaintiff as his tenant. Doe d. Fellowes v. Alford, I. D. & L. 470; 13 B. J., Ex. 47.

Administration Action—Costs.]—In an action to administer real and personal estate, cross summonses, for leave to defend at the cost of the estate certain actions of ejectment, were taken out—first, by the plaintiff, who was the sole acting trustee (three others named in the bill lawing dischained), and second, by the equitable tenant for life, who was in possession of the rents under an order of the court —relied, that the court could not refuse the claim of the thenant for life to defend the actions of ejectment. Leave given accordingly, with liberty to use the name of the trustee for that purpose. Longhourne v. Fisher, 47 L. J., Ch. 379; 88 L. T. 216; 26 W. R. 276.

#### 6. PARTICULARS.

Order for. —In ejectment by remainderman against lessee of the late tenant for life, on the ground that the lease was granted under a power not properly executed, the court will order the plaintiff to give particulars of the alleged defects in the execution. Due d. Egyremont (Lard) v. Williams, 7 Q. B. 688,

In an ejectment for a forfeiture of a lease, the court will compale the plaintiff to deliver a particular of the breaches of covenant on which he intends to rely. Doe d. Birch v. Phillips, 6 Term Rep. 507.

In an action for recovery of land, where the plantiff sets up a claim to possession as heir-atlaw without further detail, a defendant in possession is cutified to particulars of the pedigree on which such leitship is based. Palmer v. Palmer, 61 L. J., Q. B. 236; [1892] 1 Q. B. 319.

— How far a Stay of Proceedings.]—Inejectment a party elatining to be lamtiloral took
out a summons for particulars of the premises,
and also a summons for time to appear and
plead. An order was made for the fellvery of
particulars, but containing no clause for a stay
of proceedings; on the other summons, am order
for a week's time to plead:—Hold, that the order
for particulars did not operate as a stay of
proceedings. Due d. Roberts v. Rue, 2 D. & L.
678; 13 M. & W. 691; 14 L. J., Ex. 101.

The court will stay proceedings until the plaintiff specifies the particulars for which his writ is served. Doe d. Saunders v. Newcustle (Duko), 7 Term Rep. 332, u. See Ord. XIX. r. 8.

Application for.]—Semble, an application for particulars may be made before appearance. Doe d. Vernon v. Roe, 7 A. & E. 14; 6 L. J., K. B. 194; 2 N. & P. 237.

Payment into Court.]—In ejectment by a lessur for breach of covenant by the lessee, he delivered as particulars of breaches, first, the morpayment of three years' rent from 1887 to 1870; secondly, the permitting a sate by public auction on the premises in 1867, contrary to the covenants in the lesse. The lessee them took out a summons for relief under the Common Law Procedure Act, 1862, a 212, and obtained an

order that, upon payment of the amount found unauthorised, may be referred to his legal right, to be due for rent, &c., proceedings should be stayed with reference to the breach for uponpayment of rent. He afterwards paid into court the amount found to be due to the lessor :-Held, that the fact that the lessor had in his particulars asserted his right to rent due after the first forfeiture, and that the lessee had paid this rent into court, did not constitute a waiver of this forfeiture, as the lessor was no party to the payment into court, and had merely stated in his particulars that if he failed on one ground m in particulars each i ne idnes on one ground of forfeit proper another. Toleman v. Porthury, 41 L. J., Q. B. 98; L. R. 7 Q. B. 344; 26 L. T. 292; 20 W. R. 441—Ex. Ch.

Proof. - In ejectment to recover premises for nonpayment of rent, a variance between the amount of rent stated in the particulars of demand, and the amount proved at the trial to the due, is inumaterial. Tenny d. Gibbs v. Moody, 10 Moore, 252; 3 Bing. 3; 3 L. J. (o.s.) G. P. 122; 28 R. R. 552.

Where in ejectment by landlord against tenant, particulars of breaches of covenant are delivered. for selling hay and straw off the land, removing manure, and non-cultivation, evidence of a breach of covenant by mismanagement in over-cropping, or by deviating from the usual rotation of crops, is inadmissible. Doe d. Winnall v. Broad, 2 Man. & G. 523; 2 Scott (N.B.) 685; 1 Drink.113;

10 L. J., C. P. 80. Where an ejectment is brought to recover possession of premises, under a clause of re-entry for brench of covenant in a lease, if the lessor of the plaintiff is himself in possession of a part of the premises, it is unnecessary to demand possession of that part in the particulars of the breaches delivered, Doe d. Hills v. Morris, 6

## 7. NEW TRIAL.

Appeal-Discretion, |-Where, mon an appeal, in an ejectment, against a judgment discharging a rule, it appeared that there was matter which would have justified the court in granting a new trial, it refused to exercise its discretion and power in that behalf, upon the ground that the court below had not granted a new trial, and that there were defects in the equity of the appellant's claim. Gibbson v. Doeg, 10 W. R.

#### 8. JUDGMENT.

Regularity of.]-After verdict for the plaintiff in ejectment, the defendant having grounds to move for a new trial, within the first four days of the term, it was arranged that the verdiet and judgment in an action of trespass pending between the same parties should determine the verdiet and judgment in the ejectment. On the action of trespass coming on for trial a juror was withdrawn, on terms, no costs on either side. Judgment having been afterwards signed in the ejectment:—Held, that such judgment was irregular, Dow d. Boeston v. Bibber, 5 H. & N.

If there has been judgment by default in ejectment against several, the fact that the of them, who were unnecessary parties, does not vitiate the proceedings. *Le Clere* v. *Greene*, 22 W. R. 428; Ir. R. 7 Eq. 371.

The entry of a plaintiff in ejectment, under

Effect of. ]-The reason why in ejectment one trial does not bind the inheritance, is not from any rule or maxim of law that one trial caunot any fine or maxim or law that one triat caution conclude the right—for in proper actions that may be done—but from the peculiar nature of an ejectto firms, in which no judgment as to the inheritance can be given. Lunaw v. Ryder, 7 Bro. P. C. 145.

Possession under a judgment in ejectment can never amount to a disselsin of the freehold : but will enure according to the right of the party recovering, whether it is a right of freehold in possession, in tail, or in fee, Doc d. Atkins v. Horde, Cowp. 702,

How far Evidence-Estoppel. ]-A judgment in ejectment is evidence to go to the jury in a subsequent ejectment brought upon the demise of the same lessor against the same defendant. Doe d. Strode v. Seton or Seaton, 2 C. M. & R. 728; 1 Tyr. & G. 19; 1 Gale, 303; 5 L. J., Ex. 73.

In ejectment against A., on the demise of B., mortgagee, a recovery in a former ejectment subsequently to the mortgage, on the demise of A., against C. the mortgager, is inadmissible for the defendant. Doe d. Smith v. Webber, 3, N. & M. 746; 1 A, & E, 119; 3 L. J., K. B, 148.

A judgment in ejectment upon the several demises of two is evidence to support trespass quare clausum fregit, brought by them jointly.

Chamier v. Clingo, 5 M. & S. 64; 17 R. R. 276.

A., B. and C., being successive tenants in tail of property held under an inalienable parliamentary title, and B. having, after the death of A., entered into possession of the estates, and, together with them, of certain leaseholds formerly in the possession of A., his executors brought an ejectment against B. to recover possession of the leaseholds as part of his estate.

B. having died before trial of the action, another action was brought against C., the successor in title. C., who was also executor of B., compromised the action on terms of giving judgment and buying the leaseholds at a certain price, with a further stipulation that 4,000%, should be allowed as a debt from B.'s estate in respect of rents received by B. Before the compromise, a creditor's suit was instituted, and a decree made for the administration of B.'s estate, which was insolvent. On a summons by A.'s executors toprove against B.'s estate for the amount of the rents actually received by him :- Held, that the judgment in the action against C, was not evidence of wrongful possession by B., which could serve as a foundation for the claim. Tulbot v. Shrewsbury (Eurl), L. R. 14 Eq. 503; 20 W. R. 854.

A judgment in ejectment is not conclusive evidence of title in an action for mesne profits, unless pleaded by way of estoppel. Doe v. Hud-dart, 2 C. M. & R. 316; 4 D. P. C. 437; 1 Gale, 260 ; 5 Tyr. 846.

A recovery in ejectment against the wife cannot be given in evidence in an action against the husband and wife for mesne profits. Denn v. White, 7 Term Rep. 112.

The judgment in an ejectment is evidence against a defendant who comes into possession under the defendant in the ejectment. Doe v. Whiteombe, 8 Bing. 46; 1 M. & Scott, 107.

Where premises are in the possession of a colour of an habere afterwards held to be tenant, and there is judgment in ejectment against the casual ejector; in an action against the landlord for the mesne profits and costs of the ejectment, the judgment in ejectment is no evidence against him, without proof that he had notice of the ejectment, so that he night have come in to defend it; but a subsequent promise by him to pay the rent and costs amounts to an admission that he is liable to the action. Hunter V. Britta, 8 Camp. 455; 14 R. R. 807.

A judgment by default in ejectment is, per se, no evidence of the defendant's possession at LI is prima facie evidence of his possession at the date of the writ, though not for any period anterior to it, Pearse v. Chaler, 38 L.J., Ex. 82; L.R. & Ex. 92; 20 L. T. 82.

Since the Common Law Procedure Act, 1853 (Ireland), a judgment by default in ejectment is not an estoppel; and, therefore, in an action for mesue rates, is not conclusive as to the time

at which the plaintiff's title accrued. Kenna Nugent, Ir. R. 7 C. L. 464—Ex. Ch.

To an action for mesue profits the defendants pleaded title to the lands in themselves during the time for which mesue profits were claimed. The plaintiff replied, by way of estopped, as to so much of the mesue profits as had accrued since a certain day named, that he sued out a writ of ejectment, for the purpose of recovering possession of the lands, wherein lue claimed to be entitled from such day, and that thereupon such proceedings were had that he recovered the lands and possession of them:—Held, that the lands made possession of them:—Held, that the pladfield in the spectra of an estopped with respect to the duration of the plaintiffs title, and the replication was therefore bad. Harris v. Malhern, 45 L. J., Ex., 244; 1 Ex. D. 31; 43 L. T. 39; 24 W. R. 208.

A plaintiff in ejectment, who enters judgment by default against several, is not estopped by the record from shewing that some of them were not in possession, and were unnecessary parties. Le \*\*Olere v. Greene, 23 W. R. 428; Ir. J. 7. Id., 371.

#### 9. Costs.

Who Liable to Pay.]—An appearance had been entered in the annes of the tenuts in possession, and the deferree had been conducted by an attemey employed by H. and S., who had no beneficial interest in the premises, but defended as trustees. Upon motion after verdict for the plaintiffs against H. and S. for payment of the costs of the action—Held, that the court could make the real parties pay the costs, since 15 & 16 Vict. o.76, s. 169, as well as before, and therefore the rule should be made absolute. Hatchisson v. Greentcoul, 4 El. & Bl. 824; 3 C. L. R. 118.

To entitle a plaintiff in ejectment to call upon parties who are strangers to the record to pay the costs, it must be clearly shewn that the defence was conducted by them for their own benefit in the name of a pauper defendant; it is not enough to shew that they are interested as equitable mortgagees of part of the premises, and that they have endeavoured to make terms with the plaintiff after judgment signed. Anstey v. Edwards, 16 C. R. 212.

The court has jurisdiction to order, by rule, the party really interested in bringing an ejectment to pay the costs of the defendant. Mabbs v. Vandorbrande, 4 B. & S. 904; 33 L. J., Q. B. 177; 10 Jur. (N.S.) 745; 9 L. T. 760; 12 W. R. 465

The court, notwithstanding the 15 & 16 Viet, c. 76, possesses the power to order one not a party to the action to pay the costs in an ejectment, Thornton v. B'Hheimon, 9 Jur. (N.S.) 606; 8 L. T. 507; 11 W. R. 916.

When the real defendant in an action of ejectment appears and consents that the plaintiff shall sign judgment, the plaintiff is entitled to costs, though the case is not specifically provided for by the Common Law Procedure Act, 1852, Dubbiac v. Delacaurt, 44 L. J., Ex. 129; L. R. 10 Ex. 210; 23 W. R. 632.

— One of several Defendants.]—Where three ejectments were brought against a hardlord and his two tenants, and the landlord obtained a rule for the consolidation of the three actions, and that the ejectment against one of the tenants (who was a pumper) should abide the event of the ejectment against the other; and that action was tried, and the plaintiff obtained judgment, and took passession of all the tenuments, the court compelled the landlord to jay the costs of that ejectment. Threatont the Jones v. Sheaton,

10 B. & C. 110. Where one of several defendants has appeared separately, and limited his defence to part of the property claimed, he is answerable for the whole costs, whether occasioned by his own defence or by the defence of the other defendants, miless he has confessed the claimant's title. Johnson v. Mills, 87 L. J., G. P., 57; L. R. 3 C. P. 23; 17 L. T. 15; 16 W. R. 132.

Out of Estate.]—The costs of a suit in the nature of an ejectment bill to recover devised property on a certain construction of a will, though doubtfal, are not within the rule in administration suits, and they come out of the estate. Johnson v. Brady, 11 Ir. Ed. R. 386,

Compelling Delivery of Bill of.]—When a plaintiff has obtained judgment in ejectment, and executed a writ of possession, the defendant is entitled to call upon him to deliver a bill of costs. Laker v. Keunders, 7 C. B. (N.S.) 858; 29 L. J., C. P. 158; 6 Jur. (N.S.) 637; 1 L. T. 403; 8 W. R. 190.

#### 10. RECEIVER.

Disputed Title—Jurisdiction.]—Under s. 25, snb-s. 8, of the Judicature Act, 1873, the court has jurisdiction to appoint a receiver wherever it shall appear just or convenient so to do, and consequently in an ejectment action, where the title to real property is in dispute. Found to Van Grutten, 66 L. J., Ch. 53; [1897] 1 Ch. 64; 75 L. T. 898—C. A.

Defendant in Possession—Judicial Discretion.]—It is not a proper case for the exercise of this judicial discretion where the defendant in an action for ejectment is the admirted heirat-law of the last owner, and has as such taken possession of the property in dispute, and there appears to be a question to be decided between the parties, and the property is safe, and there is no evidence of waste; and the more fact that such defendant is impountious is not a ground for the appointment of a receiver. IL.

Form of Order. ]—Per Kekewich, J.: An order appointing a receiver in a case of disputed

title to real estate should be made subject to the some occurrence subsequent to action brought. rights of any incumbrancer. Ib.

Proceedings by. ]-A receiver who is about to bring an ejectment for nonpayment of rent against a tenant, is not required to obtain the discharge of a general order for liberty to distrain, as against the tenant be seeks to eject. as it may become prudent to distrain if more than a year's rent is due. Sturgeon v. Douglas, 1 Hog. 400.

A receiver cannot proceed in electment. Wunn v. Newborough (Lord), 3 Bro. C. C. 88.

Ejectment when Receiver in Possession. !-Where a receiver is in possession, an ejectment cannot be brought without leave of the court, Angel v. Smith, 9 Ves. 335; 7 R. R. 214.

Where a receiver has been appointed over lands held at a rent, the landlord must obtain leave of the court before he can commence an action to recover possession for nonpayment of rent; and, in granting such application, the court has jurisdiction to impose terms, such as that the proceedings shall not be commenced for a specified time. In disposing of such applications the court will be slow to interfere with the rights of the hindlord, and will only impose conditions when necessary for the benefit of the estate for sale, and not likely to occasion the landlord any Battershi's Estate, In re. appreciable injury. 31 L. R., Ir. 73.

A party who had commenced proceedings by ejectment, before he got notice of the appointment of a receiver over the land, need not make any application to the court, until he is ready to execute his habere. Townsend v. Somerville, 1 Hog. 99.

A judgment creditor, who is not a party in the cause, may proceed by ejectment without leave of the court, at any time before the general order is served on the tenants to pay their rents to the receiver. Hemsworth v. Maunsell, 1 Hog.

### 11. EXECUTION.

Writ of Possession, ]-Under Ord, XLVIII, a writ of possession is now substituted for the writ of assistance, whether between parties or as against strangers to the action. Hall v. Hall, 47 L. J., Ch. 680.

When Plaintiff's Title has expired. ]-A claimant in ejectment is entitled to a writ of possession, notwithstanding the lease under which he claims, though in force at the time the action was commenced, has expired before the time of trial, nuless the defendant shows affirmatively that the claimant has notific whatever. Gibbins v. Buchland, 1 H. & C. 736; 32 L. J., Ex. 156; 9 Jur. (N.S.) 207; 8 L. T. 87; 11 W. R. 380.

Where a landlord has recovered judgment in an action against his tenant for the possession of premises which had been held over after the expiration of the tenancy, he will be allowed to issue the writ of possession notwithstanding that his estate in the premises terminated after the commencement of the action and before the trial, unless it be unjust and futile to issue such writ, and it is for the defendant to shew affirmatively that this will be the result of issuing such writ. Knight v. Clarke, 54 L. J., Q. B. 509; 15 Q. B. D. 294; 50 J. P. 84—C. A.

If a person, having title to the possession of land, bring an ejectment, and lose his title by writ of restitution to a portion of the lands taken

some occurrence subsequent to accound prougate, the is entitled to judgment and costs, but not to a habore. Tobia v. Cleary, Ir. R. 7 C. L. 17. Cf. Doe d. Morgan v. Bluck, 3 Camp. 447; 14 R. R.

Time for. ] - Where in an ejectment after defence taken, the plaintiff obtains a verdict for possession, mesne rates and costs, execution cannot issue until the judgment is complete, and the plaintiff is therefore not entitled to a writ of possession until the costs are taxed and added to the judgment, or are waived by him. Beusley v. Chapman, 6 L. R. Ir. 393.

Defendant retaking Possession.]—When, after writ of possession executed, the defendant foreibly retook possession, the Queen's Bench Division made an order renewing the writ. Stacpoole v. Walsh, 6 L. R., Ir. 444.

Where a writ of habere facias possessionem has been executed, and possession has been given to the plaintiff, but the tenant subsequently forcibly dispossesses him, the court will grant a new writ, but the rule for such writ is only nisi in the first instance. Doe d. Lloyd v. Roe, 2 D. (N.S.) 407; 7 Jur. 352.

After possession once given under a writ the plaintiff cannot sue out another writ of possession, though he is disturbed by the same defendant, and though the sheriff has not yet returned the former writ. Doe d. Pate v. Roe, 1 Taunt.

After possession of premises recovered in ejectment has been delivered to the owner by the sheriff, and the writ of possession returned, the power of the court in the sait is at an end, and if the defendant retakes possession afterwards, the court will not summarily interfere. Wilson v. Chanton, 6 L. T. 255; 10 W. R. 465.

Where a defendant, having been put out of possession by the sheriff, and possession given to the lessor of the plaintiff, afterwards, on the same day, forcibly resumed possession of the premises, the court ordered a writ of restitution to issue within a week, the defendant paying the costs of the application for the writ. Due d. Pitcher v. Roc. 9 D. P. C. 971.

Judgment for Recovery of Possession of Land.]
-A judgment for forcelosure absolute is not a judgment for the recovery of the possession of land within the meaning of Ord. XLII. r. 3, of rules of court, 1875. Wood v. Wheater, 52 L. J., Ch. 144; 22 Ch. D. 281; 47 L. T. 440; 31 W. R.

Order-Attachment. ]-Where a rule of court in ejectment required possession to be delivered up, but did not mention by whom, the court refused to make a rule absolute for an attachment against the tenant for not delivering up; and, as he was a stranger to the ejectment, also refused to grant a rule requiring him to deliver up possession. Doe d. Lewis v. Ellis, 9 D. P. C. 944

Possession of too much Land given.]-Where, in ejectment for five-eighths of a cottage, the sheriff gives possession of the whole :- Held, that the tenant should be restored to his possession of three-eighths of the premises. Roe d. Saul v. Dawson, 3 Wils. 49.

Motion on the 8th of November, 1873, for a

1871:—Held, that the delay was a bar to the application, inasmuch as it was perfectly clear that more had been taken under the writ than ought to have been taken, and the delay was not accounted for. Rockfort v. Bermingham, Ir. R. 7 C. L. 508.

Tenant Holding Over-Value of Crops Seized.] -Several crops having been taken under an habere facins possessionem, issued against a tenant for holding over, the court refused a rule for the lessors of the plaintiff to pay over the value of them to the defendant after deducting the amount of rent due. Doe d. Upton v. Witherwick, 3 Bing, 11; 10 Moore, 287; 3 L. J. (o.s.) C. P. 126.

Staying Proceedings Distress after Verdict. -The landlord of premises, after notice to quit brought ejectment against the tenant, and obtained a verdict; the latter still continuing in possession, the landlord afterwards distrained on him for reut, which became due after the verdict, and which he paid :-Held, that the execution in the ejectment could not be stayed, as the tenant should have disputed the distress. Doe d. Holmes v. Davies, 2 Moore, 581,

Liability of Sheriff |- Judgment had been signed for the plaintiff in ejectment. He caused to be issued and delivered to the sheriff a habere facias; then made an appointment with the sheriff for the purpose of executing the writ. The sheriff, having been informed by the defendant's attorney that the proceedings were irregular, and would be set aside, did not execute the writ. The judgment was afterwards set aside on an affidavit of merits :- Held, that the plaintiff was entitled to recover in an action against the sheriff the easts he had incurred in preparing to assist the sheriff to execute the writ. Mason v. Paynter, 1 G. & D. 381; 1 Q. B. 974; 10 L. J., Q. B. 299.

Taking Possession on Strength of Verdict. After verdict and judgment, where the landlord defends, execution may be issued against him without any further order of the court. Doe d.

Lucy v. Bennett, 7 D. & R. 61; 4 B. & C. 897.
Semble, per Patteson, J., that a party having recovered in an ejectment, cannot, by his own act only, and without the authority of the court, take possession. Doe d. Stephens v. Lord, 6 D. P. C. 257.

#### 12. WRIT OF RESTITUTION.

Who Entitled to.]—The plaintiff obtained an irregular judgment, under which possession was delivered to him. The judgment was afterwards set aside, and a rule was obtained for restoring possession to H., whose tenant had been dispossessed; and that H, should be admitted to defend as landlord. H, entered into the consent rule, and delivered a plea. The rule could not be served upon the plaintiff, by reason of his absconding :-Held, first, that H. was entitled to a writ of restitution. Doe d. Whittington v. Hards, 20 L. J., Q. B. 406; 15 Jur. 771.

Held, secondly, that H. was sufficiently made a party to the record. Ib.

Where judgment is set aside and possession

ordered to be restored by the plaintiff if he does nature and amount of such demands, not proceed to trial and establish his title at the title d. Leon v Lonsdown, 3 Anst. 937. next assizes, a writ of restitution will be awarded

under an habere execution on the 21st of April, | if the plaintiff fails to do so, although he was alone prevented by the misconduct of his own attorney, and although the title be still undetermined. Doe d. Stratford v. Shaill, 2 D. & L. 161; 13 L. J., Q. B. 321; 8 Jur. 538. Such order to restore possession need not be

specifically directed to the party. Ib.

Judgment was signed for the plaintiff as for want of a plea, and writs of possession were exeented. The defendant had left a plea at the judge's chambers. The defendant obtained a judge's order to set aside the judgment and writs of possession, and commanding the sheriff to restore possession :- Held, that the order ought not to have been on the sheriff, and that writs of restitution issued upon the order were irregular. Doc d. Williams v. Williams, 4 N. & M. 259; 2 A. & E. 381; 4 L. J., K. B. 39.

The lessor of the plaintiff in ejectment, who was a mortgagee, obtained judgment, and after more than a year and a day had elapsed, without reviving the judgment by sel. fa., issued a hab. fac. poss., and had possession thereunder; the execution was afterwards set aside by a judge's order, but the judgment left in force. On motion for a rule for a writ of restitution:—Held, that the lessor of the plaintiff could not retain possession on the ground of his being mortgagee, independently of the writ of possession, and that, although a writ of restitution could not issue, the rule might be moulded so as to order the lessor. of the plaintiff to restore possession. Doe d. Stephens v. Lord, 7 A. & E. 610; 2 N. & P. 604; 6 D. P. C. 257.

- Defendant retaking Possession. - See

Demand under.]- Where a rule of court ordered possession of lands to be restored to A., B. and C., or to D., their tenant, a demand by A. alone, without any special authority from B. and C., held sufficient. Corbett v. Nicholls, 2 L. M. & P. 87.

Refusal to Comply with.]-Upon a refusal to comply with that demand the court granted an attachment, though the affidavits in support of the rule nisi did not negative that possession had been delivered to B. and C. or to D. Ih.

Set-off of Costs.]-The court refused to allow the costs of the judgment to be set off against the costs of the motion. Doe d. Stephens v. Lord, 7 A. & E. 610; 2 N. & P. 604; 6 D. P. C. 257; 8 L. J., Q. B. 97. See Gondtitle d. Murvall. v. Badtitle, 9 D. P. C. 1000; 5 Jur. 990.

### 13. STAYING PROCEEDINGS.

Ejectment by Mortgagees. ]—The court will not stay proceedings in an ejectment by a mortgagee against a mortgagor, on the latter paying principal, interest, and costs, if the latter has agreed to convey the equity of redemption to the Goodtitle d. Taysum v. Pope, 7 Term mortgagee. Rep. 185.

Where a mortgagee brings an ejectment to get possession, and the mortgagor moves to stay proceedings on payment of what is due and costs; if the mortgagee gives notice of other demands, as cause against the order, he must specify the

In an ejectment for a forfeiture, in not paying

mortgage-money, the defendant is entitled to have the proceedings stayed upon the payment of the principal and interest due on the mortgage deed, with the costs incurred at law and in equity, without paying any bygone interest, or the expense of preparing the mortgage deed, or any assignment of it. *Due d. Blagg v. Sterd*, I. D. P. C. 352.

In ejectment by a mortgagee the court will not interfere to direct a reconveyance to the mortgagor on payment of the mortgagor—money and costs, unless he has himself appeared and become defendant in the action. Duckl. Orchard v. Skubbs, 6 N. & M. 857. S. C., nom. Duckl. Hurst v. Chiffan.

4 A. & E. 814.

Where the principal was advanced by the mortgagee to the mortgagor for three years from the date of the deed, the interest to be payable quarterly, and the deed contained a proviso, that, if default should be made in payment of interest on any of the days appointed for the payment, the mortgagee might sell the premises assigned; the mortgagor having made default in the payment of one quartor's interest, the mortgagee brought ejectment-the court refused to stay the proceedings on payment of the arrears of interest and costs by the mortgagor, as the case did not fall within the provisions of the statute, the principal becoming payable on default of pay-Guodtitle d. Green v. ment of the interest. Notitle, 11 Moore, 491.

If a mortgage receivers possession of the mortaged premises under a judgment in an undefended ejectment, the court has no jurisdiction to restore, on payment of the debt, interest, and costs, the possession to the mortgager, who has not appeared. But if the receivery is against a tennit of the mortgager, the centr will set aside the judgment, and let in the mortgager to defend as handlord, that he may be in a condition to apply to the court to stay proceedings on the terms of the statute. Due d. Tubb Y. Roe, 4

Taunt. 887.

— Two Mortgages.]—Where there are two mortgages, the court will not stay proceedings and comple a redemption of one mortgage only, upon payment of the principal, interest, and costs on that mortgage, without paying the rest. Roe d. Ruy v. Sulen, 2 W. Bl. 726.

Right to Redeem Disputed.]—Or if the mortgagee has delivered a notice in writing that he disputes the right of the mortgagor to redeem. Filbee v. Hupkins, 6 D. & L. 264.

—— Suit Pending to Administer Estate.]—
The court will not stay an action of ejectment by a mortgagee against his tenants at the desire of an executor who has come in as co-defendant and seeks to restrain the action on the ground that a suit is pending to administer the estate of his testator of which the premises mortgaged formed part. Crowlet v. Russell, 48 L. J., C. P. 76; 4 C. P. D. 186; 39 L. T. 250; 27 W. R. 84—C. A.

— Costs.]—The court will not, on staying proceedings in an ejectment by a mortgage, compel the nortgage to pay the costs of the rule, because he had refused a tender of the sun due. Doe d. Simpson v. Bunn, 1 W. W. & H. 49.

In ejectment by mortgagee, the court, or a judge, can include as a condition of an order for stay of proceedings the payment of the costs of an abortive attempt at sale under a power. Doucle v. Neale, 10 W. R. 627.

The costs are taxed as between party and party, and not as between attorney and client. Due d. Cupps v. Cupps, 3 Bing. (N.C.) 768; 4 Scott, 468; 5 D. P. C. 634; 6 L. J., C. P. 237.

— Jurisdiction of Judge at Chambers.]—A judge at chambers has jurisdiction meder 15 & 16 Vict. c. 75, s. 219, to order a stay of proceedings on payment of principal, interest, and costs. Lawrence v. Hogben, 26 L. J., Ex. 55.

— Delivery up of Deeds.]—An action on a mortgage deed was within the 7 Geo. 2, 0. 9, 1, 1; and a judge has power to make an order for the delivering up of the deed. Succton v. Collier, 5 D. & L. 184; 1 Ex. 457; 17 L. J., Ex. 57.

Next Friend — Action not beneficial to Plaintiff.]—An action for the recovery of land may be brought under Ord. XVI. r. I7, by the next friend of a person of unsound mind not so found by inquisition; and a writ issued in such an action by the next friend, in the name of the person of unsound mind, is regular. But where the court is of opinion on the facts of the case that such action is not a beneficial one to the unatic plaintiff, it will be stayed by the court on that ground. Waterhouse v. Wormop, 59 L. T. 140.

Distress after Verdict.]—See Doe d. Holmes v. Davies, ante, col. 1523.

Costs of Previous Action Unpaid.] — See PRACTICE (STAYING PROCEEDINGS).

#### F. MESNE PROFITS.

#### 1. ACTION FOR.

Who can Bring. ]—An action for mesne profits (including the costs of the ejectment) may be brought in the mame of the lessee against the tenant in possession, after judgment by default. Jatin v. Parkin, 2 Burr. 665; 2 Ld. Ken. 376. S. P., Gulliter v. Drinkouter, 2 Term Rep. 261; Due d. — v. Davis, 1 Esp. 358.

A joint action for mesne profits may be supported by several lessors of a plaintiff in ejectment, after a recovery therein, although there were only separate demises by each. Chamier

v. Llingon, 2 Chit. 410.

Against whom it will Lie.]—An action for mesne profits lies where one tenant in common recovers against another in ejectment by default. Goodtitle v. Tombs, 3 Wils, 168.

The action lies against a person who comes in under the party against whom there has been recovered a previous integenent in ejectment which was afterwards excented. Due v. Whitwomb, 8 Bing, 46; 1 M. & Sc. 107; 1 L.J., C. P. 9. See Due v. Harrey, 8 Bing, 239; 1 M. & Sc. 374; 1 L.J., C. P. 9.

No action of mesue profits lies against an executor. Pulteney v. Warren, 6 Ves. 80.

By s. 51 of the 19 & 20 Vict. c. 108, the right to mesne profits is given only against the tenant, and not against any other person in possession. Campbell v. Loader, 3 H. & C. 520; 34 L. J., Ex. 50; 11 Jur. (N.S.) 286; 11 L. T. 608; 13 W. R. 348.

When Maintainable.]—On the trial of an ejectment between landlord and tenant, the landlord is entitled to mesne profits, although

the writ and issue do not contain any claim in respect of them. Smith v. Telt, 9 Ex. 307; 2 C. L. R. 509; 23 L. J., Ex. 93; 2 W. R. 159.

And without proving notice of trial. *Doe* d. *Thompson* v. *Hodson*, 12 A, & E. 135; 2 M. & Rob. 283; 4 P, & D. 142; 9 L. J., Q. B. 327;

4 Jun. 1202.

In trespass for mesne profits, a veriliet may be found against the defendant, though he never actually occupied during the time of the truspass, if it is proved that before the trespass the defendant, who then held lawfully, underlet to H; that the defendant's and H.'s interest beenne determined, and the right of possession vested in the plaintiff; that H. held on; and that the defendant afterwards continued to receive rent of him, and declared him to be his tenant, when the plaintiff demanded possession; the defendant and H. both alleging title in the party under whom the defendant formerly held, Doe v. Hurton, 12 A. & K. 40. See Newport v. Hardy, 10 Jun. 338.

An ejectment for land taken possession of by a railway company, for the purposes of the rail way, under incomplete proceedings, was referred to arbitration, the order of reference providing that the cause and all matters in difference between the parties should be referred, and that the arbitrator should decide what sum should be paid by the company to the plaintiff, as the price of or compensation for the lands of the plaintiff which the company had taken for the purpose of their railway; the plaintiff agreeing to execute such a conveyance as the arbitrator might direct, and that the money paid into the Bank of England should be disposed of as the arbitrator should direct. The arbitrator directed that the verdict entered for the plaintiff should stand, and awarded a sum to be paid to the plaintiff as the price of and compensation for the land of the plaintiff which the company had, at the time of making the order of reference, taken for the purposes of their railway, and directed the amount to be paid to the plaintiff out of the money in the Bank of England, and the residue to be paid to the company; and he awarded that there were no other matters in difference between the parties, and that the above payments were to be made and taken in full satisfaction and discharge of all matters in difference between them. The money in the bank included the purchase-money of other lands of the plaintiff of which the company had lawful possession, and the plaintiff treating the sum awarded as applicable to that, issued a writ of habere facias possessionem, and was put in possession, and brought an action for mesne profits :- Held, that the action was not maintainable, the mesne profits being included in the reference and award. Smalley v. Blackburn Ry, 2 H. & N. 158; 27 L. J., Ex. 65; 5 W. R.

To entitle a party to maintain an action for the mesne profits, it is not necessary to execute an habere, if the plaintiff has been let into possession by the defendant. Calvart v. Hursfall, 4 Esp. 167.

A mortgages out of possession, who gives notice of the mortgage to the tenant who has occupied since the mortgage, cannot maintain trespars for mesne profits against the tenant for the rents accuract due since the date of the mortgage, by mere entry upon the land after the notice. Litelyfield v. Ready, 5 Ex. 939; 20

Where the mortgagee gave notice of the mortgage to the tenant in possession, who had become remart since the mortgage and made an entry, and subsequently served a notice of ejectment upon the tenant, who gave a judge's order, by which it was agreed that the action should be stayed upon the tenant's madertaking to give up possession on a day named therein; and, in default thereof, the mortgagee was to be at liberty to sign final judgment, and to issue execution against the tenant for the whole costs of the action:—Held, that the mortgagee was not in a position to minimain trespass to recover the messue profits from the date of the mortgage, inasmuch as he never had such a possession as is necessary to support the action. Jb.

Remittitur damna entered on Record—Effect of ]—In an action for mesne profits by flue plaintiff, after recovery in ejectment, it is no answer to the action, that a remittitur damna has been entered on the record in the ejectment. Harper v. Epics, 8 Dongl. 399.

#### 2. WHAT RECOVERABLE.

Costs of Ejectment,]—The costs of an ejectment may be recovered in an action for nuesne profits, where the defendant has appeared and pleaded to the ejectment, but afterwards withdrawn the plea, and judgment is signed, although no costs have been taxed. Symonds v. Page, 1 C. & J. 29.

O. & J. 20.

Where an ejectment is defended, and the plaintiff obtains a verdiet, he cannot, on the exceeding of a writ of inquiry to assess damages in an action for mesne profits, give in evidence the extra costs beyond his taxed custs, in order to increase the damages, but after judgment by default in ejectment, the costs of such judgment may be recovered as well as the mescu profits, Brooke v. Bridges, T. Moore, 471; 1. L. J. (O.S.) C. P. 11. S. P., Dae v. Daeta, 1. Esp., 364.

In an action for mesne profits, the plaintiff is entitled to recover only the taxed costs of the ejectment, and not the extra costs. Doe v. Hare, 2 D. P. C. 245.

Where there is judgment by default in an ejectment, the plaintiff may, in the action for meane profits, recover all the expenses he has been necessarily put to in the ejectment, and is not limited to the taxel costs, as between party and party. Dov. Hudderf, 2 C. M. & R. 316; 4 D. P. C. 437; I Gale, 260; 5 Tyr.

Under a claim for "expenses in recovering possession" of the premises, the plaintiff in an action for messue profits may recover the costs of the prior action of ejectment, Pearse v. Challer, 38 L. J., Ex. 82; L. R. 4 Ex. 92; 20 L. T. 82.

L. T. 82.

When the costs of an ejectment have been taxed, the plaintiff cannot in an action for measu profits recover costs as between intorney and client; and it makes no difference that the costs have been taxed on the application of the defendant. Doe v. Filliter; 13 M. & W.

In an action for entry, expulsion and mesne profits, the plaintiff may recover the costs of the reversal in error of a judgment in ejectment for the defendant, as between attorney and client. Nancell v. Hoake, 1 M. & Ry. 170; 7 B. & C. 404; 6 L. J. (O.8) K. B. 26.

Loss occasioned by Closing an Inn.]—In an action for mesne profits, after ejectment for the recovery of a hones used as an inn, the plaintiff cannot recover the loss which he has sustained by the defendant slutting up the inn and destroying the custom, unless such damage is specially stated in the declaration. Dunn v. Large, 3 Dougl. 335.

Right of Defendant to Deduction.]-Where A, took possession of premises on the 2nd of June, and a sum of money became due for ground-rent on the 24th for the quarter ending on that day, which A. paid :-Held, in an action for mesne profits against A., that he was entitled to deduct the money so paid from the damages. Doe v. Hare, 2 C. & M. 145: 4 Tyr. 29: 3 L. J., Ex. 17.

## 3. PLEADINGS AND EVIDENCE.

Pleadings - Judgment - Estoppel.] - In an action for the mesne profits of a copyhold, to which the defendant plends not possessed, the plaintiff may reply, by way of estoppel, a judg-ment in ejectment in his favour, and if he does not reply it, the judgment is not conclusive evidence of his title. Matthew v. Oshorne, 13 C. B. 919: 22 L. J., C. P. 241; 17 Jur. 696; 1 W. R. 151.

To a declaration for mesue profits, stating the entry and expulsion on the 10th of December, 1844, and the expulsion and taking of profits to have been continued till the 10th of March, 1846, the defendant pleaded that the closes in which, &c. were not, nor were any of them, or any part thereof, the plaintiff's. The plaintiff replied to the whole plea, by way of estoppel, a recovery by him against the casual ejector, on a declaration in ejectment, stating the denise to have been on the lath of Ostellar 1917 for the 14th of October, 1845, for a term of twenty years; and the replication concluded with a prayer of judgment, if the defendant during that term ought to be admitted, against the recovery, record and proceedings, to plead that plea:-Held, that the replication applied only to part of the time of the trespass complained of in the declaration, and was therefore bad, Doe v. Wedlsman, 2 Ex. 368; 6 D. & L. 179; 18 L. J., Ex. 277. See Turner v. Coalbrook Steam Co., 5 Ex. 932.

Trespass for mesne profits: pleas, first, not possessed; and secondly, that W. was seised in fee and demised for twenty-one years to T., who demised to the defendant, who entered by virtue of the demise. Replication by way of estoppel as to the tresposses since the 26th of October, 1853, setting out a writ in ejectment, in which the plaintiff was claiment, and dated the 26th of October, 1853, directed to the defendant as tenant in possession. Averment of judgment thereon by default, and entry by the plaintiff, by virtue of the judgment :- Held, a good replication to both pleas; and that it was not necessary to aver notice of the proceedings in ejectment to the defendant, or that a writ of possession was issued or executed, and that entry by the plantiff, if necessary, was sufficiently averred. Wilkinson v. Kirby, 15 C. B. 430; 2 C. L. R. 1387; 23 L. J., C. P. 224; 1 Jur. (N.S.) 161; 2 W. R. 570.

Held, also, that the estoppel was from the date of the writ, and that the plaintiff's title would be presumed to continue until by rejoinder it was shewn to have determined. Ib.

Bankruptcy. ]-Bankruptcy is no plea in

Evidence-Admission by Executor. -A., B. and C., being successive tenants in tail of property held under an inalienable parliamentary title, and B. having, after the death of A., entered into possession of the estates, and, together with them, of certain leaseholds formerly in the possession sion of A., his executors brought an ejectment against B. to recover possession of the leascholds as part of his estate. B. having died before trial of the action, another action was brought against C., the successor in title. C., who was also executor of B., compromised the action on terms of giving judgment and buying the leaseholds at a certain price, with a further stipulation that 4,000L should be allowed as a debt from B.'s estate in respect of rents received by B. Before the compromise, a creditor's suit was instituted, and a decree made, for the administration of B's estate, which was insolvent. On a summons by A.'s executors to prove against B's estate for the amount of the rents actually received by him :-Held, that the admission by the executor as to mesne profits in the compromise was inoperative, being unde after the decree. Tulbot v. Shrews-bury (Earl), L. R. 14 Eq. 503; 20 W. R. 854.

--- Possession -- Evidence of Title. ] -- In an action for mesne profits, proof that the defendanthas had a lease of the premises at a certain yearly rent, and that he had suffered judgment by default in a previous action of ejectment for the same premises, is sufficient to shew that he was in possession at the date of the writ of ejectment, Pearse v. Coaker, 38 L. J., Ex. 82; L. R. 4 Ex. 92; 20 L. T. 82. And see cases, ante, col.

A judge's order cannot be considered as equivalent to a judgment by default, or as any evidence of occupation of premises. Literipiela v. Ready, 5 Ex. 939; 20 L. J., Ex. 51.

A county court order for the possession of premises, under 19 & 20 Vict. c. 108, s. 50, is not

conclusive evidence of title in an action for conclusive evaluates of that it all action for mesne profits. Campbell v. Loader, 3 H. & C. 520; 34 L. J., Ex. 50; 11 Jur. (N.S.) 286; 11 L. T. 608; 13 W. B. 348.

J. M.

### ELECTION.

- 1. GENERAL PRINCIPLES, 1531.
- 2. Cases of no Election, 1534.
- 3. Acts amounting to Election, 1542.
- 4. ELECTION BY WIDOW, 1548.
- 5. ELECTION BY APPOINTEES AND PERSONS CLAIMING UNDER SETTLEMENTS, 1559.
- 6. ELECTION BY ISSUE IN TAIL, 1566,
- 7. ELECTION BY HEIR, 1570.
- 8. ELECTION BY CO-OWNERS, 1576.
- 9. ELECTION IN OTHER CASES, 1577.

## 10. CAPACITY TO ELECT.

- a. Infants, 1577.
  - b. Lunatics, 1579.
- c. Married Women, 1579.

## 11. Compensation, 1584.

12. EXTRINSIC EVIDENCE TO RAISE ELEC-TION, 1590.

## 1. GENERAL PRINCIPLES.

Intention, - The doctrine of election is founded on the presumption of a general intention that every part of an instrument shall take effect, and the presumption of such general intention may be rebutted by an inconsistent particular intention apparent in the instrument. Vardon's Trusts, In re, 55 L. J., Ch. 259; 31
 Ch. D. 275; 53 L. T. 895; 34 W. R. 185.

Instruments to which Rule applicable.]-The rule of election, by which a person taking a benefit under any instrument must also accept the burden laid on him by it, applies in the case of deeds as well as of wills, and where one of the properties is not bound by the instrument, as well as between properties which are bound by it, and although no intention that the party should be put to election appear on the face of should be put to election appear on the face of the firstrument, or by necessary implication from its terms or language. Codrington v. Lindsay, 42 L. J., Ch. 526; L. R. S. Ch. 573; 28 L. T., 177; 21 W. R. 182. Affirmed, nom. Codrington v. Codrington, 45 L. J., Ch. 660; L. R. 7 H. L. 854; 34 L. T. 221; 24 W. R. 648.

The rule of election is equally applicable to every species of instrument, whether deed or will, and is a rule of law as well as equity. Birmingham v. Kirwan, 2 Sch. & Lef. 450.

In cases of election, it is not the custom of the court to order the deed elected against, to be delivered up to be cancelled. Wedle v. Rice, 4 L. J., Ch. 39.

When Obligation arises. ]-An obligation to elect arises whenever an object of testamentary bounty is at the testator's death the true owner of other property disposed of by the will. Couper v. Cooper, 44 L. J., Ch. 6; L. R. 7 H. L. 53; 30 L. T. 409; 22 W. R. 713.

For the purposes of election there is no distinction between personal estate and real estate, between specific and residuary legatees, or between legatees and next of kin of an intestate.

The principle of election applies to the next of kin of an intestate, although his estate has not been wound up at the time that the will comes

into operation. Ib.

The rule as to election is to be applied as between a gift under any instrument and a claim dehors that instrument and adverse to it, and is not to be applied as between one clause in an instrument and another clause in the same instrument. Wollaston v. King, 38 L. J., Ch. 392; L. R. 8 Eq. 165; 20 L. T. 1003; 17 W. R. 641.

Semble, that the doctrine of election cannot be applied so as to give effect to a disposition which transgresses the rule against perpetuity. Th.
In determining what are cases of election.

testator has a limited interest in property forming the subject of a devise or bequest, the intention to make a disposition extending beyond that interest cannot be made clear by anything short of positive declaration. The context of the will and the aptitude of the testamentary limitations to the testator's interest ought to be regarded. Wintour v. Clifton, 8 De G. M. & G. 641; 26 L. J., Ch. 218; 3 Jur. (N.S.) 75; 5 W. R. 129.

When it was not apparent on the face of the will that a general devise in trust to sell was intended to include a particular estate, of which the testatrix had been wrongfully in possession up to the time of her death, the rightful owner of that estate was put to his election in respect of an interest bequeathed to him in the money to be produced by the sale of the estate. Blommart v. Player, 2 Sim. & S. 597; 5 L. J. (o.s.) Ch. 74.

A testatrix advanced 900l, to M, on an assignment by him of a covenant by F. to transfer to M. 1,000%, stock, and to pay interest in the meantime. By her will she gave F, 3,000L, and all sums due to her by him, and directed her executors not to require payment of the 900%, due from M., but out of the 3,000l. given to F. to retain enough to purchase 1,000l. stock, in satisfaction of the covenant by F., and to pay the surplus thereof beyond the 900%, and interest to M. F., having predecensed her, she by a codicil directed the 3.000L to form part of her residuary estate. but directed her executors not to call on F.'s representatives for transfer of the 1,000%, stock nor to enforce payment by M. of the 900l. :against F.'s estate the covenant to transfer the against 1. Section the eventual to transfer transfer the 1,0007, stock, except as to the difference between the 9007, and the value of the stock. Synge v. Synge, L. R. 9 Ch. 128; 29 L. T. 855; 22 W. R. 227.

No person can take by a will, and at the same time do anything that shall destroy the will. Morrisv. Burrows, 2 Atk. 629; 2 Eq. Ca. Abr. 272. S. P., Noys v. Mordaunt, 2 Vern, 581. Streatfield v. Streatfield, 1 Swanst, 447; Ca. t. Talb. 176.

A person cannot take by custom and under a will. S. C., 1 Atk. 404.

The ground of doctrine of election is, that no person puts himself in a capacity to take under an instrument, without performing the condi-tions of it, express or implied. Moore v. Butler, 2 Sch. & Lef, 267.

In considering a question of election raised by a will, the court must have regard to the whole scope of the will to ascertain if the language of the testator can be fairly interpreted as disposing of an interest which he himself possesses. Prima facie, the court must construe the words of disposition as applying to an estate which the testator had power to dispose of, if the words will fairly apply to it; and in order to raise a question of election it must be clearly seen that the words used point to an estate which is not the testator's own, but that of another. Rancliffe (Lord) v. Parkyns (6 Dow, 149), discussed. Minchin v. Gabbett, [1896] 1 Ir. R. 1.

The doctrine of election does not apply when the testator leaves nothing of his own property. M. Donnell v. M. Donnell, 2 Con. & L. 481; 4 Dr. & War. 376.

To raise a case of election there must be a In determining what are cases of election, although a testator must be taken primă faci form of a gift as to property, which the donor had no power to dispose of. Att. Gen. v. Lonsto have intended to dispose only of what belongs to him, there is no such rule as that where a 27 R, R. 176. Construction of instruments as imposing an to letter of will, from any other benefit under it; obligation to elect. Dillony, Parker, Jacob, 505; and 4. When testator bemeaths present wift to And see Baily v. Llayd, 7 L. J. (0.8.) Ch. 98.
The doctrine of election does not extend to

grants from the Grown, semble. Cumming v. Forrester, 2 J. & W. 334; 22 R. R. 157.

A person shall not claim an interest under an instrument without giving a full effect to it, as far as he can; renonneing any right or property, which would defeat the disposition. Thellusson v. Woodford, 13 Ves. 220; 9 R. R. 175.

The only instances of limiting the principle of election are, an attempt to devise by a will not duly executed; or an attempt to devise by

au infant. Ib. 223.

Semble, the doctrine of election ought not to be applied to the case of a revocation by a recovery merely. Tennant v. Tennant, Ll. & G. t. Plunk. 531.

The rule of election ought to be confined to simple and plain devises of the inheritance, and not where there are limitations. Forcester v. Cotton, Amb. 388; 1 Eden, 532. But see 1 Swanst.

A Rule not of Positive Law but of Practice. ]-The doctrine of election is not properly a rule of positive law, but a rule of practice in equity. The knowledge of it is not, therefore, to be imputed as a matter of legal obligation. Spread v. Morgan, 11 H. L. Cas, 588; 6 N. R. 269; 13 L. T. 164.

Where a case of election arises, the person who ought to make it must be shewn to have known of his duty to do so, and must be proved to have done such acts as amounted to an election. . Ib.

A party having an equity to compel an election, does not forfeit that equity by delay in enforcing it. 1b.

An election gives a right to compensation. Assuming such compensation to be in the nature of a simple contract debt, the Statute of Limitations can only begin to run against it when the election has been made. Ib.

Doctrine of Compensation. ]-Doctrine of election or compensation explained. Pickersgill v. Rodger, 5 Ch. D. 163.

The engrafted doctrine of compensation does not apply to the case of a person electing to take under the justrament which gives rise to the election, Wilson v. Townshead (Lord) (2 Ves. 693), discussed and not followed, Chesham (Lord), In rv, Cacendish v. Dacre, 55 L. J., Ch. 401; 31 Ch. D. 466; 54 L. T. 154; 34 W. R. 321. And see Curter v. Silber, 61 L. J., Ch. 401; [1892] 2 Ch. 278; 66 L. T. 478—G. A.

Exceptions to Rule. -- Where devisee takes gift under will, law annexes a condition to gift, that he shall not dispute any other part of will, even though that other part gives away from him something to which he had an undoubted right; he must therefore make his election whether he will renounce particular gift to him by will, or abide by will altogether; but this rule has many exceptions, viz. 1, Where testator himself annexes condition to gift; 2, Where devisee does not disturb devise in toto, but only claims and excreseent interest out of estate (its dower), and then suffers it to go necontling to disposition that for R., G. and J., for their lives, and after made thereof by will; 3 Mercri is may be collected from whole will that it was not testator's inter-ton to exclude devisee, claiming contrary right provided that if the legacies and the shares of

and 4, When testator bequeaths present gift to remainderman after estate tail, and by same will either gives the lands to another, having no power to give them, or subjects the remainder to a charge to which he had no power to subject In neither of these cases is remainderman subject to equity of making his election, whether he will renounce all benefit under will, or do all in his power to make good devise of remainder on one hand, or confirm charge on other; and court said, these tacit conditions are to be considered as they stood at death of testator, and implication of them must be necessary one; something as if written in will. Stewart v. Henry, Vern. & S. 53.

Where a testator conceiving himself entitled to the property of another person, makes a general disposition of all his estate, and gives some benefit to that person, he must elect. Rutter v. Maclean, 4 Ves. 531. S. P., Whistler v. Webster, 3 Ves. 371; 2 R. R. 260: Blake v. Bunbury, 1 Ves. 523; 4 Bro. C. C. 21; 1 R. R. 111. But see Ayres v. Willis, 1 Ves. Sen. 230.

Election can only exist where a person has a decided interest, and something is left him by

will. Crosbie v. Murray, 1 Ves. 561.

To raise a question of satisfaction or election the intent must be clear; if it is, devisee cannot take under the will, and also in opposition to it even his own property intended by testator to go otherwise. Finch v. Finch, 1 Ves. 534; 4 Bro. C. C. 38. And see Browne v. Monch, 10 Ves. 597: 8 R. R. 48.

Election to take under or in opposition to a will, can only be compelled upon something in the will, not dehors. Stratton v. Bost, 1 Ves. 286; 2 R. R. 196. And see Kirkham v. Smith, 1 Ves. Sen. 260; Wilson v. Month, 2 Ves. 191; Wollen v. Tanner, 5 Ves. 218; Blount v. Bestland, 5 Ves. 515.

#### 2. CASES OF NO ELECTION.

Valid Appointment followed by Invalid Trust or Direction. ]-A testator, in exercise of a special power, appointed a fund to his three daughters, who were objects of the power, in equal shares, and he gave his residuary personal estate to the same daughters in equal shares, and he directed the share to which each daughter should become entitled under his will and the appointment to be held in trust for the daughter for life, with remainder for her children, who were not objects of the power: -Held, that the daughters took absolute in-terests in the appointed fund, and that no case of election was raised against them in favour of their children. Moriarty v. Martin (3 Ir. Ch. R. 26) disapproved; Churchill v. Churchill, 37 L. J., Ch. 92; L. R. 5 Eq. 44; 16 W. R. 182.

A testatrix having, under her marriage settlement, power to appoint 10,000%, amongsther children, appointed to R., G. and J., three of her children, the one-sixth part of this fund each, and bequeathed to each of them 1,000% and directed that the legacies, and also their shares of the appointed fund, should, within twelve months after her decease, be settled upon

the appointed fund were not settled as prescribed, | issue, as against her husband, be put to her personal estate :- Held, that the direction to settle the shares amounted to a superadded condition, attempting to qualify a previous absolute appointment, and that no question of election was thereby raised. King v. King, 15 Ir. Ch. R.

Held, also, that owing to the express clause of forfeiture, the legatees could not take the legacies without settling their shares in the appointed fund, according to the directions of the testatrix.

Where there is an absolute appointment by will in favour of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed, in a manner which the law will not allow, the court reads the will as if all the passages in which such attempts are made were swept out of it, for all intents and purposes, i.e. not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election. Wooldridge, V. Wooldridge, Johns. 63; 28 L. J., Ch. 689; 5 Jur. (N.S.) 566. But see White, In re, White v. White, 22 Ch. D. 555, infra, col. 1559.

A testatrix having under her brother's will a special power to appoint his property, gave all the real and personal estate, of which she might be selsed or possessed at her death, or over which she might have any testamentary power of disposition, to trustees upon trust to pay her debts and funeral expenses and certain legacies, and then upon trust as to two one-fourth parts of her trust fauds for persons who were objects of the power, and as to the other two one-fourth parts for persons who were not objects of the power. And she declared that, in case of the failure of any of the trusts thereinbefore declared of any of the one-fourth parts of her trust funds, the one-fourth part or so much thereof of which the trust should fail, should be held upon the trusts thereinbefore declared of the others or other of the one-fourth parts of which the trust should not fail:-Held, that as to one molety of the brother's property, the power was well exercised:

—Held also, that, by virtue of the gift-over "in case of the failure of any of the trusts thereinbefore declared," the other moiety went to the persons to whom the first moiety was appointed; and that, consequently, no case of election arose. Swinburne, In re, Swinburne v. Pitt, 54 L. J., Ch. 229; 27 Ch. D. 696; 33 W. R. 394.

A testator duly appointed a fund in favour of objects of the power absolutely, and he also bequeathed to them his own property, "especially requesting them" to leave the appointed fund to persons not objects of the power :-Held, that this did not raise a case for election : -Held, also, that the result would have been different, if there had been a direct appointment of the subject of the power to strangers. Blacket v. Lamb, 14 Beav. 482; 21 L. J., Ch. 46; 16 Jur. 142. S. P., Bate v. Willats, 37 L. T.

Where a party has a power of appointment over a fund in favour of his children, and he appoints to a child (a married woman) for life, and afterwards upon trust for that child's issue, and gives his own personal estate in the same manner, the child of the appointor cannot, where the court declares the appointment bad as to the

the legacies should become absolutely forfeited, election, nor can the husband be forced to elect, and should sink into the residue of the testatrix's Carrer v. Bowles, 2 Russ. & M. 301; 9 L. J., (o.s.) Ch. 91.

> Appointment which might have taken effect. -By the marriage settlement of A., a term of years was limited to trustees, upon trust to raise 16,0001, to be paid to the children of the marriage, or to the issue, born in the lifetime of A, of any such children, in such shares as A. should by deed or will appoint; and in default of appointment, to the children in equal shares. A., by his will, after devising certain real estates to his first and other sons, in strict settlement, and reciting the power of appointment in the marriage settlement, appointed 4,000l. to each of his children, other than the child who should under the preceding limitations be entitled, as tenant for life, to the rents of the devised premises : and as to the residue, if any, of the 16,000L, he appointed the same unto such grandchild of his body as should, by the regular course of events, become entitled as tenant in tail in possession of the devised premises. A. died, leaving three sons, the eldest of whom was tenant for life of the devised estates, and no grandehild :- Held, that, as there might have been a grandchild born in A.'s lifetime, and as such grandchild would have been among the objects of the power, the appointment to a grandchild, who, in the events that had happened, was not an object of the power, did not raise a case of election against the children, and that they were entitled to have the appointment of the residue declared invalid, and yet to retain all the benefits given them by the will. Bulwer v. Hoare, 3 L. J. (0.8.) Ch. 227.

> A., having power under her father's will to appoint a fund amongst her children, or more remote issue, to be born before such appointment, by her will, appointed the fund, and bequeathed her personal estate, to her four children. By a codicil, she, in case she had power so to do, under her father's will, or other-wise, directed that the share which one of her daughters would derive under her will, should be in trust for that daughter for life, and, after her death, for her children generally, and not those only that were then born, as prescribed by the power:—Held, that A. did not intend the codicil to affect her own property, but only that which was subject to the power; and that she did not mean to make the appointment unless she had power to do so; which she had not, and, therefore, no case of election arose. Church v. Kemble, 5 Sim. 525; 3 L. J., Ch. 65. S. P., Cull v. Showel, Amb. 727.

No free disposable Property of Appointor. ]-Parties taking nuder a will, executing a power of appointment, dispute part of it; there being no fund but that to be appointed, it is not a case of election. Bristow v. Warde, 2 Ves. 336; 2 R. R. 235.

Where donce, having a power over two sums of different stock, appointed a gross amount, part of one of them, and afterwards appointed aliquot parts of both funds as one subject, without noticing the prior appointment, exceeding the entirety of one of the funds :- Held, that the earlier appointees ought not to be put to their election, and that the loss arising from the deficiency of the one fund fell upon the last appointees; and held also, that appointing to

A testator had an exclusive power of appointment over an estate to his children and grandchildren, and an exclusive power to appoint a fund amongst his children only. He appointed the estate to some of his children, and the fund to his children, and to a grandchild (who was not an object) :- Held, that this was not a case of election, and that the children were not compellable to elect either to give effect to the appointment of the fund to the grandchild, or reject the benefits appointed under the first power. Fowler's Trusts, In re, 27 Beav, 362.

A testator who had a special power of appointment under his marriage settlement by deed or will of a moiety of funds which in default of appointment vested in his daughter, and who was also entitled at his death to the other moiety, gave all the residue of his estate, including the funds which should be in the names of the trustees of his marriage settlement, and which he directed should be considered as part of his personal estate, in trust for his wife for life, and afterwards for his daughter, her husband and children, and upon other trusts not within the special power :- Held, that the daughter was not put to her election, the testator only intending to dispose of the moiety to which he was himself entitled. Bidwell's Settlement, In re, 1 N. B. 176; 32 L. J., Ch. 71; 9 Jur. (N.S.) 37; 8 L. T. 107; 11 W. R. 161.

An owner of the freehold lands of B., subject to two rent-charges thereon of 1001, a venr each (over one of which he had a power of appointment among his children, and the other of which had been settled on his son at his marriage), and being also owner of an undivided seventh of the freehold lands of D. (which share stood charged as from the date of his death, with a life annuity for his daughter, and 500%, for her surviving children), and being also absolutely seised of freeholds in A., made his will as set out :- Held, that no election arose in the case of his son such as to prevent his retaining his 100%, rent-charge, as well as his share of the lands of B., jointly with his brother. Henry v. Henry, Ir. R. 6 Eq.

Held, also, that no ease of election by the unmarried daughters arose in connection with the devise to them of "my property in D.," as these words were referrible to the testator's oneseventh share of D. Ih.

Leaseholds were settled on A. B. for life, with remainder to his wife for life, with remainder to such child or children as he should appoint, and in default, amongst them equally. A. B. renowed the leases in his own name, and by his will confirmed the settlement, and gave all "his freeholds and leaseholds" to his son, and a legacy to his daughter; he died, having other leaseholds, besides those settled :--Held, that the will was not an execution of the power, and, secondly, that the daughter was not to be put to her election. Tanner v. Elworthy, 4 Beav. 487; 5 Jur. 1099.

By marriage articles the settlor agreed to settle lands specifically named, of which some were recited to be held in fee and for lives, and others to be leaseholds, on himself for life, with remainder to his first and other sons, &c., in strict softlement, that they should be charged with containing no Power of Revocation.]—Where a testator, ointure of 100%, a year for his wife, and that

the separate use of a fune covert was good under | divided among his children, subject to his the usual power. Traling v. Routledge, 1 De G. appointment. He afterwards acquired property. & Snn. 662 : 11 Jur. 1002. estates," subject to debts and legacies, to his eldest son for life, remainder to the first and other sons, &c., gave 100l. a year to his wife in consideration of the jointme provided by the articles; bequeathed sums of money to his younger children, exceeding in amount 2,000%. with directions as to maintenance and accumulation, &c., and appointed his eldest son residuary legatee :- Held, that the children should take the settled property under the articles, and the acquired property under the will, as there was no inconsistency to raise an election, and the latter was not to be deemed an execution of the former. Know v. Know, Beat. 501.

The testator, part of his estate being in settle-ment, devised all his estates, &c., whereof he was seised or entitled, or had any power to dispose :-Held, the general devise did not indicate such intention of testator to dispose of that part over which he had not a power as to put the devisee to elect. Forrester v. Cotton, Amb. 389; 1 Eden,

C., by will, devised all his freeholds and convholds to his two daughters, A. and M., and all other daughters that he might thereafter have, as tenants in common in fee; he had afterwards another daughter, L. He then gave directions for another will, by which he gave all his real estates to A. and M., and 15,000l. to L. The attorney took the minutes of the second will in writing, but before it was prepared the testator died; the minutes were proved in the spiritual court as a testamentary paper :-Held, first, the paper being proved in the spiritual court, was sufficient to pass copyholds; second, but was so totally void as to the freeholds, that it would not put L. to her election, and she would take her share of the freeholds under the first will, as well as the 15,000*l. Carry* v. *Askew*, 2 Bro. C. C. 58; 1 Cax, 241. And see 8 Ves. 492.

Person Claiming in Two Characters. ] - A testator, having freeholds and copyholds in fee, gave an annulty to his wife in lieu of all dower and thirds, or other claims and demands which she might otherwise have had npon his estate, and died intestate as to his real estates. His widow was his customary heir :- Held, that she was not bound to elect between the annuity and copy-holds, but was entitled to both:—Held, also, the assets being deficient, that the annuity was to be paid in priority to the pecuniary legacies given by the will. Norcott v. Gordon, 14 Sim. 258; 8 Jur. 679.

A testator being entitled under a settlement. subject to a life interest, to a moiety of a fund, by will, after reciting (erroneously) that he was, under the settlement, "subject to the trusts therein contained," entitled to the whole, parported to bequeath the whole, and to give one moiety to the husband of the lady who was really entitled under the settlement to a moiety of the fund :- Held, that the husband, who had become his wife's administrator, was not bound to elect between the legacy and his wife's moiety. Grissell v. Swinkae, L. R. 7 Eq. 291; 17 W. B. 438.

2,000%, his wife's fortune, should on his death be no power of revocation, by his will revoked, set

aside and avoided all other wills, settlements in the family arrangement, no ease of election and agreements for settlements which he had at any time theretofore made and executed :-Held, that no ease of election arose. Booker, In re, Booker v. Booker, 54 L. T. 239; 34 W. R.

Appointment partly Inoperative. |-A woman, having a general power of appointment notwithstanding coverture over fund 1, and also by her marriage settlement power to appoint funds 2 and 3 in case she died in her husband's lifetime, by her will, made in her husband's lifetime, appointed all the funds amongst several persons, some of whom were her next of kin. By the death of her husband in her lifetime, she became absolutely entitled to 2 and 3, but she did not republish her will. Fund I was insufficient to pay the legacies in full:—Held, that those of the legaces who were also next of kin were not put to their election, but were entitled both to their shares of the residue (as to which, in the events that had happened, the appointment had failed), and also to proportionate parts of their legacies. Blaiklock v. Grindle, 38 L. J., Ch. 247; L. R. 7 Eq. 215; 17 W. R. 114.

A grandfather, having made a will of real and personal estate in 1808, cancelled it in 1810, but wrote on the back of it a letter addressed to his only daughter, stating that she was his heiress, and charging her to fulfil his wishes at her death by a disposition of a specific freehold estate to her eldest son, and, by an equal disposition "of his property" equally amongst his grandchildren, her eldest and youngest son and daughter, her three only children. The letter was unaftested; and thought to be inoperative as to either real or personal estate. The daughter became administratrix to her father, and took possession of his real estate, and she and her husband received his personal estate in right of the daughter, as sole next of kin. By a settlement in 1811, between the husband of the daughter, and the daughter and two trustees, and the three children of the daughter, reciting the will, its cancellation, and the letter, and that the testator had died wholly intestate, but that the daughter was desirous of fulfilling the intention of the grandfather, his real estates were settled in accordance with the terms contained in the letter. The daughter died in 1827, her husband became her administrator de bouis non of the grandfather. The husband of the daughter died in 1840, having previously, by will, after reciting the wish to carry into effect the desires of the grandfather, disposed of the grandfather's and his own real and personal property, between the two grandsons and the property, between one two grand-daughter (his children) accordingly. The grand-daughter, who had married in 1843, obtained letters of administration to the grandfather with his letter to his daughter, which was then admitted as a will, annexed, and instituted a suit against the personal representative of her father, claiming that the personal estate of the Ir. 34-C. A. grandfather should be accounted for to her; but the benefits she received under the settlement of 1811 and will of 1837 were greater than those she claimed under the testamentary paper, the that the deed of 1811 and will of 1837 were grandfather in respect of his real estate only, and that, even after the acquiescence since 1811 not thereinbefore appointed to her daughter:—

arose. Egremont v. Lee, Lee v. Egremont, 5 De G. & Sm. 348; 16 Jur. 352.

A., being entitled to one-third of real and personal estates, settled such share upon her marriage, with power of appointment to herself (in events that happened) over one-third thereof, by deed or will, and over the other two-thirds by will, subject to the husband's life interest therein, and in default of issue. Becoming entitled to a moiety of another third of the same estates, she settled it to such uses as she should appoint, subject to the husband's life interest. The testatrix devised, bequenthed and appointed "all that one-third part of her real and personal estates," upon certain trusts; and "as to the residue of the said one-third part, and the remaining two-third parts," she gave the same to her husband for life, remainder to her infant son, who was her only child, and his heirs; but in case he should die under twentyone, without issue, she directed the residue of the said one-third part to be sold, for payment of an annuity and legacies given by her will, the annuity to be payable upon the son's death, and the legacies as soon as the said one-third part could be sold. The son survived the testatrix, and died under twenty-one without issue :--Held, that the appointment of the "one-third part" for payment of the annuity and legacles, extended only to one-ninth of the testatrix's original third, and to one-third of her moiety of the other third, and that the will did not affect the husband's rights under the settlement, and no case of election was raised against him. Sward v. M: Donnell, 2 H. L. Cas, 88; 12 Jur.

Invalid Execution of Power of Appointment. -The rule as to election is applicable only as between a gift under a will and a claim dehors the will and adverse to it, and not as between one clause in a will and another clause in the same will. Wollaston v. King, 38 L. J., Ch. 302; L. R. 8 Eq. 165; 20 L. T. 1003; 17 W. R. 641.

Therefore, where a testatrix, under a settle-ment, had a special power of appointment amongst children, under which she validly appointed the income of a fund to a child  $\Lambda$ , for life, and expressed to give A. a general testamentary power over the corpus, which testamentary power over the corpus, which is tending to perpetuity, and, subject to these dispositions, appointed the residue of the fund to other children, who also took a share of the testatrix's own property :- Held, that the other children could not be called upon to compensate out of their shares in the testatrix's own property those who would have benefited under the invalid power, if valid. Ih.

Semble, that the doctrine of election cannot be applied so as to give effect to a disposition which transgresses the rule against perpetuity. Ib. And see Handcock's Trusts, In re, 23 L. R.,

Residuary Appointment.]—The donce of an exclusive power to appoint to her children appointed to trustees upon trust during the life letter of the grandfather; and it contended that of her son, to apply at discretion the whole or she must elect between those benefits :-Held, any part of the income for his benefit, or his children, and subject thereto for his children as expressed to be founded on the intention of the he should appoint; and indefault for her daughter, Held, that the whole was well appointed to the daughter, and that no case of election could leav. 552; 25 L. J., Ch. 610; 2 Jur. (N.8.) 1057. arise. "Wallinger, L. R. Seq. 301; Under a settlement the four daughters of a 22 L. T. 259; IS W. R. 274.

Contingent Interest. ]-E. having a life estate and a contingent reversionary interest in a farm, C., by his will, charged his farms R. and C. with the payments of debts and legacies, and devised all his real estates (subject as to R, and C, to the charge) to H. for life, with remainders over, and with a contingent executory devise to M. for life. Under a settlement made in E.'s lifetime, the farm C. was settled (subject to E.'s life estate) upon M. for life, with remainder to her children (of whom H. was one) in fee, subject to bedivested, in the event of their dying without leaving issue :—Held, that the testator did not intend to devise more than his own interest in the C. farm, and that M. and H. were not put to their election. Ecans v. Erans, 2 N. R. 409. Affirming S. C., 3 W. R. 614.

Settlement of Stock destroyed - Subsequent Will.]—A person transferred a sum of stock into the names of trustees, and by an indenture declared that the stock should be held by the trustees upon certain trusts for the benefit of A. and her children by the settlor. The settlor afterwards obtained from the trustees a retransfer of the stock to himself, and ruzed the seals from the deed. By his will not referring to the deed, he gave A, an annuity and other benefits, and the residue of his estate to the children. A, was entitled to the provision made for her both by the deed and the will, Smith v. Lyne, 2 Y. & C. C. C. 345,

A father transferred stock from his own name into the joint names of his son and of a banker whom they both employed, and told the banker to carry the dividends of the stock to the son's account. The dividends were enjoyed by the son as long as the father lived :- Held, on the father's death, that the son was entitled to the stock absolutely; that a codicil to the father's will, executed two years after the transfer, could be read to qualify or explain the effect of the transfer, and that the language of the codicil respecting the stock, was too vague and obscure to raise a case of election against the son. Crabb v. Crabb, 1 Myl. & K. 511; 3 L. J., Ch. 181.

Remainder after an Estate Tail.]-Testator having a power of appointing lands to such of his sons in such shares, and for such estates, and with such limitations over as he should think proper (in default of whose appointment the lands were to go to his first and other sons in tail male, successively), appointed them by will to A., his eldest son, in tail male, remainder (subject to a charge of 1,000%, to the testator's daughter) to B. and C., his second and third sons, for their lives as tenants in common, with several remainders in tail to their issue :-Held, semble, that the charge of 1,000% was void, and B, and C. having other devises and bequests made to them by the same will, were not bound to elect on the testator's death, nor to confirm the possession. Stewart v. Henry, Vem. & S. 49.

testator took equal shares, subject to his life interest. The testator, by his will, recited that under the settlement his two daughters, A. and B., would become entitled, and that in making his will he had taken the same into consideration, and had not devised to them so large a share under his will as he otherwise should have done; he then devised to A, and B, certain estates, and to his two other daughters, C. and D., other estates, of much greater value. The will did not purport to affect the settled property :-Held, that as the will did not purport to make any disposition of the settled property, and was only made under a mistaken impression, C. and D. were not put to their election. Box v. Barrett, L. R. 3 Eq. 244; 15 W. R. 217.

No devise by implication from the mere recital of an erroneous conception of right. Dashwood v. Peyton, 18 Ves. 27, 48; 11 R. R. 145.

Devise to the heir after the death of the devisor's wife; a necessary implication, that the wife shall take for life; but no implication for her upon such a devise of another man's estate through the medium of election. Ib.

Conditional Limitation. — Devise of Whiteacre to A. for life upon condition that A. suffer a recovery of Blackacre and settle it; and if he does not, then after the decease of A. Whiteaere to go to B. A. took Whiteaere but did not settle Blackaere. The heir of A. is not bound to convey pursuant to the condition, nor are A.'s assets liable to make good the breach of the condition, for it is a conditional limitation, and not a case of bare condition or of election. Freke v. Barrington, 3 Bro. C. C. 274. And see Welby v. Rockeliffe, 1 Russ. & M. 571; S.L. J. (O.S.) Ch. 142.

Gift of Property subject to Rent-charge. |-Legacy by a father to a child entitled to a rentcharge out of an estate devised to another: the child still entitled to the rent-charge, and not put to election. Ayres v. Willis, 1 Ves. Sen. 230. But see Blake v. Bunbury, 1 Ves. 514; 4 Bro. C. C. 21; I R. R. 111.

Unattested Codicil-Before Wills Act. 1-An mattested codicil (before the Wills Act) did not, as to real estate, affect an attested will, or put a party to his election. *Middlebrook v. Bromley*, 9 Jur. (N.s.) 614; 2 N. R. 224; 8 L. T. 414; 11 W. R. 712.

#### 3. ACTS AMOUNTING TO ELECTION.

Essentials for Election.]—To constitute a settled and concluded election, there must be, first, clear proof that the person was aware of the nature and extent of his rights; and secondly, that, having that knowledge, he intended to elect. Worthington v. Wiginton, 20 Beav. 67; 24 L.J., Ch. 773; 1 Jur. (N.S.) 1005. Aftirmed, 25 L. J., Ch. 171; 1 Jur. (N.S.) 1195; 4 W. R. 40.

A testator, having invested a sum of money in stock in the joint names of himself and his wife, charge when the remainder to them vested in gave his freehold and leasehold estates and the specific stock to her for life, with remainders over, and he appointed her his sole executrix and Erroneous Impression.]—Precatory words will residuary legatee. The wife, after her husband's not create a case for election, neither will the death, had the stock transferred into her own absence of the execution of a power upon an name, and did not include it in the estimate erroneous impression, stated in the will, that, by for probate. She recovered debts as executivity. its non-execution A. (a legatee) will divide the occupied one of the houses, and enjoyed the rents

transferred the stock into the names of herself is generally to be inferred only from a series and of another person, in trust for herself for life for her separate use, and then as she should appoint by will. She died sixteen years after the testator, and it was found by the master that it would have been greatly to her disadvantage to have elected to take under the will :- Held, nevertheless, that she had elected so to take. Ib.

A testator directed moneys of his own, together

with moneys belonging to his daughter, to be settled, on her marriage, upon trusts specified in his will. On the marriage of the daughter the entire funds were settled upon trusts not in accordance with the directions of the will :-Held, that the settlement was an election to take under the will; but that the funds were bound by the trusts in the will, and not of the settlement. Brisene v. Brisene, 1 Jo. & Lat. 335; Ir. R. 7 Eq. 123.

When a party has notice that he is bound to elect to take under or against a will, and deals with the property given to him by the will as his own, that is a clear, deliberate act of election to take the property so given to him. Ih. S. P., Cookes v. Hellier, 1 Ves. Sen. 234,

By marriage settlement of 1773, certain estates were limited to the sons of A., in such shares as he should appoint by will, and in default of appointment to them in fee as tenants in common. A., having three sons, B., C. and D., by his will appointed all the lands to B. for life, remainder to his first and other sons in tail: remainder to C. for life, with limitations to his issue; and gave other valuable properties to his sons C. and D., and made D. his residuary devisee:—Held, that the power of appointment was badly executed. B. C. and D. entered into possession of the estates devised to them, and in 1802 B, settled the lands to the use of himself for life, remainder to his sons as he should appoint, &c. In 1817 a deed was executed by B., C. and D., whereby after reciting that doubts had arisen with respect to the validity of A.'s appointment to B., and that C, and D, had elected to abide by that appointment, and by the lands devised to them, and had agreed to confirm the will of their father; C. and D. released all their right under the settlement of 1773 to the uses of the settlement of 1802 :- Held, that the settlement of 1802 was not an election to take under the will. as the limitations in it were not in accordance with those in the will; and that the deed of 1817 ratified the appointment so far only as it was an exclusive appointment, and then confirmed the limitations of the settlement of 1802. Beere v. Prendergust. Hay. & J. 384.

A., being tenant for life of a leasehold for years, with remainder to B., after devising one estate to B. in tail, bequeathed to him the leasehold during his life, with remainder over, and gave him also the residue of his real and personal property : B. took possession of the residuary estate, suffered a recovery of the lands devised to him in tail, noted as the absolute owner of the leasehold estate, and outlived the term for which the lease was granted, having previously acquired a new interest in the demised premises :- Held, that B. elected to take under the will. Giddings y. Giddings, 3 Russ. 241; 27 R. R. 78.

Knowledge of Right and Obligation to

of the estates : and on her second marriage she | not, | Election is a question of intention, and of unequivocal acts. Spread v. Morgan, 11 H. L. Cas. 588; 6 N. R. 269; 13 L. T. 164.

Where a case of election arises, the person who ought to make it must be shewn to have known of his duty to do so, and must be proved to have done such acts as amounted to an election. 1b.

Where, therefore, S. continued in the enjoyment of settled estates till his death, but he had mortgaged the lands to H. in fee simple, these facts did not prove an intention to elect under the settlement; nor, on the other hand did the facts that S, had disentailed the estates and mortgaged them afford proof of an intention to take against the settlement. Ib.

If a party who is bound to elect between two estates continues, without being required to elect, in possession of both, such possession and enjoyment, inasmuch as it affords no proof of preference, cannot be held to be an election to take one and reject the other. 1h.

A devisee in trust under the will of S., who had been bound to elect between two estates, and continued in possession of both till his death, instituted a suit to ascertain which of the estates of S, was charged with debts and legacies, and A. consented to a decree :-Held, that A.'s consent to such a decree did not impliedly admit that S, had power to devise all the estates which his will purported to devise, but that it merely admitted the validity of the will and of the trust so far as there were means of carrying it into execution. Ib.

Semble, a party having an equity to compel un election does not forfeit that equity by delay in enforcing it. Ib. And see Hamilton v. Hamilton, 61 L. J., Ch. 220; [1892] 1 Ch. 396; 66 L. T. 112; 40 W. R. 312.

In 1804 A. covenanted with S. to convey to him fee-simple lands, producing annually 528/, 19s. In 1818 S. bequeathed to his wife, in addition to a jointure, 2007, a year, to be in part charged on the property to be conveyed to him by  $\Lambda$ . The residue of his property was bequeathed to his two sons W, and J, in equal shares. In 1823 A, conveyed the property to S. S. died in 1826, without having republished his will, and the property conveyed descended to W; as his heir-at-law. In 1834 W, and J, executed to a sub-tenant a renewal of some of the premises comprised in the dead of 1823, the dead of renewal reciting that the reversion was vested in them by mesne assignment or otherwise. In 1856 W.S., cutitled as heir of W., mortgaged the property described in the deed of mortgage as his moiety or other interest therein, as charged by the will of S, with the additional jointure, The widow received the additional jointure out of the property conveyed until her death, in 1865 :- Held, that the acts of W, and W. S, did not amount to an election to take under the will of S., there being no evidence to shew that the parties at the time were aware of their right or obligation to elect. Sweetman v. Sweetman, Ir. R. 2 Ec. 141.

Time for Election.] - There is no time for limitation of the right to elect, it continues not-Knowledge of Right and Obligation to given lapse of fine, unless if can be shewn that a law is injury would result to third persons and that imputed to every person, yet knowledge of the they would be placed in a much worse condition rule of equity as to the doctrine of election is than if the party entitled to elect had elected early; and further, that he knew he had a right long as his interest in either of the subjectof election, and knew not merely the existence matters of election is reversionary. Ib. of the instrument giving it, but the consequences of the instrument on his rights. Brice v. Brice, 2 Mall 21

A testator made a provision for his wife, expressly in satisfaction of any estate or interest to which she might be entitled, as his wife, out of his real and personal estate. The wife enjoyed this provision, but in ignorance of her right to dower:—Held, that the lapse of sixteen years after the testator's death had not affected her rights. Sopwith v. Manghan, 30 Beav. 235.

Husband devised all his real and personal estates in trust for his wife for life, provided she did not marry; and made her executrix. The trustees not acting, she took possession. After receiving rents and profits for five years, she was not allowed to elect to take a sum under marriage settlement, without special ground, as that, from the situation of the property it was doubtful what would be the result. Butricke v. Broadhurst, 1 Ves. 171; 3 Bro. C. C. 88; 2 R. R. 100. And see Wake v. Wake, 1 Ves. 335; 3 Bro. C. C. 255.

Right to Account before Election.] - Party having right of election may file a bill to have property cleared in order to elect to advantage. Ib, 172.

No person bound to elect without a clear knowledge of the funds. Whistler v. Webster, 2 Ves. 367; 2 R. R. 260,

In what cases, and the principle on which party entitled to benefit has a right to an account before election. Pigott v. Bugley, account before election. P M'Cle, & Y, 569; 29 R, R, 850.

Where the child of a freeman of London is to make his election, whether he will abide by the will or by the custom, he is not obliged to elect until after the account taken. Cooper v. Scott, 3 P. Wms. 124, u.

Court will not receive feme covert's consent to bar her equity until her share is ascertained, Jernegan v. Bawter, 6 Madd, 32.

To make out a case in equity of compulsory election, the party to be bound thereby must be shewn to be fully cognisant of the nature and extent of his rights, in respect of such subjectmatter of choice so east upon him, or to have actually elected as testified by his acts. Edwards v. Mirran, 13 Price, 782; M.Cle. 541. Affirmed nom. Morgan v. Edwards, 1 Bligh (N.S.) 401.

Possession of Subject-matters of Election. ]-On a question of election by a party bound to elect between two properties, it is necessary to inquire into the circumstances of the property against which the election is supposed to have been made; for if a party so situated not being called on to elect continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take the one and reject the other; and, in like nummer, if one of the properties does not yield rent to be received, and the party hable to elect deals with it as his own by mortgaging the same, &c. (particularly if this is done with the knowledge and concurrence of the party entitled to call for an election), such dealing will be unavailable to prove an actual election as against the receipt of the rents of the other property. Palbury v. Clarke, 2 Macn. & G. 298; 2 Hall & Tw. 341; 19 L. J., Ch. 533.

Construction of acts, as constituting election. The acts of a party bound to elect between two inconsistent rights, in order to constitute election, must imply a knowledge of the rights, and an intention to elect : possession being, under the circumstances, equivocal as referrible to either right. The execution of deeds containing recital of the character in which the party claimed, and the execution of a power to dispose of the estates in that character, amount to conclusive evidence of election. Dillan v. Parker, 1 Swanst. 359; 1 Wils, K. B. 253; 18 R. R. 72. Affirmed, Jacob, 505; 1 Cl. & F. 303; 1 Bligh (N.s.) 325.

In 1726, the estates of K. and W. were settled to the use of A, for life, with remainder to his first and other sons in tail. In 1762 A, and B., the first tenant in tail, resettled the W. estate to other uses. In 1768 A, and B, resettled the K. estate to the use of B, for life; remainder to his first and other sons in tail male; remainder to J. S. for life; remainder to his first and other sons in tail male; remainder to the defendant for life; with remainder over. On B.'s death without issue in 1801, J. S. became seised of both estates, and suffered a recovery of the K. estate, and declared the uses to himself in fee. He also executed certain powers of charging and jointuring over the W. estate given by the settlement of 1768. In 1802, 15,000*l*, was granted by government for the purchase of lands to be settled conformably to the deed of 1768, and in the meantime to be laid out on real security. The trustee named in this settlement having refused to act, a suit was instituted in chancery in which another person was appointed trustee, to whom the 15,000t was paid; and by whom it was soon after advanced to J. S. on a mortgage in fee of the K. estate. In 1804, the court ordered that the defendant should be made a party to the suit, and he became acquainted with the dealings in respect of the 15,000%. In 1816, J. S. granted to the plaintiff an annuity for her life of 100L charged upon the K. estate; and soon after died, having devised that estate to his daughter E. B., whom he also appointed residnary legatee. In 1823, a suit was instituted in chancery by the defendant against E. B., which was compromised by the defendant's obtaining possession of the K. estate, and releasing E. B. from all demands upon the personalty :- Held, that J. S. had elected to take under the settlement of 1726. But at all events that the defendant by his conduct before and after the death of J. S. was estopped from disputing the plaintiff's claim. *Rathbone* v. *Aldborouph*, Hayes, 207.

Receipt of Income of Trust Moneys. |-In 1875 and 1876, a husband by two several deeds which contained no power of revocation, assigned two policies of assurance on his own life to trustees for his wife absolutely. In 1883 by deed, executed but not acknowledged by the wife, the husband with the privity and consent of his wife, purported to revoke the trusts of the two former deeds, and to resettle the two policies upon trust for his wife during widowhood, with remainder to his children, and also assigned other property to trustees upon trust to pay a sum due to a creditor, party to the deed, and subject thereto upon the same trusts as were thereby The liability of a party to be called upon to declared of the two policies. The husband died elect will not be affected by lapse of time so in 1888. The wife married again in 1891, having up to that date received the income of the additional property settled by the deed of 1883, deed of 1883 was an assignment of a future interest, and should have been acknowledged by the married woman under Malins' Act; that the mere receipt by the wife of the income of the trust moneys, without more, did not amount to an election by her to confirm the deed of 1883, and, therefore, that the wife was entitled to the proceeds of the two policies absolutely, she accounting for the income received by her from the additional property included in the deed of 1883. Turner, In re, Turner v. Fitzroy, 66 L. T. 758.

Where persons, entitled to have money invested in stock under a will, have long been receiving interest on the principal money instead, they caunot afterwards elect to take the amount of stock which would have been purchased, had it

stock which would have been hald out at the proper time. Child. Ciblett, 3 Myl. & K. 71; 3 L. J. Ch. 124.
Wildownot bound by election made under a mistaken impression of the extent of the claim against her. Kidney v. Consequence, 12 Ves. 136; 2 R. R. 118.

Election by Conduct. |-- In order to establish a case of election by conduct, it must be shewn that the person bound to elect has full knowledge of his rights, and acted with an intention to clect. Wilson v. Thornbucy, 44 L. J., Ch. 242; L. R. 10 Ch. 239; 32 L. T. 350; 23 W. R. 329.

Bill against the devisee and personal representatives, on the ground of an election by the testatrix to take under a will, dismissed with costs, on the conduct of the plaintiff, who eighteen years ago had compromised a suit instituted by him upon the subject; in consequence of which, the right to compel an election depending on a doubtful question on the will was not ascertained; and the party having possession under the will during her life had disposed of her estate real and personal by will. Yatev. Moseley, (Lord) v. Effingham (Earl), (t. Cooper, 319. 5 Ves. 480. S. P., Beaulieu (Lord) v. Cardinan. Amb. 538.

Widow's acquiescence in payments made to her for several years, of one-third of the dividends arising from the proceeds of the sale of an estate subject to her dower :-- Held, to be an election to take her dower in preference to the devised estate. Purher v. Direning, 4 L. J., Ch. 198 : 2 Jur. 28.

A widow in a case in which she was bound to. elect between her dower and an annuity given by her husband's will, received the annuity for five years .- Held, that she had not under the circumstances elected. Reynard v. Spence, 4 Beav. 103 ; 5 Jur. 478.

Partial accession at the age of twenty-one to a settlement by a female infant, an election to abide by the whole. Milner v. Harrwood (Lord), 18 Ves. 277.

Legatees.]-Where under a gift to a person and his issue at twenty-one, such person elected to take against the will, the children of such person are not bound by the election, and liberty was given to apply on the death of the parent. Ward v. Baugh, 4 Ves. 623; 4 R. R. 307.

What acts shew an election to take as legatee, Northumberland (Earl) v. Aylerford (Earl), Amb. 540. S. P., Northumberland (Duke) v. Egremont (Lord), Amb. 657.

#### 4. Election by Widow,

as well as that of the proceeds of the two Dispositions not Inconsistent with Dower. — policies:—Held, that the two policies were not To compel a widow to cleek to take under a will settled to the separate use of the wife; that the or dower, her claim to dower must be inconsistent with the will, Strahan v. Sutton, 3 Ves. 249. S. P., Lawrence v. Lawrence, 3 Bro. P. C. 483; 2 Vern. 365; Free, C. C. 234; 1 Eq. Ca. Abr. 218; 2 Eq. Ca. Abr. 386, 388, N. C. at law, I Ld. Raym, 438; 1 Lartw, 735.

An annuity charged on all testator's real estate, and the devise of a house during widowhood, held to be no bar to dower; but the question was reserved, whether in the event of the widow marrying again she would be entitled to dower out of the house. Holdich y. Holdich, 2 Y. & C. C. C. 18,

Testator by will gave his wife 1,000/, a year, in lieu of dower, but if she married again, he gave her 100%, a year, in lieu of all benefits from his estate. She married, and elected her dower; she shall not have the 100% annuity. Boynton v. Boynton, 1 Bro. C. C. 445.

Devise of lands to a man's wife who was entitled to dower, without saying in recompense or satisfaction of her dower:—Held, to be a voluntary gift, and no bar of dower. Hitchius v. Hitchins, Pre. Ch. 133; 2 Vern, 403; Free, C. C. 211; 2 Eq. Ca. Abr. 389,

A. seised in fee, devises his houses and demesne to his wife, for life, at a rent below the actual value, she keeping the same in repair, and not aliening, except to the persons in remainder; A. devises the residue of his estate, together with the remainder, after the death of his wife, to B. in fee; the wife, electing to take the house and demesne under the will, cannot have dower thereout, but is entitled to dower out of the residue of the estate. Birmingham v. Kirwan. 2 Sch. & Lef. 444.

Widow held not to be put to her election by a devise to her for life of a mansion-house and fifty acres held with it, being part of the same estate, out of which she claimed dower. Durchestee

A testator gave his honsehold furniture and effects to his wife; all his real estates to be sold by auction; and then one-half of the personalty and of the proceeds of the realty to his wife, and one-fourth to a nephew, and one-fourth to a niece :- Held, that the widow was not bound to elect between her dower and the benefits given her by the will, Bending v. Bending, 3 K. & J. 257; 26 L. J., Ch. 469; 3 Jur. (N.S.) 585; 5 W.R. 435

A direction to sell realty contained in a will is not in itself alone inconsistent with the intention that the widow should have her dower, as a power to demise would be. Ih.

Though the estate devised to widow be larger then the dower, yet she shall have both. Gulten v. Hancock, 2 Atk, 127.

As to election in cases of dower, see Lary v. Anderson, I Swanst. 445; Cas. in Ch. 155; Rose v. Reynolds, 1 Swanst. 446; Streatfield v. Streatfield, 1 Swanst, 447; Ca. t. Talb. 176; Webster v. Mitford, 1 Swanst, 449; 2 Eq. Ca. Abr. 368.

Where settlement was made on wife after marriage, in bar of dower, &c., and by wife's waiving it, lands would go to heir to prejudice of creditors, she was decreed to have the estate for life, according to settlement; but that she should assign it over in trust for creditors, who should convey to her a third for dower. Mills v. Eden, 10 Mod, 487.

wife an annuity, and then bequeathed all his permitted one lessee to creet buildings, which substance to his trustees for payment of his had been done, and the estate was thereby greatly debts, it was not such a direction as should improved :- Held, that the widow was not put to deprive the wife of her dower, or force her to her election, but was entitled to dower, as well elect; for her title was paramount to the will. Foster v. Cook, 3 Bro. C. C. 347.

A testator devised his freeholds and copyholds, upon certain trusts for the benefit of his family, subject to an annuity to his wife during widowhood, and he bequeathed to her the use of his household goods and furniture also during widowhood :- Held, that she was entitled both to the annuity and to her dower. Dowson v. Bell, I Keen, 761; I Jur. 471. S. P., Harrison v. Harrison, I Keen, 675; 6 L. J., Ch. 276.

Widow not put to her election between her dower and annuity by will of her husband, for the claim of dower must be inconsistent with the

will. Greatorex v. Cary, 6 Ves. 615. Rent-charge demised to wife, not a bar of dower, unless so expressed, or the circumstances such as to shew it must be intended. Pearson v. Pearson, 1 Bro. C. C. 292. S. P., Pitts V. Snowdon, eited 1 Bro. C. C. 292, n. And see Wake v. Wake, 1 Ves. 335; 3 Bro. C. C. 255. Jones v. Collier, Amb. 730. Villa Real v. Galway, Amb. 682; 1 Bro. C. G. 292, n. Arnold v. Kempstead. Amb. 466; 2 Eden, 236,

To put the wife to an election there must be a clear intention to exclude her from dower, either express or implied; and such intent is not to be implied either from the gift of particular messuages and hereditaments to her for life, or from anunity provided for her. Miall v. Brain, 4 Madd, 119; 20 R, R, 277,

Equal Division between Widow and Others.] -Devise upon trust as to one moiety for wife, during widowhood, and as to other for children: -Held, wife must elect to take under will or her dower. Roberts v. Smith, 1 Sim. & S. 513. S. P., Dickson v. Robinson, Jac. 503; Chalmers v. Storil, 2 V. & B. 222.

Where a man devised a moiety of his estate, after payment of his debts, legacies, and portions to his wife for life, this would not bar her dower, but she ought to elect. Daly v. Lynch, 3 Bro.

Devise in Trust for Sale.]—Where testator bequeathed all his personal and real estate to be sold and converted and invested, and a moiety of the interest, &c., thereof to be paid to his widow for her life, during widowhood, and the other to his sister and children; the widow being dowable out of part of the real estate :- Held, that she was entitled both to dower and also the interest given by the will, and was not put to her election. Ellis v. Lewis, 3 Hare, 310; 13 L. J., Ch. 210; 8 Jur. 238.

A testator gave all his freeholds and leaseholds to trustees, for all his estate and interest therein, on trust to sell and apply the proceeds in manner thereinafter declared; he then gave certain legacles out of his personal estate, and the residue thereof, together with the proceeds to be derived, from the sale of his freehold and leasehold estate, he directed to be divided into four parts; onefourth he gave to his wife, and the other threefourths to certain other relations. Amongst other legacies, sums of money were given in unequal amounts to his wife and the other devisees. The and he empowered his trustees, during the contestator, after the date of his will, had leased tinuance of the trusts, to continue and carry on parts of his estates for terms of years, with an allor any of the farms or other concerns in which

Annuity to Widow. ]-Where a man gave his option to the lessees to purchase, and had as to the benefits given her by the will, and that the acts by which the value of the property was increased not being hers, she would take her dower according to the existing value. Gibson v. Gibson, 1 Drew, 42: 22 L. J., Ch. 346.

> --- Power to Lease Unsold Land. -- A testator having contracted to sell part of his fee simple estates, devised all his property to trustees, and directed them to complete his contract, and to sell and convert into money all his estates; and out of the interest of the sale proceeds to pay an annuity to his wife for life; and he empowered his trustees to lease unsold parts of his real estates :- Held, that the widow was bound to elect between the benefits given her by the will and her dower. O'Hara v. Chaine, 1 Jo. & Lat. 662.

> A gift by a testator of an ammity to his widow, followed by a devise to trustees to sell and lease the land until sold :- Held, that the widow must elect. Linley v. Taylor, 1 Giff. 67; 28 L.J., Ch. 686; 7 W. R. 639.

> Powers of Leasing and Management. ]-An annuity given to the testator's widow, charged on estate A., in exoneration of estates A, and B., describing them, with power of leasing to the trustees:—Held, the widow was put to her elec-tion. Pepper v. Dison, 17 Sim. 200;

> A power to lease and manage his real estate, given by a testator to his trustees, does not, by itself, raise an implication of the testator's intention to exclude his wife from dower, so as to compel her to elect. Warbutton v. Warbutton, 2 Sm. & G. 163; 23 L. J., Ch. 467; 18 Jur. 415; 2 Eq. R. 414; 2 W. R. 300.

> In determining the obligation of the widow to elect, the court will regard the intention of the testator, apparent on the whole of the will. Ib. The amount of the provision made by the will is a material circumstance in indicating

> the testator's intention. Ib. A testator bequeathed to his wife an annuity payable out of part of his real estate, and he devised other real estate to trustees upon trust, on the youngest of his nephews and nieces coming of age, to sell and to divide the proceeds among his nephews and nieces; the testator among his helpflows and meeters, the essatur-gave to the trustees power to lease, and to cut timber for repairs:—Held, that the widow was bound to elect between the annuity and her dower. Parker v. Sowerby, 4 De G. M. & G. 321; 23 L. J., Ch. 623; 18 Jur. 523; 2 W. R. 547; 2 Eq. Rep. 664.

> To raise a case of election, it is not necessary that it should be apparent on the face of the will that the wife's right to dower was present to the testator's mind: it is sufficient that the disposition of the property is inconsistent with the right to dower. Ib.
>
> A testator devised and bequeathed all his real

> and personal estate to trustees, subject to debts, upon trust out of rents and profits thereof, topay an annuity of 100%, to his wife during her life or widowhood, and subject thereto upon trust for his daughter for life, with remainders over;

he might be engaged at the time of his death, and to demise, mortgage or sell the same:— Held, that the widow was not entitled both to the annuity and to her dower. Lowes v. Lowes, 5 Hare, 501; 15 L. J., Ch. 369; 10 Jur. 453.

A testator, after bequeathing to his wife an annuity charged on his estate at S., devised all his property to trustees, upon certain trusts, and he directed them to occupy and manage, during the minority of his son, a farm, constituting the greater part of his estate at S., and to let and manage the residue of his real estates, and to receive the rents of the whole of such estates :-Held, that the widow must elect. Roadley v.

Dixon, 3 Russ. 192; 5 L. J. (o.s.) Ch. 170.

Where a testator by his will provided amply for his widow, giving her a portion of his estate for life, and also an annuity charged upon his general estate with powers of distress and entry in case of nonpayment, and gave a leasing power to his trustees, which overrode the entire freehold estate :- Held, that these circumstances were widow from her dower. Hall v. Hill, 1 Dr. & War. 208. 94: 1 Con. & L. 120: Ir. R. 4 Eq. 27.

Widow, devisee, put to her election in respect of dower, out of farm, which it was testator's intention that trustees should possess entire, and her title to dower would disappoint that intention. Butcher v. Kemp, 5 Madd. 61.

A testator devised all his interest in the lands of T. (subject to the charges after mentioned) to his eldest son A. for life, and on A.'s decease to appoint, and in default of appointment in equal shares, with similar limitations, to his other sons. He empowered A, when in possession of T, to grant to any wife 500l. a year jointure, either in bar of dower or not, with a term to score it. The testator authorised the devisees, according as they should be in possession of T., to lease all or any part thereof. After creating a charge of 3,000l, on the house, lands and furniture at T. for his daughter, and bequeathing to his wife, "in addition to the sums already settled on her," an confirmed the settlement made on his wife :-Held, that the widow must elect between her dower and the annuity of 50l. Robinson v. Wilson, Ir. R. 13 Eq. 168.

Freebench. |-Gift by a husband of a legacy of 2001, and an aunuity of 7001, to his widow (for life or nutil her second marriage), charged upon part of his freehold and copyhold hereditaments, with a direction that she should occupy his mansion-house and enjoy the rents of a portion of the property. The testator devised his real estate specifically, and gave his trustees powers of management and leasing. His real estate consisted chiefly of customary lands, out of which his widow was entitled to freebench; but the evidence shewed that in no instance in these manors had a widow ever been admitted or her freebench set out by metes and bounds :-Held, that the widow was put to her election. Thompson v. Burra, 42 L. J., Ch. 827; L. R. 16

Eq. 592.
Upon the construction of a will, held that the widow of a testator was bound to elect between in part of the devised estates. Taylor v. Taylor, 1 Y. & C. C. C. 727.

A testator being seised of copyhold lands made a specific devise of real estate, and gave the residue of his real and personal estate to trustees, upon trust to pay to his wife an annuity of 201. and then upon the trusts therein mentioned. He empowered his trustees to lease any lands which they might hold on the trusts of his will :- Held. that the widow was put to her election between the annuity and her freebench out of the convholds. Grayson v. Deakin, 3 De G. & Sm. 298; 18 L. J., Ch. 114; 13 Jur. 145.

A testator gave annuities to his vidow, charged on land, certain freehold parts of which he had no power to devise, and as to certain copyhold parts of which it was contended that it did not pass by his will. He declared that such annuities were in satisfaction of all dower and thirds at the common law or otherwise, which she might have been entitled to in default of his will :-Held, that the widow was put to her election, as well to the freeholds which he had no power to devise, as to the freebench out of the copyholds, sufficient to indicate an intention to exclude the Notley or Notley v. Palmer, 2 Drew. 93; 2 W. R.

A testator, in 1831, devised his copyhold messnages to trustees, upon trust to permit his wife to occupy one of them during the minority of his youngest child, and to apply the rents of the others to the maintenance, &c., of his children, Thomas and John, and the children or child of which his wife was then enceinte, during minority, making thereout a provision for his wife. He then provided for the advancement of all his sons in such shares as he (A.) should his "said children," the division of the messuages among them at twenty-one, and for benefit of survivorship among them. He bequeathed his personal estate on the like trusts in favour of his "said children"; and in all these cases he added the words "as well as the children or child of which my wife is so enceinte as those already born"; but in several instances he simply used the words, "said children," and in one instance omitted "said," In 1847 he made a codicil disposing of freeholds and copyholds acquired since addition to the sums already settled on her," and the date of the will, on the same trusts, and con-annuity of 50% during her life, and charging the firming the will. The child of which the wife annuity on the house, &c., at T., and directing was enceinte was afterwards born, and, in 1835, his son A. to pay the head rent of the lands, he a fourth child was born;—Held, that the fourth child was entitled to a share; and that the widow was put to her election. Goodfellow v. Goodfellow, 18 Beav. 356; 2 W. R. 360.

> Agreement to make Partition.]-A tenant in common agreed to make a partition, and by his will be confirmed the agreement and devised the estate to trustees to convey the part agreed to the other tenant in common and his heirs, and to receive a conveyance of the other part, and he devised it and all his real and personal estate to trustees to receive the rents and pay an ammity to his widow, &c. &c. :-Held, that the widow was bound to elect. Reynard v. Spence, 4 Beav. 103 : 5 Jur. 478.

Disclaimer. ]-A testator, by a will not executed so as to pass freeholds, gave freeholds and copyholds to his brother, on condition that the latter joined the testator's nephew in the purchase of certain annuities, and he gave the nephew freeholds, leascholds and personalty on a similar condition. The brother disclaimed :- Held, that the nephew must make provision for one-half of the the benefits given her by the will and freebench annuities. Wilson v. Wilson, 1 De G. & Sm. 152; 11 Jur. 793.

One of the annuities was directed to be paid to

the widow so long as she should live, and if she to his wife generally, on the same quarterly days had any child born, such sum to be continued for its life. There were three children born:— Held, that the direction applied to the eldest only; and that, taking the annuity, she was bound to give effect to the other annuity, and to the gifts to the nephew as regarded the one-third share of freeholds which descended to her. Ib,

Right of Terce.]—A testator bequeathed to his wife, during her life, four-sevenths of the income of his general residuary estate, in which he intended to include a Scotch heritable bond ; but the infant heir having elected under the order of the court to claim against the will, took that bond by his legal title, subject to the widow's right of terce :- Held, that the widow must elect; and that, although disappointed of the four-sevenths of the interest of the bond debt, which the testator meant her to enjoy, she must, if she claimed what he had effectually be meathed to her, bring in her terce to increase the general residuary estate. Requolds v. Torin. I Russ, 129; 25 R. R. 13.

Forfeiture. ]-Where a testator, having granted an annity to his widow, under his will directed 3 Ves. 337.
that if she persisted in any claim on the residue of his property she was to forfeit the annuity :- Held, the widow was not put to her clection, but was entitled both to her dower and to the annuity. Wetherell v. Wetherell, 4 Giff. 51:8 Jur. (8.8.) 814; 7 L. T. 89; 10 W. R. 818.

A testator directed payment of his debts, and gave all his personal estate and effects (by description) to his wife, for her sole use for life. He tion) to his wife, for her sole use for life. He tion. Thompson v. Nelson, 1 Cox, 447. S. P., then gave her a cottage at B. for her sole use for French v. Davies, 2 Ves. 572. life, and after her death to fall into the residne of his estate; and he gave her two houses in N. Street, one in K. Place, and one in M. Street, in the same words. And he directed that the aforesaid properties, and all his other property should be disposed of for the benefit of his children, or so many as should survive his wife; nevertheless if any married and died leaving in regard the mother might (which she did) issue, they should inherit the father's or mother's share; and that the property should be kept in elect to take the provision under the settlement, repair and let until his youngest son attained or her dower, and freebench. Clarathers v. twenty-one. The widow claimed to be entitled Caruthers, 4 Bro. C. C. 500. in fee to the premises in N. Street, K. Place, and M. Street, and to be reconped the mortgage money she had paid off; she also claimed dower: -Held, that she was put to her election, both as to the property given by the will, and as to Also that there was a forfeiture. And that there was a gift to those children who survived the wife, and the issue of those that died in her lifetime, leaving issue. Hilton v. Hilton, 15 W. R. 193.

Deed of Separation. - By a deed of separation between husband and wife, the husband conveyed a fee simple estate to trustees upon trust, out of the rents, to pay an annuity to his wife, and the residue to himself and his heirs :- Held, that the wife, who survived her husband, was not bound to elect between the annuity and her dower. Hill v. Hemsworth, Ll. & G. t. Plunk, 87.

A., by deed of separation, covenanted with the trustee of the deed to pay him an annual sam of 521. during the life of A.'s wife, to be paid to her on four special quarterly days for her separate the public funds, and whether standing in his use, without power of anticipation. A, by will, name alone or jointly with his wife, to his wife subsequently gave certain specific property to for life, and after her decease to other persons. trustees, to pay out of the rents an amulity of 521. At the date of the will, and at the testator's death,

-Held, that there being no direction in the will to pay debts and legacies, and no expression of a contrary intention, the general rule must prevail, that the annuity given by the will was in satisfaction of the animity covenanted to be paid by the deed; and that the widow was put to her election. Athinson v. Littlewood, L. R. 18 Eq. 595; 31 L. T. 225.

Alternative Gifts.]—A testator being entitled to two leasehold houses situate at P. and at R., directed his trustee to allow his wife to occupy his honse at P. or at R. as she should elect, for her life, without payment of any rent :- Held, that the widow must elect between the two houses; but that she was entitled to be indemnified out of the testator's estate against the rent and covenants to which the honse she might select was liable. Harby v. Moore, 6 Jur. (N.S.) 883.

Death of Devisee during Life of Devisor. |-Devisee died in the life of the devisor, and the estate descended; the devisor's widow, being entitled by the will to a provision in bar of dower, bound to elect. Pickering v. Stamford (Lord),

A widow will not be barred of her dower by a provision made by will, unless there be a clear indication of the testator's intention, or unless some other disposition of his property would be defeated by the widow's taking both. The testator's having given all his property on trust, in the first place to pay such provision to the wife, is not of itself a sufficient indication of such inten-

Marriage Settlement. ]- By the settlement made on the marriage of a female infant, an estate was settled on the husband's mother for life, remainder to the husband for life, remainder to the wife for life, with remainders over, in bar of dower. This settlement would not bind the wife survive the husband; the wife might therefore

Investments in Names of Husband and Wife. ] -A husband transferred a sum of stock into the joint names of himself and his wife; he afterwards made his will, and gave her an estate for life in the stock and in certain freehold and leasehold estates, with remainder to other persons, and he made her his residuary legatee. She treated the stock as her own, and enjoyed the estates during her life :- Held, in a suit instituted after her decease, that she was cognisant of her rights, and was bound to elect between the stock and the benefits given to her by the testator, and that her acts shewed that she had elected to take under the will. Worthington v. Wiginton, 20 Benv. 67; 24 L. J., Ch. 773; 1 Jur. (N.S.) 105. Affirmed, 25 L. J., Ch. 171; 1 Jur. (N.S.) 115; 4 W. R. 40.

A testator, after giving his wife a legacy of 3,0001, gave all the residue of his estate and effects, including therein the money in his banking account in the Bank of England, and money in wife. This stock had by a previous will been regard to the long annuities. bequeathed to the wife, subject to two executory gifts over which did not take effect. The testator had received the stock, and transferred it into their joint names. After his death his widow received the income of the residuary estate, including the consols, but did not deal with the stock as her own. There was, however, no evidence that she knew what her rights were. On her death her representatives claimed the stock: -Held, that the testator intended the stock to pass, and was not dealing only with his right of survivorship; that the doctrine of election applied both to the wife and her representatives, and that the latter could only take the stock upon compensating the residuary legatees to the extent | Poole v. Odling, 31 L. J., Ch. 439; 10 W. R. 337. of the legacy of 3,0001, and of the amount received by the wife in respect of her life interest on the testator's own property. Curpenter, In re, Carpenter v. Disney, 51 L. T. 778.

A husband before making his will transferred two sums of 4 per cent, and 5 per cent, stock, then forming the whole of his funded property, into the joint names of himself and his wife. By his will he gave all his funded property or estate, of whatsoever kind, upon trust for his wife for life, and after her decease, upon trust to pay divers legacies of 4 per cent, stock, amounting within 50l, to the stock of that description, which he had so transferred. He afterwards purchased further sums of 5 per cent, stock in the names of himself and his wife, and died in her lifetime, leaving no funded property, except the 4 per cents, and 5 per cents, already mentioned, exclusive of which his assets were insufficient to pay his legacies:-Held, that all the sums of stock became by survivorship the absolute property of the wife, and that the will did not purport to dispose of the stock in terms sufficiently distinct and explicit to put the wife to her election. Dummer v. Pitcher, 2 Myl, & K. 262; Coop. t. Brough, 257. Affirming 5 Sim, 35.

A testator bequeathed all his canal shares in trust for his wife during her life, and after her decease to other parties. He had no interest in any canal shares, except in some which, at his death, and at the date of his will, stood in the joint names of himself and his wife in the books of the canal company; he had received the dividends during his life, and had acted and been treated by the company as owner :- Held, that the canal shares were intended by the testator to pass by his will, and that his widow was bound to elect. Shuttleworth v. Greaves, 4 Myl. & C. 85; 8 L. J., Ch. 7; 2 Jur. 957.

Testator bequeathed 2,2001, stock, his property, standing in the joint names of himself and wife, to trustees, upon trust to pay the dividends to his wife for her life, and after her decease, to distribute the capital amongst his grand-children by name; and he directed that in case he had not that sum standing in his name at the time of his death, the same should be made up out of his other estate and effects :-Held, that the stock was the absolute property of the wife surviving, and that she must elect between it and the other benefits bequeathed to her by the will. Coates v. Stevens, 1 Y. & C. 66.
A testator, whose only funded property con-

sisted of long annuities, which had been pur-chased by him in the joint names of himself and wife, bequeathed to his brothers an interest in

there was only one sum (viz. 7,1101, consols) ties. He also made a provision for his wife :-standing in the joint names of himself and his Held, that the wife was put to her election in Groscenor v. Durston, 27 Beav. 97.

A testator gave 8007, consols and two leases hold houses to trustees for all his estate and interest therein, upon trust to pay his wife the interest and proceeds for her life, and after her decease, to pay an annuity of 14% to his daughter for life, with a gift over of the 8001, to his grandson and his children. At the testator's death the 800%, consols were standing in the names of himself and his wife :- Held, upon bill filed by the trustees against the wife's executor for a transfer of the fund, that the gift of the 800l. was a general bequest, that the sum survived to the wife, and that she was not put to her election.

Property of Wife. - A testator gave to his wife for life the use of furniture, &c., of every description in his house at his death. There was both furniture, &c., belonging to the testator, and also furniture settled to the separate use of the wife in his honse :- Held, that the widow was bound to elect between the benefits given by the will and her own property in the house. Parrott v. Wallace, 4 L. J., Ch. 36,

Statement of property written by testator, and his books of accounts admitted as evidence, that he considered as his property, and meant to dispose of mortgages and leases the property of wife under will, by which he was co-executor with her before her marriage. Wifn was put to her election. Druce v. Denison, 6 Ves. 385

Testator devised all his estates in different places (which he had surrendered) to his wife for life, with remainders over; in some of the places he had no estates but in right of his wife; these did not pass by the will, and wife not put to an election. Read v. Crop, 1 Bro. C. C. 492.
Where an estate had been contracted to be

purchased by a woman who married, leaving part of the purchase-money masatisfied, which was paid by her husband, who took the conveyance to himself, and devised the estate :- Held, that the estate was the property of the wife, subject to a charge in favour of her husband for the amount of the purchase-money contributed

by him. Maddison v. Chapman, 1 J. & H. 470.

The husband having devised his real and personal property, at L. and elsewhere, and died, leaving no real property at L. other than the charge aforesaid, and having given benefits by his will to his widow :-- Held, that he had sufficient interest to satisfy the words of the will without attributing an intention to devise his wife's property, and that the widow was not put to her election. Ib.

General exception of mortgage debts out of charge in will for debts, not sufficient to put wife to election to take under will, or have mortgage of her estate paid out of assets. Clinton v. Hooper, 1 Ves. 178; 1 R. R. 102.

The wife of a testator was entitled to a share of the produce of the R. estate, which had been directed to be sold. By his will be gave all "his share, estate, and interest" in the R. property to his daughter, and benefits out of his own estate to his widow :- Held, that the will raised a case for election as against the widow. Whitley v. Whitley, 31 Beav. 173.

A testator made various bequests in favour of his wife, including some property to which she his present funded stock or government scenri- was entitled in her own right, and he also gave her an annuity, charged on specified real estate, ther will leave the moneys payable under such in lieu of dower and freehench. The wife surpolicy, and also the moneys payable under a vived her husband, and during her life received policy for 300% on the testator's life, to his the benefits given her by the will, but never elected whether to take under or against it, and died intestate, leaving four next of kin, three of to the testator :- Held (Righy, L.J., dissenting), whom elected to take under the will, while the that the language of the testator was not fourth, who was her administrator, elected to take against it :--Held, that each of the next of kin had a separate right of election, that neither the election of the majority nor that of the heir and administrator bound the others, and that in taking the accounts on such election the annuity taking the accounts on such election the annuity the wishes of the testator as to the 1,000*l*, policy specifically charged in lieu of dower must be belonging to her. Wright v. Athyas (T Ves. brought into account, could being given for the | 25°; 19 Ib. 299; Turn. & R. 143), and London. due proportion of dower. Fytche v. Fytche, L. R. 7 Eq. 494; 19 L. T. 343.

By a marriage settlement property of the wife was conveyed to trustees in trust to pay the interest to the husband for life, and after his death to the wife for life, and after the death of the survivor to pay the principal to the children of the marriage, as the wife should appoint, and in default of appointment amongst, the children equally, and on failure of issue to the wife. There was one child was died an infant; and afterwards the husband, who had received the balk of the trust funds from the trustees, made his will, by which he made certain gifts to his wife, in bar of all her claims under her marriage settlement; and if she elected to take under the settlement, the gifts should be void, and should be comprised in the general devise of his property; and he devised all the rest of his property to trustees :-- Held, that the wife who survived the husband was barred by the will from claiming any portion of the principal of the funds comprised in the settlement. Mackey v. Maturin, 15 Ir. Ch. R. 150. But see Coleman v. Jones, 3 Russ, 312 : 6 L. J. (o.s.) Ch. 16.

Held, also, that she was entitled to the interest

of the funds during her life. Ib. Two sums of money, the property of a wife, were lent by her to her hasband, who gave her a cheque for one sum, and for the other a letter acknowledging the receipt of it, and placing it to her credit in his firm :- Held, that she was

entitled only to one year's interest on the sums, against her husband's assets. 1b.

The wife being entitled to a settled estate, the husband gave her, by will, an interest in another estate, and all his personal property in lieu of her claims; the will was not duly attested to pass real estate, she could not take the devised land, but must elect between the personal estate alone, and her claims under the settlement. Newman v. Newman, 1 Bro. C. C. 186.

A lmsband, conceiving himself entitled under a void deed to a residue bequeathed to his wife, and dying without getting possession, having made a general disposition by a will, under which she took an interest, it was a case of election; and her election to take the provision under the will, which, though less in point of value was to her separate use, was established against the assignees under the bankruptey of her second husband. Rutter v. Maclean, 4 Ves. 531. Affirming S. C., nom. Wright v. Rutter, 2 Ves. 673; 3 R. R. 24.

A testator devised and bequeathed his residuary real and personal estate to his widow "absolutely in the fullest confidence that she" would carry out his wishes in certain particulars—namely, absolutely to such of the articles as did not con-that she would pay the premiums on a policy for sist of paraphernalia, but as to such as formed 1,000% on her own life, and that she would by paraphernalia, the wife's next of kin could elect

daughter. The policy for 1,000l. was the property of the widow; that for 3007, belonged sufficient to create trusts of the policies in favour of the daughter after the widow's death, or to impose a condition on her, and therefore that she was not, on account of the benefits given toher by the will, put to her election to carry out Earns (40 L. J. Ch. 447; L. R. 6 Ch. 597) discussed. Williams, In re, Williams v. Williams, G. L. Ch. 12, Ch. 485; [1897] 2 Ch. 12; 76 L. T. 600; 45 W. R. 519-C. Å.

Paraphernalia.]—Although a husband has no right to dispose of his wife's paraphernalia, yet if he does so, she must either abide by the will, or relinquish all benefit therefrom. Churchill v. Small, 2 Ken. 6.

The wife is not debarred of her paraphernalia by a bequest of the use of all household goods, furniture, plate, jewels, lineu, &c., for life. Marshall v. Blew, 2 Atk, 217.

Husband devises wife's jewels to wife for life, remainder to his son ; the wife makes no election or claim to have the jewels as her paraphernalia, her administrator cannot make this claim. Clarges v. Albemarle, 2 Vern. 217; Nelson,

A., by marriage articles, agreed to leave his wife 8007, and her jewels, &c., and it was declared that notwithstanding the articles, she should not be debarred of anything he should give her by will. He by will disposed of his whole estate, and gave his wife 1,000. The wife must either waive the articles or the will. Herne v. Herne, 2 Vern. 555.

Jewels purchased by the husband and worn by the wife with others belonging to her husband become her paraphernalia, in the absence of evidence to the contrary; but family jewels by being merely worn by the wife do not become part of her paraphernalia. *Jervoise* v. *Jervoise*, 17 Beav. 566; 23 L. J., Ch. 703; 2 W. R. 91.

A husband who was entitled to family jewels and diamonds bequeathed to his wife all "his jewels for life, and afterwards as heirlooms":-Held, that this bequest did not include pearl orunments presented to her, or brilliant bracelets bought by the husband and given to the wife, and worn with the family jewels, so as to put the wife to her election. Ib.

Where a lady was possessed of jewels and ornaments of the person before her marriage, and after her marriage they were in all writings spoken of by her linsband as hers, and were denosited with bankers, with whom she, with his consent, kept a separate account, and after her lunacy, the husband made his will, giving her the use of his plate, furniture, linen, jewels, and household effects, including the jewels and effects "which belonged to her before her marrige," and which he "had assumed by marital right" during her life, upon the death of the hundre, who survived her husband, the court held that the husband's next of kin were entitled

# 5. ELECTION BY APPOINTERS AND PERSONS CLAIMING UNDER SETTLEMENTS.

Invalid Appointment. |- Testator appointed to grandchildren, under a power to appoint to children, a fund to go in default of appointment equally : the appointment being bad, the children having legacies must elect. Whistler v. Webster, 2 Ves, 366: 2 R. R. 260.

A testatrix having under her marriage settlement a power to appoint among children, appointed by her will a part of the fund to grandchildren, and gave benefits to those who would take in default of appointment :- Held, that those who could defeat this undne appointment must elect between their claims under the settlement, and the benefits given them by the will. Present v. Edmunds, 4 L. J. (o.s.) Ch. 111. S. P., Bernard, Ex parte, Leigh's Trust, In re, 6 Ir. Ch. R. 133.

A testator, having power under a settlement to appoint the settled hereditaments to children of his first marriage only, appointed the same (describing them as his own property) in favour of a son of the first marriage subject to a charge in favour of his other children, including the children of his second marriage, and he devised property of his own to the same son subject to the same charges in favour of his other children " so as to equalise the shares of all his children in all his property" :-Held, that a case of election arose in favour of the children of the second arose in rayour of the enlargen of the second marriage. Woodhridge v. Woodhridge, supra, col. 1335, distinguished. White, In re, White v. White, 52 L. J., Ch. 232; 22 Ch. D. 555; 48 L. T. 151; 13 W. R. 451.

B., having an estate at D., conveyed it to his daughter in fee, with livery of seisin, and she by a declaration of trust of even date agreed to hold it for such one or more of B's children, herself being one, as he should by deed or will appoint, and in default in trust for them equally. B. continued in possession during his life, and by his will devised his estate at D, to trustees, his son being one, in favour of his daughter and his two sons and their children, with gifts of other property to his sons and his grandchildren. The testator had a very small property at D. which was not subject to the power :- Held, that the testator intended absolutely to give the whole of his property at D., there being a good exercise of the power pro tanto, and that the sons were put to their election. For v. Charlton, & L. T. 743: 10 W. R. 566.

\_\_\_\_ Derivative Interest\_Next of Kin.] \_ The principle of election applies to the next of kin of an intestate, although his estate has not been wound up at the time that the will comes into operation. Cooper v. Cooper, 44 L. J., Ch. 6; L. R. 7 H. L. 53; 30 L. T. 409; 22 W. R. 713.

A lady having a power of appointment over the reversion expectant on her own death in a trust fund in favour of any of her issue, to be executed before her children had all attained twenty-five, made within that period an appointment by deed among her three sons equally. By will she purported to appoint the fund to her eldest son; and one of her sons having died

whether they would take them or the benefits given by the will. Heresun, In re, If Almaine v. that it could not take effect as a new appointment under the power, and that the family belonged to the two surviving sons, and the estate of the deceased son, according to the appointment by deed, the eldest son filed a bill to put the children of his deceased brother to their election :- Held, that such children were put to their election. Ib.

> Election to allow Maintenance. ]-Held, on construction of settlement, that will not being duly attested, and under other circumstances, trustees had no power to allow maintenance during certain period; but that eldest son should be put to his election to allow it, as he had other benefits under the will, and was the only person that could be benefited by withholding the maintenance. Hume v. Rundell, 2 Sim. & S. 174.

> Inconsistent Appointments. -Successive Where successive irrevocable appointments are made in favour of the same person, the latter appointment will be held to be in substitution for the former, if such appears to be the intention of the donce of the power, and the person in whose favour the appointments are made will be compelled to elect between them. England v. Lurers, L. R. 3 Eq. 63; 15 W. R. 51.

> A person having a power of appointment, by deed or will, over a fund, in favour of his children, upon the marriage of one of his daughters, E., appointed one-seventh to her; and upon the marriage of another daughter, I., appointed another one-seventh to her. He afterwards executed a deed-poll, by which, without noticing executed a decel-poil, by which, without noticing the previous appointments, he gave one-sixth of the fund to E, another sixth to L, three other sixths to other children, and left one-sixth nudisposed of. By his will be disposed of so much of the fund as was not then already appointed in favour of any of his children :— Held, that the appointments to E. and L., made by the deed-poll, were in substitution for those previously made, and raised a case of election; and that the will operated as an appointment of so much of the fund as was not disposed of by the

> deed-poll. Ib.
>
> A lady on her marriage, appointed by deedpoll 3,000%, to trustees, the interest to be paid to her hashand for life, and after his death the capital to be divided between her nephews and nicces; and the deed contained a power to revoke the trusts subsequent to the life estate. By her will, after marriage, she revoked all the trusts of the deed, and gave 1,000% to her husband and the residue to the plaintiff— Held, that the will was made under an erroneous impression, and was intended to revoke all the trusts of the deed, and that the husband was put to his election between the life interest and the 1.000*l*. Coutts v. Acworth, 39 L. J., Ch. 649; L. R. 9 Eq. 519; 18 W. R. 482.

Appointment Violating Rule against Perpetuities. |- Under his narriage settlement, A. had a power of appointing property amongst the children or remoter issue of the marriage. By will, he appointed the settled property to his son and daughter in equal shares, to vest in them in the manner thereinafter expressed concerning intestate in her lifetime, she gave benefits out of his residuary estate. He afterwards gave his her own property to his children. All her residuary estate in trust as to one-half to his son children had attained twenty-five before the will absolutely, to vest at twenty-five, but subject to the settlement thereinafter directed, which was to any after-born son he might have by his wife : the serious in the remainder furceces, which was no any arter-room son he might will not be be made upon him and his children with gifts —Held, that the power of charging could not be over to persons not objects of the power. The exercised in favour of any child of the first over to persons not objects of the power. The son insisted that he took the settled property absolutely, discharged from the void restrictions: -Held, that he must elect whether he would take under or against the will. Blane, 28 Beav, 422.

Exercise of Non-existent Power of Appointment. ]-A testatrix entitled for life to property which in case of her death without issue (which happened), went over to her brothers and sisters, of whom J. was one, by will purporting to exercise a power, which she erroneously supposed she had, appointed the property to a class of named persons referred to in the will as objects of the power, of whom J, was not one, and by codied gave J. property over which she had a free power of disposal:—Held, that J. was put to his election. Brookstank, In re, Bauwlerk v. James, 56 L. J., Ch. 82; 34 Ch. D. 160; 55 L. T. 593; 35 W. R. 101.

R., having a testamentary power to appoint land to his male issue as he should direct, devised certain of the land to his eldest son, J. (who survived him)," to be chargeable with 2,000% borrowed for J.'s sole use." He also gave benefits out of his own property to all the objects of the power, and directed that certain portions of his estate should be sold or charged as by his will provided, and the proceeds applied, together with the said 2,000%, which he stated he had paid, to form a fund for payment of his debts and legacies:— Held, that the charge of 2,000l, not being well appointed, a case of election arose between the objects of the power and the persons entitled to the fund of which the 2,0007, was to be part. King v. King, 13 L. R., Ir. 531.

Erroneous Recitals.]—By a deed, reciting that estates were charged with 1,000%, for younger children under a previous settlement, the lands were resettled and a sum of 2,500% charged for the younger children. The previous settlement really charged the lands with 2,000/.; the younger children claiming both the 2,000I, and 2,500%; -- Held, that there was no case for election between the deeds, but merely a misrecital, and if the real intention was to charge the 2,500%, in addition to 1,000%, only, it should have been proved by parol evidence. Ruby v. Foot and Boamish, Beat. 581.

A. B., on his second marriage, settled certain lands to the use of the settler for life, then to secure a jointure for his intended wife, and subject thereto to the use of his first and every other son by his intended wife, and the deed of settlement empowered the settler if he should have more than one son, by deed or will to prefer such son to the whole or part of the settled hinds, subject to his wife's jointure, and also subject to such sums of money not exceeding 4,000l, as the settlor might charge thereon by deed or will. Shortly afterwards the settlor executed this power, and charged the lands with 4,000%, in favour of the children of his first marriage, and subsequently made his will, and thereby devised certain estates of which he was seised to the minor defendant, his only son then living by his second marriage, and reciting "that by his settlement, the settled lands were chargeable" as aforesaid, and "that he had accordingly charged them"; and also that he had power to

marriage, but that a case of election was created by the will. Cooke v. Briscoe, 1 Dr. & Wal. 596.

Gifts in Satisfaction.]—Testator, having upon his daughter's marriage given a bond to leave-5,000l, at his death among her younger children, by will created a term for years in trust, to apply rents for maintenance of such children till twenty-one; and also gave his personal estate in trust, to pay the produce of it to his wife for life, and after her death to pay 1,5004, to one of the daughters of his daughter, and 3,500l. among the other younger children of his daughter, as she should appoint, and in default of appointment, equally between them at twenty-one or marriage; and declared the legacies should be in satisfaction of the bond :- Held, that the daughter must elect to claim under the will, or under the bond : but Lord Hardwicke declared he would not extend the construction of devises in satisfaction further than they had already gone, and decreed the children born after the testator's death should have their share under the bond. Graves v. Boyle, 1 Atk. 509.

Where a particular thing is bequeathed in discharge of a demand, and the party insists on it, he must waive, not only that thing, but all benefit claimed under the will. 1b.

A., on the marriage of his daughter B., in 1794, granted to trustees an annuity of 1001, out of part of the lands of C., in trust for her husband for life, and after his death for B. for life, in case she survived her husband, and after death of the survivor, for the children of the marriage, in such shares as the parents, &c. In January. 1813, A. made his will, and after minutely specifying his property and the head rents and profit rents, he devised the same to trustees, upon the trusts thereinafter mentioned, and none other, and after payment of the head rents payable thereout to apply same to the trusts. thereinafter mentioned; he then directed them to pay 100%, a year to his wife, and subject thereto, he gave B, an annuity of 50%, a year for life, and on the decease of his wife, a further annuity of 50%, a year, "the two annuities to B. for her separate use, free from the control of her husband"; and subject to the head rents, and to the two annuities to his wife and daughter, he disposed of the rest of his property without making any allusion to the charge upon it under the deed of 1794: he died, leaving B, and her husband surviving; the latter having died, and the person entitled to some of the lands charged with the two annuities having refused to continue to pay both, she filed a bill to raise the arrears:—Held, that she was bound to elect. Graham v. Thynne, Ir. R. 2 Eq. 402,

A child entitled by his father's marriage articles to a share of his father's personal estate, has a legacy given him by the will of his father; if he will have the legacy, he must waive the benefit of the articles. Herne v. Herne, 2 Vern. 555.

Two Instruments.]—Deed poll not delivered, but operating at the death of a grantor, and a bond given in favour of a natural daughter; she was put to her election. Johnson v. Smith, 1 Ves. Sen. 314.

Settlement and Will.]-Case as to election between will and settlement on the construction prefer any son to the hunds, he devised the same of will. Ranciffe (Lord) v. Parkyns, 6 Dow, M. 251 : 9 L. J. (o.s.) Ch. 116.

In a case both of election and satisfaction by will of parent, as to two subjects of claim by his younger children under a settlement, a case of election was raised as to a third subject, stock vested in trustees, upon construction of will. Pole v. Somers (Lord), 6 Ves. 309.

A husband, on first marriage covenanted that one-half of whatsoever substance he should be seised or possessed of at his death, whether in fee of otherwise, should immediately become the property of the children of that marriage. A deed executed after his second marriage, conveying part of his property to the use of himself for life, remainder to his wife and children of his second marriage, was set aside as a fraud on the

children claiming under the covenant. A child claiming a portion under the first settlement, and a legacy under father's will, put to her election. Bradish v. Bradish, 2 Ball & B. 479;

12 R. R. 109.

Gift of Property previously settled by Donor. I-A. by his marriage settlement conveyed certain real and personal property, and all the property of which he was then or might die seised or possessed, to trustees on trust, in case his intended wife should survive him, to raise a ans interacts whe should survive min, o ruse a sum of money for her. He bequesthed a considerable portion of the real and personal property, specifically mentioned in his settlement, to his wife, for life, with remainders over. He directed other portions of his property to be sold, and the proceeds invested for the benefit of his wife for life, with remainders over. He died, leaving his wife surviving :—Held, that she was bound to elect between the money provided by the settlement and the benefits conferred by the will. Heazle v. Fitzmaurice, 13 Ir. Ch. R. 481.

A father on the marriage of his daughter, covenanted that, immediately after his death, a share, which in the event became one-third, his real and personal estate should be settled for the benefit of the daughter, her husband, and their children, in equal shares. One of the four children of the marriage, a daughter, died in the settlor's lifetime, leaving a linsband, who also died in the settlor's lifetime, and two infant children, who survived the settlor. The settlor made a will whereby, after directing payment of his debts, he disposed of personal chattels, gave legacies, and amongst others, a legacy of 4,500%, and part of the residue of his estate, to his nephews and nieces, and his said two infant great-grandchildren in equal shares :- Held, that the liability under the covenant was not a debt to be paid before the division of the residue, and that the infants were bound to elect between the benefits under the settlement and under the will. Bennett v. Houldsworth, 46 L. J., Ch. 646; 6 Ch. D. 671; 36 L. T. 648.

A., by his marriage settlement, covenanted that he would, by will, or otherwise, settle all the real and personal estates which he should die seised or possessed of, so that the same might be enjoyed by his wife for life, in case she should survive him; and after the death of the survivor, by all their children equally. Some of the children died in the lifetime of A. and his wife :- Held, that under the covenant, all the children became entitled to vested interests on their coming into existence, and that A. (who, as administrator to some of his deceased children, had become

149—H. L. (E.) And see Minchin v. Gabbett, entitled to their shares of his personal estate) [1896] I Ir. R. I; and Weall v. Rice, 3 Russ, & having by his will given both his real and personal estates to the same persons, some of whom exclusively claimed the real estates under the eovement, a case of election arose. Nayler v. Wetherell, 4 Sim, 114; 9 L. J. (o.s.) Ch. 125.

A testator gave his real and personal estate to trustees on trust out of the income to pay an annuity of 500/, a year to his widow for life or widowhood, for the maintenance of herself and his children, and to invest the surplus; and after her death or marriage again, upon trust to apply the income for the maintenance and advancement of such of his children as should be under twenty-one; and when the youngest should attain that age, mon trust to distribute all his property equally between his children, except so much as would secure to his wife, if then alive and married again, an annuity of 100%, a year for life; and in case of the death of any of his children, leaving lawful issue, he directed that their shares should go to their children. After the will, the testator, on the marriage of one of his daughters, settled 2,000%, for the benefit of herself, her husband, and her children :-- Held, that the daughter must elect whether to take under the will or the settlement, Beckton v. Barton, 28 L. J., Ch. 678; 5 dur. (N.S.) 349.

In 1790, upon the marriage of A. B., lands were settled to the use of A. B. for life, remainder to trustees for five hundred years, remainder to issue male of A. B. The trusts of the term were to raise, in the event of there being two or more daughters and no issue male, 6,000%, for the portions of such daughters, to be paid in such shares as A. B. should appoint; and if no appointment, share and share alike. The settlement provided, that if A. B. should advance any of the daughters in his lifetime, such advancement should, according to its amount, be deemed a satisfaction of the portion, unless A. B. should, by writing under his hand, declare the contrary, There were issue of the marriage three daughters only,-E., S. and I. In 1813 A. B. contracted to sell the estates; and to protect the purchaser against the contingency of there being issue male, 71,000%, of the purchase money was permitted to remain a charge upon the lands. In 1821 A. B., on the marriage of his daughter, E., assigned 20,000/, part of the unpaid purchase money, to the trustees of the settlement as her portion, not to be paid, however, until his death. In 1826, on the marriage of S., A. B. covenanted that he would appoint and assure that 20,000%. part of his personal estate, should, within three months after his death, be transferred to the trustees of the settlement. In 1886 A. B., by his will, directed that in performance of this cove-nant 20,000% should be paid to the trustees of the settlement, out of the unpaid purchasemoney, and in case that should prove deficient, then out of his residuary personal estate; and he bequeathed to his executors 20,000/., upon trust to pay the interest thereof to I., who was unmarried, for her separate use during her life, &c. ; -Held, that I, was bound to elect between the will and under the settlement of 1790, and that, taking the latter, she was entitled to 6,000l. Brownlow v. Meath (Earl), 2 Jr. & Wal. 674; Ir. R. 2 Eq. 383.

By marriage settlement 1,000%, was to be laid ont to the use of the wife for life, with remainder in case she should survive to her; and if the husband should survive, then to such uses as the wife should appoint; in default of appointment,

to such person as the same would have gone unto | prejudice of their father's interest therein under by the Statute of Distribution, in case the wife the settlement; but that, before the indorsement had died unmarried. She died without appointment, leaving a daughter. The father gave the election, and he had not lost such right by daughter a real estate in fee, in performance of being a party to the indorsement. Seton v. the covenant; this was a case of election, but the Smith, 11 Sim. 59. daughter electing to take under the will took the personalty as next of kin. Houre v. Barnes, 3 Bro. C. C. 316.

Testator devised to trustees to uses, under which his daughter was tenant for life, and directed that annuitants, under his will, should take in satisfaction of all claims upon him. The daughter had a claim of 10,000%, under the marriage settlement; she must elect between the two. Macnamara v. Jones, 1 Bro. C. C. 481.

By the testator's marriage settlement 1,000l. was secured for his wife for life, with remainder to their issue. The plaintiff was the only issue. By his will be gave the interest of 2,000%, to his wife, expressly in addition to her claims under the settlement, and 5,000% to the plaintiff (without making any reference to the settlement) on her attaining twenty-one or marriage :-Held, she could not claim both sums, but must elect between the settlement and will. O'Neil v. Hamill, Beat. 618.

A man, on his marriage, covenanted to purchase and settle lands of 400%, a year to the use of himself for life; then to his wife for life; remainder to the heirs of their bodies; and if he died before a settlement the wife might elect, either to have the 400l, a year, or 3,000l, in money in lieu of dower and thirds. The husband died before a settlement made. On a bill by the creditors, the wife by answer elected the 3,000%, and the children insisted on a settlement, according to the articles, expectant on their mother's death, by which means all the assets would be exhausted. Decreed a settlement to be made on the wife and children notwithstanding the election. Hancock v. Hancock, 6 Vern. 605.

A sum of 10,000%, consols was held in trust for two sisters for life, and after their deaths, twothirds of the capital, in trust for their brother, and one-third in trust for the two sisters. The brother bequeathed "the whole of his property" to trustees, as to part, upon certain trusts, for his sisters, and he afterwards bequeathed "the property, including the 10,000%, trust-money," to other parties :- Held, that the sisters must be put to their election between the interests under the will and their interest in the 10,000l. Swan v. Holmes, 19 Benv. 471.

- Waiver of Right to put to Election-Delay-Act done alio intuitu. ]-An unmarried lady being entitled to 5,000%, charged upon real estate of which she was tenant for life, with remainder to her children in tail, and being remainder to her children absolutely, by her marriage settlement released the real estate from the 5,000%, and, supposing the stock was her absolute property, settled it on her husband for life, with remainder to her children. After the marriage, the parties to the settlement, having discovered the mistake as to the stock, made an indorsement on the settlement that henceforth the stock should be held by the original trustees thereof (in whose name it was still standing), upon the trusts to which it was subject before and at the date of the settlement :- Held, that the children could not claim the benefit of the A testator being absolute owner of copyholds, of

was made, he was entitled to put them to their

## 6. ELECTION BY ISSUE IN TAIL.

General and Particular Intention.]-By a settlement made in 1842 on the marriage of a female infant, the husband and wife covenanted, as soon as the wife attained 21 to convey real property to which she was entitled as tenant in tail, and personal property belonging to her, to trustees upon trust, after the death of the wife, for their children as they should by deed appoint, and in default of appointment, as the survivor should by deed with or without power of revocation and new appointment, or by will, appoint, and in default of appointment upon trust for the children equally; and the husband assigned a policy on his own life to be held upon the same trusts. The wife died in 1857 without the joint power of appointment being exercised and without barring the entail, leaving five children her surviving, and the eldest son entered into possession of the real estate as tenant in tail. In 1864 the husband by deed appointed the trust property other than the real estate to his four younger children, reserving to himself a power of revocation and new appointment. In pursuance of this appointment, the whole trust property except the policy moneys was divided. In 1869 the husband by will, reciting the power contained in the marriage settlement, appointed certain specific moneys to his eldest son and three of his younger children. In 1878 by deed, reciting the deed of 1864, and the division of the property therein, and that the policy moneys alone remained subject to that settlement, the husband revoked the deed of 1864, and applied the policy moneys in equal fifths between his four surviving children, including the eldest son, and the issue of a deceased child, and reserving to himself a power of revocation. The husband died in 1888 :—Held, that the will did not operate by virtue of s. 24 of the Wills Act, to revoke the deed of 1878; that the will remained in force as to the share which the husband by the deed of 1878, purported to appoint to the issue of his deceased child; that the eldest son was not bound to elect between the real estate and the benefits derived under the deed of 1878, but that he was bound to elect between the real estate and the benefits derived under the will. Wells, In re, Hardisty v. Wells, 58 L. J., Ch. 835; 42 Ch. D. 646; 61 L. T. 588; 38 W. R. 229.

Copyholds-Estate Tail not Barred. ]-Where entitled also to a sum of stock for her life, with a testator, acting upon the belief that he had barred his estate tail in his copyhold lands, charged all his real estate with the payment of an annuity to his customary heir in tail, and devised both his freehold and copyhold lands, which were inseparably intermingled, to third persons:—Held, that the heir in tail must elect between the copyholds and the annuity under the will. Honywood v. Forster, 30 Beav. 14; 30 L. J. Ch. 930; 7 Jur. (N.S.) 1264; 4 L. T. 785; 9 W. R. 855.

- Equitable Estate Tail-General Devise. ]release of the 5,000L, and also the stock, to the which he had been admitted tenant, and having the legal fee of other copyholds holden of the same manor, to which he had not been admitted, but subject to trusts under which he was, in equity only, tenant for life, with remainder to his son in tall, remainder to himself in fee, surrendered to the use of his will all his copyholds holden of the manor, or which he was seised of, or entitled to; he was subsequently admitted tenant of all the copyholds subject to the trust, except the moiety of one tenement, and afterwards devised all his hereditaments, freehold and copyhold, to trustees upon trust for his son for life, with remainder over :—Held, that the surrender and the will passed both the legal and beneficial interest in all the copyholds upon which the surrender operated, including those of which the devisor was in equity only tenant for life, and that the son must elect between the general devise and the equitable estate tail, which he took under the old trusts, to which some of the copyholds were subject. Abdy v. Gordon, 3 Russ. 278.

Devise of Manors in Fee. ]-A., at the date of 4 Jur. (N.S.) 1271. his will, was seised in fee of the manor of G., and was tenant for life, under his father's will, of the mansion-house of C. and the manor of W., with an ultimate reversion in fee after life estates and estates tail. He devised the mansion-house. of C. and the manors of G. and W. to C. for life, with remainders over. The limitations of the will corresponded in a great measure to those of the father's will. The will gave the tenants under the father's will, powers of jointuring, to be capable of being exercised as they should come into possession of the estates under the limitations in the testator's will:-Held, that it was the intention of the testator to dispose not only of his reversion in the mansion-house of C., and manor of W., but to deal with the present interest in them; and that C., who had become absolutely entitled to those properties M. & G. 641; 26 L. J., Ch. 218; 8 Jur. (N.S.) 74: 5 W. R. 129.

Case of election under will of tenant in tail assuming to devise certain manors in fee. Woodroffe v. Daniell, 7 Jur. 959.

Devise of Estate subject to a Charge, |-- Under the will of S., several estates, including H.'s farm, stood limited to W. for life, remainder to his issue in tail, remainder to J. for life, remainder to trustees for one thousand years, remainder to J.'s issue in tail. The trust of the term was, upon the decease of the survivor of W. and J., and the failure of issue of W., to raise 10,000%, for the children of J. and C., other than that one entitled to the first estate of inheritance. W. never had a child, but J. and C. had each several. J., in the lifetime of W., made his will, by which he devised unto his eldest son, S., absolutely, real estates, his own property, and also H.'s farm, which he described as "all that his messnage or tenement, farm, and lands, called H.'s farm," and he made bequests to all his other children, greater in value to each than their shares in the 10,000l :- Held, that no case of election was raised against the younger children charge. Stephens v. Stephens or Stone, 1 De G. and H., or E. and his eldest son. Lorton v. & J. 62; 3 Jur. (N.S.) 525; 5 W. R. 416, 540. Kingston (Eurl), 5 Cl. & F. 269.

Devise of Reversionary Interest charged with Annuity. - Devise of Blackacre to the defendant for life, conditional upon his confirming the disposition in the will of property thereinafter devised of testator's late brother U., followed by a residuary devise of all the manors and hereditaments being freehold of inheritance of or to which testator was then, or at his death should be, seised or entitled at law or in equity for any devisable estate or interest, including lands known as duchy lands; as to Whitenere and two other estates, to uses for securing an annuity; and as to all the same manors and hereditaments, subject, as to the three last-mentioned estates, to the uses thereinbefore limited to use of the plaintiff for life :-Held, that the defendant must elect between Blackaere and certain duchy bands of which Whiteaere was one, and which stood limited to U. for life, with remainder to the defendant for life, with remainders over for life, and in tail with ultimate remainder to the testator in fee, the testator having no other duchy lands. Ustiche v. Peters, 4 K. & J. 437;

Queere, whether, if Whiteacre had not been mentioned a case of election would have been avoided, upon the ground that the testator contemplated the possibility of acquiring other duchy lands between the date of his will and his death. Ib.

Quære, whether, where a testator disposes of all property of a particular character of which of the father's will. The will gave the tenants he has now, or may hereafter have power to for life, several of whom were tenants for life dispose, he is, in order to avoid a case of election, to be taken as providing for the case of his buying some of that class of property. Ib.

H. K., being in 1722 in possession of estates, A. and B., under a limitation in a deed, dated in 1689, to him for ninety-nine years, remainder to his first and other sons, in tail male, in strict settlement, with similar limitations to his brother R. K. and his issue, remainder to his sisters in tail, covenanted with R. K., the sisters, and also under the will of the testator's father, was put the trustees to preserve, &c., to levy fines and to his election. Wintour v. Clifton, 8 De G. suffer recoveries (levied and suffered accordingly). to the use as to estate A, of R. K, in fee, and as to estate B. to trustees for sale, but if not sold (as happened) to the use of H. K. for life, remainder to his first, &c., sons in strict settlement, to which last uses estate A, also devolved at R. K.'s death in 1725, by virtue of a deed executed by him in 1724. H. K. afterwards, claiming to be seised in fee of both estates, devised them to his younger sons E. and H. in moieties for their respective lives, remainder to their first, &c., sons respectively, in tall male.

After H. K.'s death in 1730, R., his eldest son, entered into possession of both estates, and suffered recoveries. On his death, without issue, in 1755, E., his brother and heir, and H. claiming as his devisee, instituted suits against each other. which they terminated by agreement, confirmed by act of parliament, securing to H. for life and to his issue both estates, whether H. K. had power to devise them or not, remainder to E, and his issue in tail, so far only as H. K. had power to devise them :- Held, that H. K. did not acquire the fee of the estates, and had no power to devise them; that R. acquired the fee and died so seised, and if he died intestate E. was entitled to the reversion in fee expectant on the estate vested of J., there being nothing in the will to show in H. by the agreement and act; and, that no that J. assumed to devise H.'s farm free from the case of election arose on H. K.'s will between E.

not disentailed. —The produce of an entailed testator having disposed of his whole estate property was settled on the parents, and aftermongst his children, what he gave them was wards on the children. As to part of the fund, the entail had not been barred :- Held, that the heir in tail (a son of the marriage), having accepted benefits under the settlement, must give effect to it as to the part not disentailed. Mosley v. Ward, 29 Beav, 407.

Two Documents treated as One Settlement. ]-Two ante-nuptial settlements of even date, one of realty and the other of personalty :-Held, to be one settlement for the purpose of putting to her election a person whose property was affected by one, and who claimed a benefit under the other : and the circumstance that her property so affected was a remainder in tail, which the settlor might have barred, was unsuccessfully relied upon in favour of a contrary view. Bacon v. Cosby, 4 De G. & Sm. 261; 20 L. J., Ch. 213; 15 Jur. 695,

Devise to Heir in tail.]—Heir put to election between estates devised to him and descended. the devisor having been tenant in tail of some, and tenant for life, with reversion in fee of others. Welby v. Welby, 2 V. & B. 187; 13 R. R. 58.

Tenant in tail of a rent-charge under settlement, being also devisee in strict settlement of v. Bunhury, 1 Ves. 514; 4 Bro. C. C. 21; 1 R. R. 111. But see Ayres v. Willis, 1 Ves. Sen.

Disposition conditional on Power to make it. -One devised to A, for life an estate which she wrongly supposed she had power to dispose of; she also gave a life interest in other estates to A. A. claimed the first estate under an old entail : Held, he is not put to his election. Cull v. Showell, Amb. 727.

Where A., tenant in tail, remainder to B., the wife of C. in tail, conceiving he had obtained a fee under a void execution of a power, granted leases, and then demised the estate to B. for life, remainder over, and gave B. and C. other benefits under his will, leaving D. residuary legatee. Upon a bill by D. to establish the will, B. elected to take her estate in tail, in opposition to the will, which the master reported to be for her benefit; and it was decreed to her accordingly. Durlington (Earl) v. Pulteney, 2 Ves. J. 544; 3 Ves. 384: 3 R. R. 8.

Condition Precedent.]—C., having an estate for life, under the will of S., with remainder in tail to H., devised his own estate, together with the estate under the will, to trustees to uses, by which the tenant in tail would take only a life estate ; but provided that his own estate should not be conveyed until the tenant in tail should suffer a recovery, and bar the remainders in the former will. H. did acts of ownership, and prepared for, but never suffered the recovery, and died. This was not a case of election, but a condition precedent, which the tenant in tail not having performed, C.'s own estate never vested, and the estate of S. was not affected by it. Roundel v. Currer, 2 Bro. C. C. 67.

Implied Condition. ]-A. having two daughters, B. and C., devised fee-simple lands to B., and lands settled upon him in tail to C. ; if B. elnimed a share of the entailed lands under the settle- heir :-Held, that D, had elected to take under

Produce of Entailed Property .- Part of Fund | ment, she must quit the fee-simple lands ; for the upon an implied condition they should release to each other. Noys v. Mordaunt, 2 Vern. 581. And see Furrester v. Cotton, Amb. 388; I Eden, 532. But see I Swanst. 408, n. S. P., Anon., Gilb. Eq. Rep. 15.

A. seised in tail of freeholds, and in fee of copyholds, devised the copyholds to defendant, who was entitled to the remainder of freeholds, and devised the freehold to plaintiff; defendant apprehending that A, had suffered a recovery, agreed with plaintiff, without consideration, that each should enjoy according to the will; but discovering afterwards that no recovery had been suffered, he sued for the freeholds. Plaintiff brought his bill to establish the agreement, and it was decreed to him accordingly. Frunk v. Frank, 1 Ch. Ca. 84. But see Leonard v. Leonard, 2 Ball & B. 183.

Feme Covert.] — Feme covert must elect between annuity by will to her separate use for life, charged upon a devised estate, and a title paramount to part of the same estates in tail, paramount to part of the same estates in thill.
Wilson v. Thousead (Lord), 2 Ves. 693; 3
R. R. 31. But see Chesham (Lord), In re,
Cavendish v. Duere, 55 L. J., Ch. 401; 31 Ch. D.
466; 54 L. T. 154; 34 W. R. 321.

## 7. ELECTION BY HEIR.

Unattested Will.]—Will purporting to give a real estate to A., but not executed agreeably to the statute, giving (inter alia) a contingent legacy to an infant (who became the testator's heir-at-law), and directing, that if any who received benefit by the will should dispute any part of it, they should forfeit all claim under it : -Held, that the infant heir should elect when he came of age; in the meanwhile A., the intended devisee, was allowed to be in possession of the estate, though restrained from committing waste, and subject to account; as to which his share of the personal estate was declared liable to make satisfaction. Boughton v. Boughton, 2 Ves, Sen, 12. S. P., Whistler v. Webster, 2 Ves, 371: 2 R. R. 260. And see Hearle v. Greenbank, 3 Atk. 715.

Heir put to an election under a will not duly attested. Hume v. Rundell, 2 Sim. & S. 174.

Will not duly executed according to statute had no operation, even to raise an election against person taking personal estate, unless an express condition was annexed. Ilchester (Earl), Ex parte, 7 Ves. 372; 6 R. R. 138. S. P., Sheddon v. Goodrich, 8 Ves. 481. Gardiner v. Fell, 1 J. & W. 22 : 2 Wils, 32 : 20 R. R. 208.

A will, attested by two witnesses, contained a devise of freeholds in England to D. (the testator's son and heir) for life, with remainder to trustees, and a devise to them of estates in St. Kitts, upon trust to sell and invest the proceeds in estates in England, to be held upon the same trusts. D. was in possession of the English, and he received the rents of the St. Kitts' estates during his life; and, with his concurrence, the trustees made efforts—though ineffectual—to sell the latter. After the death of D., intestate, the trustees contracted to sell one of the St. Kitts' estates, but the purchaser refused to complete, on the ground that the will was inoperative in the island, and that the estates descended upon the the will, and that his infant heir was bound by decease to trustees upon certain trusts. He then his acts, and was a trustee under the act of 1850 devised an estate, called the Tempo estate, to his v. Maitland; L. B. 2 Eq. 834; 12 Jur. (N.S.) 699; 14 L. T. 853; 14 W. R. 958.

A testator gave all he should leave in the world to trustees to pay his debts and legacies, among which was 1,000l. to his brother and heir, and as to the residue in trust for natural children. He had a real estate in Nova Scotia, but as there was no witness to his will, it descended to his heir. Held, that, supposing the will would have passed real estate if attested in due form (which was doubted), the brother was entitled to his legacy, and also to the real estate. Furquharson v. Colville (Lord), Romilly's Notes of Cases, 129.

Invalid Devise of Land-Bequest of Shares. ]-A married woman who was entitled to shares in a colliery for life, for her separate use, with a power of appointment by will, and also to real estate in fee simple, not for her separate use, by will in February, 1880, appointed her shares in favour of her heir and other children, and pur-ported to devise the real estate away from the heir. She died in June, 1880, leaving her husband surviving :- Held, that, the will being void as to the real estate, the heir was not put to his election. De Burgh Lawson, In re. De Burgh Lawson v. De Burgh Lawson, 55 L. J., Ch. 46; 53 L. T. 522; 34 W. R. 39.

Devise to Heir before the Inheritance Act. ]-Heir put to election between estates devised to him and descended, the devisor having been tenant in tail of some, and tenant for life, with reversion in fee, of others. Welly v. Welby, 2 V. & B. 187; 13 R. R. 58. And see Schroder v. Schroder, infra.

After-acquired Lands. A devise by a will made before 1837 (1 Vict. c. 26, ss. 24, 34), of all the real estates of which the testator then was or at the time of his death should be seised. to his heir-at-law, if the testator acquired real estates subsequent to the date of his will, but the 578; 23 L. J., Ch. 916; 18 Jun. 621; 2 W. R. 462. Affined, 3 Eq. Rep. 97; 24 L. J., Ch. 510; 12 L. J., Ch. 510; 15 L. J., Ch. 5 Ta Jur. 987; 3 W. R. 55. S. P., Churchman v. Ireland, 4 Sim. 520; 1 L. J., Ch. 172. Affirmed 1
 Russ. & M. 250. Hance v. Truchtit; 2 J. & H. 216; 31 L. J., Ch. 289; 8 Jur. (Ns.) 430; 6 L. T.
 19; 10 W. R. 191. Contra, Back v. Kett, Jacob, 534

So, also, would such a devise by a testator, who died before 1834 (3 & 4 Will, 4, c. 106, s. 3), from the mere intention thereby shewn to give the heir property under the will, notwithstanding that he would take nothing in fact under the will, but by his better title as heir. Ib.

In such a case the testator, subsequently to the making of his will, contracted to buy a certain freehold estate, and then made a codicil directing the executors and trustees of his will to complete the purchase, and hold the estate upon the trusts of the will which were partly in favour of the heir, and then the testator took a conveyance of the same estate to uses to bar dower in his own favour :- Held, that the devise by the codicil was revoked, and that the heir must elect. Ib.

A testator devised all his real estates, of which

for the person claiming under the will. Dewar daughter (who was his heiress-at-law), for life, with remainders over; and continued as follows: "I leave and bequeath the rest, residue and remainder of my properties, both freehold and personal, of whatsoever nature or kind I may die possessed of, to A. B.," &c. The testator, after the date of his will, acquired other freehold estates, and by two deeds executed after his will, charged four denominations of the Tempo estate with annuities, and limited such denominations to trustees, taking back therein an estate in fee simple to himself, subject to the annuities, whereby there was a revocation in law of the will as to those denominations. The heiress having elected to take against the will, her life interest in the Tempo estate became liable for compensation to the disappointed devisees :-Held, that neither the persons to whom estates were limited by the will in remainder in the Tempo estate, nor the residuary devisees in respect of the after-acquired estates, were entitled to compensation out of the life interest of the heiress in the Tempo estate. Tennant v. Tennant, Ll. & G. t. Plank, 516.

Semble, that the doctrine of election ought not to be applied to the case of revocation by a

recovery merely. 1b.

Will directing, that in case the testator should enter into contracts for the purchase of hands, and die before the conveyance, such contracts should be carried into execution, and the money paid out of his personal estate, and the conveyance to his trustees, the heirs, &c., to the uses of his will; the heir having interest bequeathed to him put to election. Thellusson v. Woodford, 13 Ves. 209; 9 R. R. 175. Affrmed nom. Rendlesham v. Woodford, 1 Dow, 249; 14 R. R. 62.

The only instances of limiting the principle of election were an attempt to devise by a will not duly executed, or an attempt to devise by an infant, Ib.

was revoked as to an estate purchased before the will by the conveyancer thereof, after the date of the will to the usual uses to bar dower :-- Held, that the testator's heir (who was entitled to benefits under the will) was not bound to elect. Plowden v. Hyde, 2 Sim. (N.S.) 171; 2 De G. M. & G. 684; 21 L. J., Ch. 796; 16 Jur. 512.

Devisable Interest.]—A testator seised in fee of copyholds devised them to his wife for life; and he directed his executors (without giving them any estate) after her death to sell the copyholds, and divide the proceeds. The testator's widow was admitted for life, and after her death the executors sold the estate, and executed a bargain and sale to a purchaser, who, without having been admitted, made his will, and devised the estate to his wife; he was subsequently admitted and died. The wife under her husband's will had also entered upon freehold lands, purchased after the date of the will:—Held, that they passed to the heir, and that he was not bound to elect between them and the benetits given by the wife's will. Seaman v. Woods, 24 Benv. 372; 27 L. J., Ch. 538; 4 Jur. (N.S.) 725.

A. devised his T. estate to D., charged with a

legacy to B., and his M. estate to U. (who was A,'s heir) for life; remainder to the trustees of a he should be possessed or entitled to at his college. C. filed a bill impeaching the will. A compromise was agreed upon with the college, tenant divested himself of the legal estate, and the effect of which would be to confirm to C. the greater portion of the M. estate; but before it was completed C. died, having devised the estate as her own to B., and the T. estate to D. B. went into possession under C.'s will. After C.'s death the compromise was completed:—Held, that C.'s will raised a case of election against B., and that he could not claim the legacy under the will of A., having elected to take the M. estate under the will of C. Sudier v. Butler, Ir. R. 1 Eq. 415.

C. devised the T. estate as "all my real estates, &c., in the county of T." :-Held, that the T. estate was devised free from the legacy charged

on it by the will of A. Ib.

Unsurrendered Copyholds - Devise prior to 55 Geo. 3, c. 192.]—Devise in general terms, residue of real and personal property to nephews and nieces, not being for creditors, wife or children, did not raise a case of election against the customary heir, or for supplying the want of surrender of copyholds contignous and intermixed with the freeholds, Judd v. Pratt. 15 Ves. 390.

Under similar circumstances the court would not put the heir to election, though the devise was to a younger child. Hodgson v. Merest,

9 Price, 556.

Where a copyhold was devised, but was not surrendered, and the heir had a legacy and an interest in other estates devised to him he was entitled to both. Jeffreys v. Duhamel, Romilly's Notes of Cases, 129. Contra, Blunt v. Clitherow, 10 Ves. 589. Pettiward v. Prescott, 7 Ves. 541.

Devise of all freeholds and copyholds; the copyholds were surrendered to the use of the will, but the testatrix afterwards exchanged part for other copyholds, which were not surrendered. The heir claiming beneficially surrendered. The neir claiming beneficiary under the will was put to election. Frank v. Standish (Lady), 15 Ves. 391, n.

Testator taking notice that he had not

surrendered copyholds which he devised, but directing his son to convey them, and devising to him other estates, though the copyholds were not devisable by custom, the surrenders decreed to be made. Wardell v. Wardell, 3 Bro. C. C. 116.

Testator devised the residue of his estates, "the copyhold part thereof having been previously surrendered to the use of my will," upon trusts in favour of his wife and children; the only trust for his eldest son and heir was an annuity of 300l. for life, remainder to his wife and children. The testator never having surrendered his copyhold, it was held a mistaken description, the copyhold being intended to pass; and, the annuity being much more valuable, heir was decreed to elect, and was not bound by receiving half a year's payment of the annuity while abroad. Lumbold v. Rumbold, 3 Ves. 65. Testator, possessed of freehold and copyhold

not surrendered, of which latter his mansionhouse was part, devised all his real and personal estate to his wife for life, remainder to his heirat-law :-Held, from an expression in his will, "if she should think proper to reside at his said mansion-house," that the testator intended to devise his copyhold, and that the heir therefore ought to elect. Unett v. Wilhes, 2 Eden, 187; Amb. 480.

In a manor where there was no custom of surrendering to the uses of the will, but the able bond :-Held, that the residuary estate was

by surrender vested it in a trustee, who subscribed a memorandum or defeasance that the surrender was to the uses of the surrenderor's will. The father and maternal grandfather of the testator R. N., being both copyholders, had respectively surrendered their copyholds to the other, who had subscribed the usual defeasance. The legal estate in both descended to the testator. The testator's maternal grandfather devised the beneficial interest in his copyholds to trustees upon trust for the testator R. N.: -Held, that the equitable interest had merged in the legal estate, in the testator, and could not be devised by him according to the custom of the manor; that his widow was entitled to freebench, and the heirs subject thereto, to the inheritance: but they, taking benefits under the will, were bound to elect. Nicholson v. Nicholson, Tam. 319.

Devise to Heir subject to Trust. ]-Devise to a son, recommending him to continue his consins as tenants of their respective farms, as theretofore, and so long as they continued to manage the same in a husbandlike manner, and to duly pay their rents. A trust for the cousins who had been tenants at will, and the son being the heir was put to his election. As to the effect of election against the will, whether compensation or forfeiture, quere. Tiblits v. Tiblits, 19 Ves. 656. Affirmed Jacob, 317; 23 R. R. 79.

Heir by Will directed to elect. |-- Where, by will, an heir was directed to elect, and trustees had power to appoint, and from circumstances of case, if the heir had been held to have elected at all, it would have been in a manner contrary to the prayers of bills filed to compel him, and the appointments made by trustees, the court would ouly refer it to the master to compel him to elect generally. Tucker v. Sanger, McCle. 439; 13 Price, 607.

Devise of Scotch Heritable Property. ] - A testator devised "all the residue of my real estate situate in any part of the United Kingdom or elsewhere." He had real estate as well in Scotland as in England :- Held, that the heirat-law taking the Scotch lands by descent was put to his election. Orrell v. Orrell, 40 L. J., Ch. 539; L. R. 6 Ch. 302; 24 L. T. 245; 19 W. R. 370.

A testator, domiciled in England and entitled to heritable bonds affecting lands in Scotland, made a will according to the English law, whereby he gave to trustees all his real and personal estate upon trust for his wife and all his children. The will was inoperative to pass the heritable bonds, for want of the word "dispone" in the devise, and of a proper attestation clause according to Scotch law:—Held, that the heir-at-law was not put to his election. Maxwell v. Maxwell, 2 De G. M. & G. 705; 22 L. J., Ch. 43; 16 Jur. 982. And see Dundas v. Dundas, 2 Dow & Cl, 349-H. L. (Sc.)

A domiciled Englishman executed a trust disposition and settlement in the Scotch form, of an estate in Scotland. He then made an English will, declaring that it should not affect the previous settlement of his Scotch estate, and charged his residuary real and personal estate with payment of his debts. He subsequently charged the Scotch estate with 14,000l., by a heritof the Scotch estate. After the date of his willthe testator purchased other freehold property in Scotland, which passed by intestacy to his heir: Held, that the heir was not bound to elect, but had the same right to that property which he would have had if there had been no will, Max-

well v. Hyslop, L. R. 4 Eq. 407; 16 L. T. 660.

A Scotchman, domiciled in England, devised the residue of his real, personal, and mixed estates whatsoever and wheresoever, upon trust for his children in certain shares. One of the children, being the heir-at-law of the testator, became entitled, according to the law of Scot land, to a heritable bond made by a debtor of the testator after the will, and given as a security for a debt which was owing to him when the will was made :-- Held, that the heir was not a trustee of the bond for the executors of the testator, and that he was not bound to elect. Allen v. Anderson, 5 Hare, 163; 15 L. J., Ch. 178; 10 Jur. 196.

An heir is not put to his election between a Scotch estate and benefits given to him by a will, by mere general expressions, especially if the uses of the will are not applicable to Scotch property. A testator, by a codicil, reciting that he had purchased certain freeholds since his will, devised them to trustees upon the trusts of his will, and directed that if any hereditaments purchased by him should be conveyed after the date and publishing thereof, his heir-at-law or other real representatives and any other person in whom the same should be vested, should upon his decease assure the same to his trustees upon the trusts of his will. He purchased other estates; a case of election was not raised against the heir taking benefits under the will. Johnson v. Telford, 1 Russ. & M. 244; 8 L. J. (o.s.) Ch. 94.

Heir of heritable property in Scotland, being legatee of personal property in England, put to Brodie v. Barry, 2 V. & B. 127; his election. 13 R. R. 87.

An heir of heritable property in Scotland, who was also the devisee of real estate in Ireland. under a will executed by the testator when domiciled in Ireland, and attested according to the law of this country, is bound to elect,

M' Call v. M' Call, 1 Dr. 283. The Scotch heir of cutail, whether or not he be also heir of line, and whether the entail were created by the last holder, or by a more remote ancestor, must, unless he take by special and exclusive destination (from the last holder). collate such entailed estate before he is admitted to a share of the personalty. Anstruther v. Anstruther, 4 Cl. & F. 33-H. L. (Sc.). S. P., Breadalbane v. Chandos, 3 Cl. & F. 43 (and 56, n.)-H. L. (E.). Affirming 2 Myl. & C. 711; 7

L. J., Ch. 28. A widow with one child, a son, by a marriage contract exercised a power vested in her to charge Scotch estates in favour of younger children to the extent of 30,000/. This power bound her successive heirs in tail according to the Scotch law; and there being one child of the second marriage, he, on her death, became entitled to the charge, which was a personal bond. The heir of cutail, the son by the first marriage, substituted a heritable bond for the personal security, and paid off portions; the son of the second marriage releasing the land pro

liable to payment of the 14,000% in exoneration | bequeathing estates of which he was a mortgagee; upon trust to reconvey on payment, and by a codicil referring to mortgages on Scotch estates :- Held, that prima facie there was no conversion into realty; although that was not certain; and was a question of Scotch law, and not necessary to decide, inasmuch as the heir was put to his election, and there was an intention to pass by the will the money secured by the bond. Lamb v. Lamb, 5 W. R. 720,

#### 8. ELECTION BY CO-OWNERS.

Devise of whole by one Tenant in common. J. C. being entitled in fee to undivided moietles of two freehold houses, and also to an undivided moiety in a leasehold house, devised "all that my freehold messuage or tenement, with the garden, &c., referring to one of the houses only :- Held, that these words were a gift of the entirety of the house referred to, and raised a case of election as against the party entitled to the other moiety, and who took beneficially under the will. Pudbury v. Clarke, 2 Mac. & G. 298; 2 Hull & Tw. 341; 19 L. J., Ch. 533. S. P., Fitzsimons v. Fitzsimons. 28 Beav. 417; 6 Jur. (N.S.) 641; 3 L. T. 141.

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A testatrix, after devising "all and singular the estate and mines of A," npon certain trusts, bequeathed to T. 10,000L, in satisfaction of any sum which she might owe him, and to W. 3,0001. in satisfaction of any rent-charge out of a certain part of her real estate. Her will contained the usual devise of trust and mortgage estates. She was owner only of one moiety of the A. estate. being in possession of the other molety under a mortgage, the money due upon which was subject to trusts, under which T. and W. on her death, became cutitled each to one-fifth :-- Held, that T, and W. were put to their election. Wilhinson v. Dent, 40 L. J., Ch. 253; L. R. 6 Ch. 339; 25 L. T. 142; 19 W. R. 611,

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A testator being selsed of a messuage in S.street, and of another messuage in P.-street, and being entitled to two-third parts of a freehold messuage, and eighteen cottages in S.-street, his wife being entitled to the other third part, devised tanto, and bequeathing his property to trustees all his freehold messuages or tenements, cottages, (the obligor in the second bond being one), upon hereditaments, and premises, situate in P. street trusts for his wife and children, and specifically and S. street, to his widow for life, and gave her of election arose as against the widow. Miller v. Thurgood, 33 Beav. 496; 33 L. J., Ch. 511; 10 Jur. (N.S.) 304; 10 L. T. 255; 12 W. R. 600.

#### 9. ELECTION IN OTHER CASES.

By Creditor-Should be made within Reasonable Time.]—Where there is a choice of debtors, and a liability is sought to be created by estoppel, and the remedy over against the person who ought to pay is likely to be imperilled by delay, the rule that an election should be made within a reasonable time ought to be strictly applied. Fell v. Parkin, 52 L. J., Q. B. 99; 47 L. T. 350.

- Unequivocal Indication of Intention. ]-And while the indication of intention to elect must be clear and unequivocal, an act of a creditor (who has the right of election) by which he materially affects the position of the co-creditors of one of his debtors, is such clear and unequivocal act of election to proceed against that particular debtor. Ib.

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#### 10. CAPACITY TO ELECT.

#### a. Infant.

Infant Tenant in Tail-Interests of Remaindermen.-Election on behalf of Infant-Direction to convey. -- A testator purported according to the doctrine of election to devise to the trustees of his will settled lands which, at the testator's death, stood limited to the use of an infant in tail, with remainders over to other infants, and devised lands of his own of much greater value to the infant tenant in tail, whose advantage it was to elect to take under the will. The infants entitled to the settled lands in remainder also took interests under the testator's will; but it was not yet clear whether it was altogether to their advantage to elect to take under the will. The infant tenant in tail was seventeen years of age :- Held, that the court would not postpone electing out of regard for the infant remaindermen, but would elect at ouce on behalf of the infant tenant in tail to take under the will. Montagu, In re. Faher v. Montagu, 65 L. J., Ch. 372; [1896] 1 Ch. 549; 74 L. T. 346; 44 W. R.

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> Infant Heir-at-Law.] - Will, purporting to give real estate to A., but not executed agreeably to the statute, giving (inter alia) a contingent legacy to an infant (who became the testator's heir-at-law), and directing that, if any who received benefit by the will disputed any part of it, they should forfeit all claim under it :-Held, that the infant heir should elect when he came of age: in the meanwhile A., the intended devisee, was allowed to be in possession of the estate, but restrained from waste, and subject to account as to which his share of the personal estate was declared liable to make satisfaction. Boughton v. Boughton, 2 Ves. Sen. 12.

Marriage Articles-Subsequent Settlement. —The ancestor, by marriage articles, agreed to settle lands to the use of himself and his intended wife, remainder to the issue. He made a deed, not pursuant to the articles, and had a son and two daughters; and upon the marriage of his son, settled other lands, in consideration of such marriage, in the usual manuer; and levied a fine of the former lands to the use of himself in fee; and then devised part of the former lands to his two daughters, and the rest of his real estate to trustees, to the use of his grandson for life, with usual remainders; and with direction, out of the profits, to educate the grandson; and to place out the rest of the profits, to be and to place and the rest of the points, to be paid to the grandson at twenty-one; and if he did not attain that age, to be paid to his said daughters. The grandson was not bound by the deel which did not pursue the articles; but he must make his election when he came of age; and if he chose to take lands which ought to have been settled, the daughters (his annts) were to be reprised out of the lands devised to him. Streatfield v. Streatfield, Forcest, 176.

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A lady, being entitled to a sum charged on an estate of which she was tenant for life, with remainder to her children in tail, and being entitled to a sum of stock for life, with remainder to her children absolutely, on her marriage, supposing the fund to be her own, settled it on her husband for life, with remainder to her children.

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A lady, being entitled to a sum charged on an estate of which she was tenant for life, with remainder to her children in tail, and being entitled to a sum of stock for life, with remainder to her children absolutely, on her marriage, supposing the fund to be her own, settled it on her husband for life, with remainder to her children,

held by the trustees on the original trusts :-Held, that the children were obliged to elect under or against the settlement, and a reference was directed as to which would be most for their benefit. Seton v. Smith, 11 Sim. 59.

Marriage Articles not confirmed.]-Where marriage articles, executed when the lady was a minor, contained a covenant by the husband to settle her interest in real and personal estate, including after-acquired property, on the usual trusts, and she died without having confirmed the articles, leaving her husband surviving, and an only child, her heiress-at-law, who claimed an interest under the articles in the personal estate, and also claimed the real estate attempted to be settled as heiress-at-law of her mother :- Held, that the heiress-at-law was put to her election. Brown v. Brown, L. R. 2 Eq. 481; 14 L. T. 694.

And see HUSBAND AND WIFE-INFANT.

#### b. Lunatic.

Paraphernalia. - Where a lady was possessed of jewels and ornaments of the person before her marriage, and after her marriage they were in all writings spoken of by her husband as hers, and were deposited with bankers, with whom she, with his consent kept a separate account, and after her lunacy the husband made his will, giving her the use of his jewels and household effects, including the jewels and effects which belonged to her before her marriage and which he had assumed by marital right, for her life, Upon the death of the lunatic, who survived her husband, the court held, that as to such of the articles as formed paraphermalia, the wife's next of kin were entitled to elect whether they would take them or the benefits given by the will, Hewson, In re, D'Almaine v. Moseley, 23 L. J. Ch 256

Married Woman of Unsound Mind-Jurisdiction of Court to elect.]—A married woman, who had elected to confirm a marriage settlement made when she was an infant, having subsequently become of unsound mind, if she had not elected the court would have made an election on her behalf, it having jurisdiction to bind the equitable interests of lunatics, not so found by inquisition, when it appears to be for their benefit. Wilder v. Piyott, 52 L. J., Ch. 141; 22 Ch. D. 263; 48 L. T. 112; 31 W. R. 377. And see Greenhill v. North British and Mercantile Insurance Co., infra.

And see HUSBAND AND WIFE-LUNATIC.

#### c. Married Women.

Restraint on Anticipation. ]-The doctrine of election depends on intention, and a settlement which settles property on the wife without power of anticipation contains a declaration of a particular intention inconsistent with and excluding the doctrine of election; so that the married woman who by the settlement has (being an infant) covenanted to settle future property is children out of the income of the fund settled to tioned on this point. Ib. her separate use without power of anticipation. By an ante-nuptial settlement, dated in 1856

and released the charge; but the mistake being [Willaughby v. Middleton (2 J. & H. 344; 31 discovered after the marriage, a memorandum L. J., Ch. 683; 8 Jur. (X.S.) 1055; 6 L. T. 814; was indorsed, declaring that the stock should be 10 W. R. 460), dissented from: Smith v. Lucus 10 W. R. 400), dissented from ; Smeth V. Lucus (18 Ch. D. 531), and Wheatley, In re (54 L. J., Ch. 201), approved. Vardon's Trusts, In re, 55 L. J., Ch. 259; 31 Ch. D. 275; 53 L. T. 895; 34

W. R. 185-C. A.

In the case of a married woman to whom an interest with a restraint on anticipation attached thereto is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the value of her interest in the property to be relinquished by way of compensation has, by the terms of the by way of compensation has, by the terms of the instrument, been made inalicinable. Wheatley, In re, Smith v. Spence, 54 L. J., Ch. 201; 27 Ch. D. 606; 51 L. T. 681; 33 W. R. 275.

By a post-nuptial settlement made in 1847, the hasband covenanted that all property which the wife, or her husband in her right, was then or should during the coverture become possessed of or entitled to, should be assured upon trust for the wife for life to her separate use, without power of anticipation, and after her death upon trusts in favour of the husband and issue of the marriage. During the coverture property of the wife was reduced into possession by the husband, and settled upon the trusts of the settlement. In 1883 the wife became entitled, as one of the next of kin of a deceased testator, to a share of undisposed-of personalty :--Held, that the wife could be put to her election, notwithstanding that the compensating fund was subject to restraint on anticipation. Willoughby v. Middleton (2 J. & H. 344) questioned but 7. Manteton (2.5, a. 1. 544) questioned but followed. Queude's Trusts, In re, 54 L. J., Ch. 786; 53 L. T. 74; 33 W. R. 816.
An agreement by husband and wife, in an

ante-nuptial settlement, for the settlement by the husband and wife of the wife's after-acquired property, is a covenant by the wife as well as by the husband, whether the wife is a minor or of full age. Smith, v. Lucas, 18 Ch. D. 531; 45 L. T. 460; 30 W. B. 451.

If the wife is a minor, and the covenant is for her benefit, it is voidable only and not void, and is binding upon all property coming to her during the coverture for her separate use, without a restraint on anticipation, until she avoids or disaffirms the covenant as to such property; for she may, after attaining twentyone, and during the coverture, elect whether the covenant shall be binding on her separate estate or not, such right of election being a necessary consequence of a married woman's power to dispose of, without her husband's consent, property settled to her separate use : but-inasmuch as a contract by a married woman, while under coverture, affecting her separate property binds only her then-existing separate property binds only ner then-existing separate property, and not separate property which she may thereafter acquire (*Pike* v. *Fitzgilban*, 50 L. J.; Ch. 894; 17 Ch. D. 454; 44 L. T. 562; 29 W. R. 551-C. A.)-the wife, in electing to confirm the covenant, thereby binds only that separate property to which she is entitled at the date of the confirmation, and not that to which she may subsequently become entitled during the coverture. Semble, the doctrine of election or compensation does not apply in the case of a married woman entitled for her not bound, on taking a bequest for her separate separate use with a restraint on anticipation, use, to make compensation to her husband and Willoughby v. Middleton (2 J. & H. 344) ques-

the lady being then a minor, after reciting that 69 L. T. 526; 42 W. R. 91. See also Hodson's she would be entitled on attaining twenty-one Scattlement, In re, Williams v. Knight, 63 L. J., to a share of her deceased father's estate, and Ch. 609; 8 R. 346; [1894] 2 Ch. 421; 71 L. T. the intention to settle the same, it was agreed and declared between the parties thereto, and the husband covenanted with the trustees, that the husband and wife and all other necessary parties would, as soon as the wife attained twenty-one, convey the share to the trustees upon trust for the wife during her life for her separate use without power of anticipation, and after her death for the husband till bankraptey or alienation, with remainder for the issue of the And it was further agreed and declared that if the wife then was, or if at any time or times during the coverture she or her husband in her right should become seised or possessed of or entitled to any real or personal property for any estate or interest whatsoever, then and in every such case the husband and wife and all other necessary parties should assure the same to the trustees upon the trusts thereinbefore declared. The settlement contained a power for the trustees at the request of the wife, to lend any of the trust funds to the husband on his personal security. The wife attnined twenty-one in 1857, and in 1858 she and her husband, in pursuance of the covenant in that behalf in the settlement, conveyed her share of her father's estate to the trustees of the settlement. In 1863, apon the death of a brother, the wife became entitled under his will to certain funds thereby bequeathed to her for her separate use. These funds, and also funds arising from her share of her father's estate, were, with the assent of the wife, paid to the trustees of the settlement and by them lent, at her request, to the husband on his personal scenrity. In 1880 mother to a sum of 4,000%, and a share of her residuary estate thereby bequeathed respectively to her for her separate use :-Held, that the wife could elect to retain the 4,000% and share of residue for her separate use unbound by the covenant for the settlement of her after-acquired property. *Ib.* And see *Hamilton* v. *Hamilton*, 61 L. J., Ch. 220; [1892] 1 Ch. 396; 66 L. T. 112; 40 W. R. 312.

Ante-nuptial Agreement to settle Wife's Property - Settlement executed by Husband alone. |-- A husband and wife had entered into an ante-nuptial agreement, which was signed by the husband only, for the settlement of the wife's property, part of which consisted of a reversionary chose in action which was not within Malins' Act. After the marriage the husband alone excented the settlement, which contained a covenant by the husband and wife to assign the wife's property to trustees upon trust for the wife for life, and after her death for such persons as she should by deed or will appoint. The wife, however, during coverture exercised the power of appointment given her in the settlement by mortgaging the reversionary chose in action for her own benefit : -Held that she had by her conduct elected to confirm the settlement, and, although a married woman, was bound by it; and that, therefore, the mortgage was valid, Scoton v. Scoton (57 L. J., Ch. 661; 13 App. Cas. 61; 58 L. T. 565; 36 W. R. 865—H. L. (E.)), is not inconsistent with, and does not overrule Barrow v. Barrow (4 K. & J. 409), and Wilder v. Pigott (22 Ch. D. husband and wife, or anything short of a 263). Greenhill v. North British and Mercantile commission, or as near thereto as possible. Insurance Co., [1893] 3 Ch. 474; 62 L. J., Ch. 918; Parsons v. Dunn, 2 Yes. Sen. 60.

Wife's Reversionary Property comprised in Post-nuptial Settlement.]—A lady, having an absolute interest in reversion in property under the marriage settlement of her parents, married hile an infant. After she came of age, post-nuptial settlement was executed, to while an infant, which she was a party, comprising her re-versionary interest, and also property of her father and her husband. The morriage was afterwards dissolved, and she then claimed the reversionary property independently of the settlement:—Held, that as it appeared from the settlement that her reversionary property formed part of the consideration for the settlement of the other property, she was put to her election whether to take under or against it. Codrington v. Codrington, 45 L. J., Ch. 660; L. R. 7 H. L. 854; 34 L. T. 221; 24 W. R. 648.

Inquiry directed. -A married woman cannot declare an election. An inquiry was therefore directed in the case of a married woman (one of two next of kin required to elect) for the purpose of ascertaining whether it was for her benefit and the benefit of her children to take under or against a will. Cooper v. Cooper, 44 L. J., Ch. 6; L. R. 7 H. L. 53; 30 L. T. 409; 22 W. R. 713. Prole v. Soudy, 2 Giff. 1; 29 L. J., Ch. 721;
 Jnr. (N.S.) 1382; 1 L. T. 309; 8 W. R. 131.

Where it is manifest that it is the interest of a feme covert to elect to keep a particular fund instead of taking another bequeathed to her, no inquiry will be directed as to which would be most for her benefit. Wilson v. Townshend (Lord), 2 Ves. 693 : 3 R. R. 31.

Possession taken by husband of estates to which his wife was entitled paramount the will will not prevent her electing to take under the will. Ib.

In some cases a wife shall not be put to elect at all, or her election shall be suspended. As where an infant widow, having a jointure. marries again without determining her election, and her husband enters on the settled estate, his entry shall bind both during the coverture. Harrey v. Ashley, 3 Atk. 617. And see 1 Swanst.

Election by Court. ]-By a settlement trustees were to invest certain moneys in the purchase of lands, and had power to resell; but it was declared that the lands should be considered as personalty. An estate, S., was accordingly bought, and on the marriage of E.—an infant, who was entitled to the lands-was treated as The marriage settlement was made under the direction of the court, and contained provisions for giving the husband a life estate in S, and in the wife's after-acquired lands. She inherited lands, and died leaving a daughter :-Held, that S, was to be considered as personalty; and that the court would elect for the daughter, whether to take the inherited lands against the settlement, or to take under the settlement. Ashburnham v. Ashburnham, 13 Jur. 1111.

Power of Attorney.]—Election to be made by feme covert resident abroad cannot be effectuated under a power of attorney from the husband and wife, or anything short of a

1584

Suit by Wife for specific Performance.] - A married woman can elect, so as to affect her she has so elected, the court can order a conveyance accordingly; the ground of such order being, that no married woman shall avail herself of fraud. Barrow v. Barrow, 4 K. & J. 409; 27 L. J., Ch. 678; 4 Jur. (N.S.) 1049; 6 W. R. 714.

An intended husband covenanted to settle lands, of which the intended wife, then an infant, was tenant in tail, upon trusts for her separate use for life, remainder for himself for life, remainder for the children. The wife, on attaining twenty-one, filed a bill against her husband, and obtained a decree for specific performance of the covenant. The husband dving a month after the decree :- Held, upon petition by the children, that these acts on the part of the wife amounted to an election, and that she was bound by the decree, and she was ordered to settle the property accordingly.
But see Hamilton v. Hamilton, supra.

Separate Examination in Court. ] - The purchase-moneys of real estate to which a married woman was absolutely entitled, having been paid into courr by a railway company under the Lands Clauses Consolidation Act 1845, s. 69, upon a petition by the owner and her husband for payment out to the latter :- Held, that the married woman might elect upon her separate examination in court to take the fund as personalty, and an order was, by her consent, made for payment out to her husband without a deed. Rahin's Estate, In re, 27 W. R. 705.

Reference to Arbitration. ]-Court would not permit reference to arbitration, one of the parties being stated to be a feme covert interested in real estate, nor even a reference to master whether it would be for her benefit, as in case of an infant, distinguishing the case of election mon the condition imposed. Davis v. Page, 9 Ves.

Suit to ascertain Value with view to Election. -A domiciled Scotchman by his will gave certain benefits to his wife, and she after his death filed a bill claiming her right by the law of Scotland to elect between such benefits and one-third of his movables, and her terce in his heritable estate, and praying that the value of the objects between which she had to elect should for the purpose of her election be ascertained by the court. The devisee of the Scotch real estate, who was also residuary legatee, and one of the executors, filed a cross bill praying for a general administration of the personalty :- Held, that under the circumstances the court had jurisdiction to direct such inquiries as might be necessary to guide the wife in exercising her right of election, and as far as possible to give effect to it. Danglas v. Danglas, 41 L.J., Ch. 74; L. R. 12 Eq. 617; 25 L. T. 530; 20 W. R. 55.

Reversionary Choses in Action.]-A married woman cannot, by election, part with her re-versionary choses in action. Williams v. Mayne, Ir. R. 1 Eq. 519; 16 W. R. 173.

Quere, can a married woman, entitled to a reversionary chose in action, elect to take a legacy against the will of her husband. Wall v. Wall, 15 Sim, 513; 16 L. J., Ch. 305; 11 Jur. 403.

Consent by Counsel to release Jointure. ]-The consent of a married woman by her counsel interest in real property, without deed acknowledged mader the 3 & 4 Will. 4, c. 74, and where for maintenance during the life of her husband, to release her jointure, and accept an allowance who was a lunatic, without prejudice to her right to dower:—Held, not to be binding upon her after his decease. Frank v. Frank, 3 Myl. & C. 171.

A feme covert is not competent, during the coverture, to elect between a jointure made to her after marriage and her dower at common law, Ib.

Equity to a Settlement-Waiver. - In 1866 A., a married woman, being one of the presumptive next of kin of a lunatic, in consideration of sums advanced to her husband, and of a covenant by C. to pay her, on the death of the lunatic, two sums of 400L and 500L, with interest on the former sum in the meantime, for her separate use, joined her husband in assigning her presumptive share of the lunatic's assets to C. The interest was paid until 1881, when the hunatic died; but C.'s assignee refused to pay the further interest.

A. was declared one of the next of kin in a suit to administer the lunatie's assets, and applied to the court for payment of the interest due on the 400%, and a portion of the principal. In 1883, A., being then administratrix of the lunatic, acknowledged the deed of 1866 before commismissioners. A part of the lunatic's assets had been lent on mortgage of real estate :- Held, that the deed of 1866 was void against A., and could not be confirmed by any act of hers, and that she had not elected to take under it, or waived her equity to a settlement; and that neither the fact of part of the assets being lent on mortgage, nor  $\Lambda$ 's being administratrix when it was made, gave the acknowledgment any legal validity. Druitt v. Willens, 23 L. R., Ir. 436. And see HUSBAND AND WIFE-INFANT.

## 11. COMPENSATION.

Nature of Right-When Complete. |- Election gives a right to compensation; assuming such compensation to be in the nature of a simple contract debt, the Statute of Limitations can only begin to run against it when the election has been made. Spread v. Margan, 11 H. L. Cas. 588; 6 N. R. 269; 13 L. T. 164.

Principle of election giving a right not the thing itself, but to compensation out of something else. Dashwood v. Peyton, 18 Ves, 49; 11 R. R. 145.

Effect of Election against Will. - The effect of election against a will is to give the property, which was devised to the party election, to the devisees disappointed by the election, and it never goes as if undisposed of by the will. Hamilton v. Jackson, Ir. R. 8 Eq. 195; 2 Jo. & Lat.

As to the effect of election against the will, whether compensation or forfeiture, quere. Tibbits v. Tibbits, 19 Ves. 656. Affirmed Jacob. 317; 23 R. R. 79.

Testator made provision for his wife, and gave money in trust for the separate use of a daughter, and after her death to divide the principal equally between her children and their issue at twenty one: if none such, to his son, whom he made residuary legatee: then, after similar provisions for his other children, he declared that the provision in the will for his wife and children was in satisfaction of all claims under his marriage articles; and if his wife and children, or either | disposition. Marris v. Burrows, 2 Atk, 627; 2 of them, should refuse the provisions made for them by the will, he revoked the legacy and becaust therein contained, and declared the same void as to such one or more of them who should refuse to execute a release and discharge as though he had died intestate. A child electing to take under the articles forfeited the life interest, which fell into the residue. Ward v. Baugh, 4 Ves. 623: 4 R. R. 307.

Election between Deed and Will. ]-Distinction, upon election, between a deed and a will ; whether in the latter case the principle is forfeiture or compensation only, quere; but upon election against a marriage settlement, as operating as a contract, an injunction was granted, on the principle of forfeiture. Green v. Green, 19 Ves. 665; 13 R. R. 277.

Ground of Election against Heir. ]-Ground of election against heir is not only an implied condition that he shall confirm the whole will, but also the intention in case the condition shall not be complied with, to give the disappointed devisees, out of the estate, over which the devisor had power, a benefit correspondent with that of which they are deprived by such noncompliance; and the construction is, accordingly, to the heir absolutely, on his confirming the will if not, in trust for the disappointed devisees as to so much of the estate given to him as shall be equal in value to the estate intended for them, Welby v. Welby, 2 V. & B. 190: 13 R. R. 58.

Two Funds. ]-A party bound to elect between two funds, having mortgaged one, elects the other; the former must be taken, subject to the mortgage, but shall be reimbursed by the latter. Rumbold v. Rumbold, 3 Ves. 65.

Tenant in Tail. ]-Tenant in tail of a rentcharge under settlement, being also devisee in strict settlement of the estate charged with it, put to election. Blake v. Bunbury, 1 Ves. 514; 4 Bro. C. C. 21; 1 R. R. 111.

Devisee cannot disappoint the will, even if it disposes of his property, but must either convey according to the devise, or renounce the benefit of it pro tanto; so if he is an incumbrancer upon estate directed by the will to go free from incumbrance, he must elect, but the intent must appear by plain declaration, or necessary inference. Ib.

A., tenant in tail, with power to lease, remainder to B., the wife of C., made leases exceeding his power; he devised some benefits to B.; but B. elected to take her estate tail in opposition to the will; after her death C. claimed as tenant by the curtesy, though he also derived and accepted benefits under testator's will; C. brought ejectments against the lessees :- Held, that the lessees could not raise any equity against C., holding as tenant of the curtesy under B.'s election of her estate tail: but their bill was retained that they might have satisfaction from testator's assets. Darlington (Earl) v. Pulteney, 2 Ves. 544; 3 Ves. 384; 3 R. R. S.

Freeman of London, ]-A freeman of London, by will, disposed of all his estate, as well the orphanage as the testamentary part. Where as one of his children, to one-sixth, and as heir some of the children elected to abide by the custom, and others to take by the will, their to three-sixths of his father's estates, devised all shares of the orphanage part did not accrue to his real estate for the benefit of his widow and that part, but went according to the father's children, and died shortly before his mother, A. :

Eq. Ca. Abr. 272, pl. 39.

After-acquired Estates. - A testator devised his real and freehold estates, of which he should be possessed or entitled to at his decease, to trustees upon certain trusts. He then devised an estate, called the Tempo estate, to his daughter, Letitia (who was his heiress-at-law), for life, with remainders over; and devised the residue of his property to A. B. After the date of his will, he acquired other freehold estates, and also by two deeds executed after his will charged four denominations of the Tempo estate with anumities, and for that purpose limited such denominations to trustees, taking back therein an estate in fee simple to himself, subject to the annuities, whereby there was a revocation in law of the will as to the four denominations. The heiressat-law having elected to take against the will :-Held, that neither the persons to whom estates were limited by the will in remainder in the Tempo estate, nor the residuary devisees in respect of the after-acquired estates, were entitled to compensation out of the life interest limited by the will to the heiress-nt-law in the Tempo estate. Tennant v. Tennant, Ll. & G. t. Plunk. 516.

Semble, that the doctrine of election ought not to be applied to the case of revocation by a recovery merely. Ib.

How Person taking against Instrument to be compensated.]—The ancestor, by marriage arti-cles, agreed to settle lands to the use of himself and his intended wife, remainder to the issue of the marriage in the usual manner. He made a deed, not pursuant to the articles, and had a son and two daughters, and on the marriage of his son settled other lands, in consideration of this last marriage, in the usual manner; and levied a fine of the former lands to the use of himself in fee; and then made his will, and devised part of the former lands to his two daughters, and the rest of his real estate to trustees, to the use of his grandson for life, with usual remainders; and with direction out of the profits to educate the grandson; and to place out the rest of the profits to be paid to the grandson at twenty-one years of age; and if he did not attain that age, to be paid to his said daughters. The grandson was not bound by the deed which did not pursue the articles; but he must make his election when he eame of age; and if he chose to take lands, which ought to have been settled, the daughters (his aunts) were to be reprised out of the lands devised to him. Streatfield v. Streatfield, Forrest, 176.

By the will of S., A., his widow, took a life interest, and his six children the remainder in fee as tenants in common in his real estates, of the annual value of 8701. A., under the erroneous expectation of acquiring an absolute power of disposition, having levied a fine of her husband's estates, devised a portion of them, worth about 1351. per annum, to G., her grandson in fee; another portion of the like amount (together with an estate of her own at N., of the annual value of 1151.) for the benefit of the widow and children of W., her eldest son; and the residue, worth about 600l. per annum, to her daughter B. in fee. W. being entitled, under the will of S., as one of his children, to one-sixth, and as heir

-Held, that the widow and children of W. her estate to an extent not exceeding the amount electing to take under the will of S., and in opposition to that of A., and by that election frustrating, to the extent of 455L per annum, the disposition of the latter in favour of E., E. was entitled to the estate at N. in partial compensation. Gretton v. Hayward, 1 Swanst, 409.

Compensation in Proportion to the Losses. A testator was entitled to a moiety of two farms, T. and P., one-fourth of which belonged to L., and the remaining fourth to W. By his will be gave both farms to his wife for life, and after her death he gave T. to W. and E. in equal shares. with cross limitations between them, and P. to the plaintiffs. After the testator's death, L. conveyed his interest in both furns to himself for life, remainder to the testator's widow for life, remainder to the plaintiffs in fee, and died in the widow's lifetime. After the widow's death W. elected to take against the will :- Held, that one-fourth of T, belonged to W., another fourth to the plaintiffs, another fourth to E., subject to the estate and interest of W. in T., under the will, ought to be apportioned between the plaintiffs and E. in proportion to the value of that interest of the plaintiffs in P. and that interest of E, in T., of which they had been respectively deprived by W.'s election. Howells v. Jenkins, 1 De G. J. & S. 617; 32 L. J., Ch. 788; 9 L. T. 184: 11 W. R. 1050,

Gift to A, for life, and after her decease to his claughters, Ann, Sarah, and Hannah, equally, or to the survivors of them; Ann alone survived A. Admitted, that Ann was entitled by survivorship to the whole fund. Hannah, by her will, pro-fessed to dispose of part of the fund:—Held, that Ann, who took benefits under Hannah's will, was bound to elect. Ann elected to take against the will, by which some other legatees were defeated :- Held, that they were entitled, in proportion to their defeated interests, to the benefits given to Aun, and which, by her electing to take against the will, were undisposed of. Att.-Gen. v. Fletcher, 5 L. J., Ch. 75.

Compensation by any Means Sufficient.] Where a testator, making provision for the different branches of his family, gives a fee simple estate to one, and a settled estate to another, imagining that he had power so to do, by his will, gave C. an annuity of larger value a tacit condition is implied to be annexed to the than her share under the settlement, for her devise of the fee-simple estate, that the devise thereof shall permit the settled estate to go according to the will; and if in that respect he should disappoint the will, what is devised to him shall go to the person so disappointed. Bor v. Bor. 3 Bro. P. C. 167.

Right not lost by Death. ]—A husband, entitled under a settlement to a life interest in cottages his death, purported to devise them to her for life, with remainder to A., who, without knowing of the settlement, sold his supposed reversionary interest to E. The testator's widow, who took other benefits under the will, subsequently sold the cottages to a purchaser without notice of the devise. On the widow's death, R. claimed compensation against her estate :- Held, that compensation for the loss he had sustained in the money, and invested it in the funds, but respect of their value at the widow's death out of treating it as her own she afterwards sold it out.

of her other benefits under the will. Rogers v. Jones, 3 Ch. D. 688; 24 W. R. 1039. And see S. C., 7 Ch. D. 345; 38 L. T. 17.

No Lien for Compensation on Estate taken. ]-A. B., an heir, elected to take against the will, and required the executors to complete a contract entered into by the testator for the purchase of a freehold estate, and it was conveyed to him, He, nevertheless, received great benefits under the will :-Held, that the parties disappointed by the election had no lien on the estate for the amount received; but that they were entitled to prove against A. B. s estate for the whole amount received by him under the will. Greenwood v. Penny, 12 Beav. 403.

Compensation as to Part. ]-Upon the marriage of a man with an infant ward of court, who was entitled jointly with her sister to real and personal estate, held by trustees in undivided moieties, he, with the sauction of the court, covenanted that upon the wife coming of age her real property should be settled upon himself and herself, and the children of the marriage, with an ultimate limitation in default of issue to the heirs of the wife; he also settled the personal property in the same manner, except that there was an ultimate limitation in default of issue to the next of kin of the wife. The marriage took effect, the wife attained twenty-one, and about a month after the marriage died without issue, and without executing a settlement of the real estate. leaving her sister, who was also an infant ward of court, her sole heiress and next of kin :- Held, that the surviving sister could not compel a conveyance to herself of her deceased sister's moiety of the real estate, without making compensation to the husband for his loss of that interest in the real estate which he would have taken under the settlement had it been executed by the wife, Savill v. Savill, 2 Coll. C. C. 721 : 11 Jur. 723,

Wife's Equity-Real and Personal Estate.] Under a settlement made upon the marriage of M., his daughter C. became, upon his death, subject to the rights of her husband, tenant in tail in possession of a certain real estate, and absolutely entitled to a share of personalty. M., separate use, which she was required to accept in lieu of such share. C.'s husband was an insolvent, and his assignee refused to give up her husband's interest in the settled property :- Held, that as to the share of personalty, which was outstanding in the trustees, the court, electing on C.'s behalf to take under the will, could order it to be made over in accordance with the testator's directions, but that, as to the realty, the court could not to which his wife became absolutely entitled on affect the estate which had passed to the assignee, and that C. must make compensation to the amount of rents and profits withheld. Griggs v. Gibson, 35 L. J., Ch. 457; L. R. 1 Eq. 685; 14 W. R. 513.

A widow was absolutely entitled to legacies of 3,500%, of which her husband by his will professed to give to her and her children 2,500%, which he directed to be invested in the funds or the widow had elected to take the cottages real securities. He gave his widow other benefits against the will, and that A. was entitled to out of his own property. The widow received and applied it to her own use. A case of election by her election had a lien on the funds for what arose on the will, but it did not appear when she she had so received; but that she was not liable had elected :—Held, that the widow electing to to account for income received during the take under the will was responsible for 2,5001. only, and not for the stock purchased therewith.

Pulmer v. Wakefield, 3 Beav. 227.

A widow electing to take against a post-nuptial settlement of her future personal property Held, that her life interest in the funds which had come under the settlement was to be retained by the trustees for the benefit of the children. and that she must account for what she had received in respect of it. Anderson v. Abbott, 23 Beav. 457; 5 W. R. 381.

An heiress, a married woman, being put to her election between an estate in Scotland, of which an attempted devise failed for want of proper solemuities, and money given to her separate use, the marital rights of her husband in the descended estates were held to be unaffected. Brodie v. Barry, 2 V. & B. 127; 13 R. R. 37.

Fund in Court.]—Compensation claimed by the person disappointed by the devise of his interest in the property agreed to be settled in consideration of marriage, the settlement not having been made according to the terms of the agreement, refused; but a competent part of the fund in court ordered to be retained, and set apart to answer the eventual claim of the parties. Roper v. Burtholomew, 12 Price, 833.

Creditor. ]-A testator, reciting the amount of a debt he owed A., according to his own computation of it, directed such amount to be paid out of his real and personal estate, and bequeathed an ammity to A, for life out of his real and personal estate; such creditor might enjoy the annuity, and be at liberty to dispute the testator's calculation of the debt. Clarke v. Guise, 2 Ves. Sen. 617.

Dissolution of Marriage,]— By a post-nuptial settlement made before 20 & 21 Vict. c. 57, personal estate belonging to the husband, and other personal estate brought into settlement by the wife's father, were settled upon trusts for the benefit of the husband and wife and the children of the marriage; and by the same deed, in consideration of the premises, the hasband and wife assigned the wife's reversionary interest in other personalty upon trusts for the husband and wife, and the issue of the marriage by reference to the trusts previously declared. The marriage was afterwards dissolved by the Divorce Court, and subsequently the wife's reversionary interest fell The divorced wife having into possession. instituted a suit to set aside the settlement so far as it affected the reversionary interests :- Held, that she was bound to elect between the relief sought by the bill and the benefits given to her by the settlement. Codington v. Lindsug, 42 L. J., Ch. 526; L. R. 8 Ch. 578; 28 L. T. 177; 21 W. R. 182. Affirmed, nom. Codington v. Codrington, 45 L. J., Ch. 660; L. R. 7 H. L. 854; 84 L. T. 221; 24 W. R. 648. And see *Hamilton* v. *Hamilton*, 61 L. J., Ch. 220; [1892] 1 Ch. 396; 66 L. T. 112; 40 W. R. 312.

Election against Settlement - Liability to account for Income. |-Held, also, that in the event of her electing to take against the settlement, she was bound to account for all income received under it since the date of the order nisi 309; 5 L. J., Ch. 260. for dissolution, and that the parties disappointed

coverture. Ib.

Derivative Interest-Next of Kin .-- A will, made in R.'s lifetime, affected to give to A. personalty which belonged to R., and it also gave legacies to R.'s children, and by a codicil, made after R.'s death, additional benefits were given to R.'s children :-Held, that R.'s right to the personalty having devolved on his children as his next of kin, they must elect between making satisfaction to A. out of their father's personalty, and abandoning all the benefits which they took as well under the will made in R.'s lifetime as by the codicil made after his death. Choper v. Cooper, 44 L. J., Ch. 6; L. R. 7 H. L. 53; 30 L. T. 409; 22 W. R. 713.

Next of kin (unlike creditors) are not merely interested in the balance in the hands of the administrator after sale of the intestate's effects and payment of his debts; they take a substantial proprietorship in every one of the intestate's chattels, the Statute of Distributions being in the nature of a will for all persons who die intestate. Therefore, for the purposes of election, the next of kin of an intestate who would have been put to his election are under the same obligation.

In estimating the amount of compensation to be paid by such persons, they are entitled to deduct from the value of their property so derived and so erroneously given away from them a ratable proportion of the debts, having regard to the whole of the intestate's assets. Ib.

No Compensation where Person elects to take under Instrument causing Election.]—The engrafted doctrine of compensation does not apply in the case of a person electing to take under the instrument which gives rise to the election. Wilson v. Townshend (Lord) (2 Ves. 693) discussed, and not followed. Chesham (Lord), In re, Curendish v. Davre, 55 L. J., Ch. 401; 31 Ch. D. 466; 54 L. T. 154; 34 W. R. 321. And see Carter v. Silber, 61 L. J., Ch. 401; [1892] 2 Ch. 278; 66 L. T. 473.— C. A.

- Bequest of Heirlooms in disregard of Settlement. - A testator, who died in 1882, by his will dated in 1878 gave chattels on trust for sale, for the benefit of his two younger sons, and the residue of the estate to his eldest son, C. The chattels so bequeathed were heirlooms settled, by a deed dated in 1877, upon trust to go and be held with a mansion-house, of which C. was tenant for life:—Held, that C., having elected to take under the will, was not bound to make any compensation out of his legacy to his younger brothers, that he had no interest in the chattels apart from the mansion-house which he could make over for their benefit, and that no case of election arose. Ib.

12. EXTRINSIC EVIDENCE TO RAISE ELECTION,

When admissible. |- Extrinsic evidence explanatory of a will, in order to raise a case of election, is not admissible. Dummer v. Pitcher, 2 Myl. & K. 262; Coop. t. Brough. 257. Affirming 5 Sim. 35. S. P., Clementson v. Gandy, 1 Keen.

A testatrix having 30,000%. 3 per cent. stock,

only 5,0001. stock, and the rest of the property

transferred 25,000L of it to trustees, upon trust for was of inconsiderable value:—Reld, that her herself for her life, and after her death for such ideolarations to her solicitor, at the time of giving nersons as she should by deed or will appoint. Instructions to him for her will, that she had appointed 25,000L among her children; had 30,000L stock, were admissible in evidence, shortly afterwards she made a will, by which she Ald, gave legacies of stock to the amount of 30,000L, that the parties were bound to elect between the representations being received:—Hold, gave legacies of stock to the amount of 30,000L, that the parties were bound to elect between the representations being received:—Hold and the deed of appointment, which is fact, exclusive of the 25,000L, she had [Meares, 7 L. J. (0.8.) Oh. 136.

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W. A. G. W.

1592

END OF VOLUME V.